ABSTRACT

Title of Document: THE SACRED CAUSE OF STATE RIGHTS: THEORIES OF UNION AND SOVEREIGNTY IN THE ANTEBELLUM NORTH

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"The Sacred Cause of State Rights" examines the problem of federalism as the central issue in U.S. constitutional history before the Civil War. Drawing on Keith Whittington's insight into the political construction of the Constitution, the argument focuses on the role of state legislatures and courts, particularly in the North, relative to their claims of co-equal authority to the national government in the struggle to determine constitutional meaning. The project seeks to rescue the political history of federalism from the post-Civil War view that the Union had been polarized into patriotic nationalists and traitorous defenders of state rights. In fact, most Northerners occupied a middle ground between the arch-nationalism of Daniel Webster and John C. Calhoun's exposition of nullification. Martin Van Buren appealed to Northern moderates when he fought to defend "the sacred cause of state rights" against the heresy of nullification in 1833.

Analytically, the dissertation strives to establish the core theoretical components of representative debates. It begins with the formulation of the first national Union under the Articles of Association (1774) and then moves to the constitutional compromise of 1787 and the debate over its meaning in the Virginia and Kentucky Resolutions (1798). These chapters analyze the revolutionary political grammar of association and its importance to American constitutional deliberation. Subsequent chapters treat the issue of sovereignty through a study of the Olmsted Crisis in Philadelphia and the issue of concurrent state powers in New York by examining the Steamboat Cases. Then, the dissertation explains how Northern states' claim to interpret the Constitution for themselves was sorely discredited by the national attention given to Calhoun's radical theory of nullification in 1833. Finally, it examines the North's turn away from state rights and social contract theory and toward the organic nationalist theories of the Union espoused by Daniel Webster and Joseph Story.

‘THE SACRED CAUSE OF STATE RIGHTS’: THEORIES OF UNION AND SOVEREIGNTY IN THE ANTEBELLUM NORTH

By

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Even at this critical emergency in our public affairs, when so much discredit is apprehended to the sacred cause of State rights from the excesses of South Carolina, the confidence of the Committee in the correctness of that cause is strengthened by the exemplary conduct of her sister States.

-Martin Van Buren. “Report.” New York Legislature. 1833.

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The financial support of the H.B. Earhart Foundation and the Lynde and Harry Bradley Foundation has offered me the time and resources to ponder the nature of federalism and familiarize myself with the wide variety of sources demanded by a project of this scope. The archivists and librarians at the Library of Congress, the National Archives, the Pennsylvania Historical Society, the Drew University Archives, and the New Jersey Historical Society offered valuable assistance to my research. Rebecca Barry at the Drew University Archives greatly aided me during my study of the Gibbons Family Papers. A Civitas fellowship from the Center for Public Justice offered me funding during the midway point of my research project. In particular, the tutelage of Jim and Doreen Skillen, Stanley Carlton-Theis, and the 2004 Civitas Fellows offered financial and moral support to think through the nature of sovereignty from the perspective of political philosophy I also wish to thank those who served on my dissertation and prospectus committees, as well as those who offered perceptive criticism of earlier drafts: Charles Butterworth, Gary Gerstle, Mark Graber, James Henretta, Irwin Morris, Alison Olson, Keith Olson, and Whitman Ridgway.

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I wish to thank my parents, Jacob and Lorraine Esh, for fostering my interest in history and for their earnest support, encouragement, and delight in my progress. Dear friends have endured the difficult times with me and rejoiced in moments of success: Dave Abel, Aaron Bojan, Ken Deusa, Pete and Sandy Gaylor, Kevin Offner, Rick Schaffner, and many others have helped to foster the disciplines necessary to sustain a long project such as this. I count myself genuinely privileged to know them.

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Table of Contents

Abbreviations

CCFU	Constitutional Convention and the Formation of the Union
DHRC	Documentary History of the Ratification of the Constitution
DUA	Drew University Archives, Madison, NJ
JCC	Journals of the Continental Congress
PDWC	Papers of Daniel Webster, Correspondence
SDFR	State Documents on Federal Relations

Chapter 1: "A Virtuous and Spirited Union": (1774-1777)

> The origin of society then is to be sought, not in any natural right which one man has to exercise authority over another, but in the united consent of those who associate.[1]
>
> -Brutus.

> British America is divided into many provinces, forming a large association...[2]
>
> -Hector St. John de Crevecouer

Ever since Americans have been conscious of their union, they have argued over its character, terms, participants, limits, ends, means, and obligations. Disagreement over union remains a fundamental part of the American political system, yet the history of "union" remains ill-understood.[3] In particular, scholars have neglected the way that revolutionary ideas of association shaped the events leading to 1776. As Americans converted the British constitution and colonial charters into an American fundamental law, they drew upon the political grammar of consent, association, social and civil compacts to form a nation embodied in a voluntary federal union.

American political actors prior to the Civil War understood that the questions about the nature and character of the Union—who were the legal parties of the Union? When was it formed? How was it constituted?—informed the basic questions about the

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[1] Brutus, second essay, November 1, 1787.

[2] J. Hector St. John de Crevecoeur, "What is an American?" (1782) *Letters from an American Farmer* (Gloucester, Mass.: Peter Smith, 1968), 50.

[3] As evidence that the division of sovereignty between the states and general government is still unresolved, see U.S. v. Lopez, 115 U.S. 1624 (1995), U.S. Term Limits v. Thornton, 514 US 779 (1995), and U.S. v. Morrison, 529 US 598 (2000).

The best current scholarship on union can be found in Rogan Kersh, *Dreams of a More Perfect Union* (Ithaca: Cornell University Press, 2001); Peter S. Onuf and Nicholas Greenwood Onuf, *Federal Union, Modern World: the Law of Nations in an Age of Revolutions, 1776-1814*, 1st ed. (Madison: Madison House, 1993); J. R. Pole, *The Idea of Union* (Alexandria, Va.: Bicentennial Council of the Thirteen Original States Fund, 1977). For an insightful treatment of the character of the Union before the Constitution, see Daniel Farber, *Lincoln's Constitution* (Chicago: The University of Chicago Press, 2003), chapter 2.

power of the state and national governments in American society. Antebellum constitutional theory drew upon two distinctly different ideas of union, the "national principle" and the "federal principle." In essence, the federal principle contains the idea that the states are the sovereign constituents of the Union while the national principle represents the idea that one people delegated sovereignty to a central government. Abraham Lincoln articulated the national principle at Gettysburg that government was "of the people, by the people, and for the people." In his First Inaugural Address, Lincoln expressed his understanding that the Union had been formed by the Articles of Association in 1774. He espoused a strong organic national union that pre-dated the states and was superior to them. [4] The strength of union grew in 1776 (independence), 1781 (confederation), and again in 1787 (Constitution). By the outbreak of Civil War, the Constitution had become the perpetual guarantor of the Union, binding upon all of the parties.[5]

Lincoln's political opponents in both the North and the South posed diametrically different views of union. The seceding "fire-eaters" of the South contended that the

[4] I am particularly indebted to Andrew McLaughlin for his use of the term "organic." He described the organic philosophy with three principles. First, the state is the natural condition of society. The "state of nature" never existed. Thus the United States has formed an organic state from its separation from England, not since the ratification of the Constitution. The Union is a natural, fraternal association, not an artifice of the Revolutionary generation. Second, law is a function of the ruler's will, rather than an agreement that requires popular consent. Finally, sovereignty resides in the organic state; it cannot be divided. (Andrew C. McLaughlin, "Social Compact and Constitutional Construction," *American Historical Review* 5 (1900): 467-490). McLaughlin correctly apprehends that not all political thought fits into neat contractarian categories. But he exaggerates the importance of the nation-state to political thinking before Hegelian romanticism. The Founders would have considered Union or even a social compact to be organic; they did not believe that the state was organic. Law really was the command of the sovereign, but because the people were ultimately sovereign, fundamental law rested on popular consent. The work of Trisha Posey has also been particularly helpful to me in framing the ideas of organic social and political thought. (Trisha Posey, "Poverty Encounters: Unitarians, the Poor, and Poor Relief in Antebellum Boston and Philadelphia" (Ph.D. diss., University of Maryland, College Park, forthcoming).

[5] Abraham Lincoln, *Abraham Lincoln: His Speeches and Writings, e*d. Roy Basler (Cleveland: Word Pub., 1946; reprint, New York: De Capo Press, 1990), 582–83.

Union was not permanent. Because the sovereign states had contracted with one another to form a federal union, they could secede. Secessionists insisted that the North had violated the contract by refusing to satisfy the South's constitutional rights concerning slavery, so no legal impediment kept the slave states in the Union. Northern Democrats held a different view. James Buchanan declared that people acting in their states constituted the Union, and that the Union remained a creature of the states. However, the Union was designed to be perpetual and "sovereign over the special subjects to which its authority extends." Although secession was a legal impossibility, the states still possessed considerable rights within the Union. This moderate position insisted that the powers of government had been divided between the federal and state governments, granting some to the national head while reserving most power to the states or to the people.[6] In 1861, the contest between the federal and national ideas of union had proved to be irreconcilable, despite three generations best efforts to reconcile them. And the war came.

This brief history demonstrates the importance that ideas of union play in American history. The three parties (Republicans, Northern Democrats, and Secessionists) drew upon distinctly different ideas of association that were each rooted in the way the Union was formed in the American Revolution. Lincoln focused on the national aspects of colonial associations, while Southerners reasoned from revolutionary

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[6] James Buchanan, *Journal of the Senate*, 1860, 36th Congress, 2nd sess. 4 December. (Washington: George W. Bowman, 1861), 7-19.

Northern Democrats tried to distance what they believed to be the true Northern position from the innovations of the Republicans. "State Sovereignty is to be the issue between the two parties, not as understood in the South, absolute and independent, covering the rights of secession, but the moderate conditional sovereignty of the old Northern Democracy." (Regarding the 1864 election, James Bowen to John Bigelow, November 8, 1864, quoted in John Bigelow, *Retrospections of an Active Life* (New York, Baker and Taylor, 1909), 227-229). That Bowen and others like George Washington Woodward of Pennsylvania were so insistent suggests that political theory cannot be easily divided into "Northern" and "Southern" camps.

contract theory. Buchanan drew upon the Articles of Confederation to contend that the sovereign states had formed an indissoluble Union. The questions about the nature of union would only be settled by war because each side could draw upon valid historical arguments to prove their points.

What was the character of the nation when it was formed? I argue that the national principle and the federal principle were not mutually exclusive during the Revolution. Lincoln was correct. American national union originated in the Articles of Association (1774). Northern Democrats were likewise correct in their assessment that the institutional structure of the Union was federal. Between 1774 and 1777, American political actors created a nation embodied in a voluntary federal union. A union of one people could be governed by multi-layered political institutions. Each level of government was instituted for fundamentally different ends. When the colonists realized the need for a united commercial and diplomatic policy *vis-à-vis* the British Empire, they formed a national union organized as a confederation. Because the states remained the basic unit of governance, the Union was organized on the federal principle. In the Articles of Association, these principles informed the first American Constitution.

Given its embryonic character, the Revolutionary Union should be understood broadly as an unwritten ordering of American political institutions and principles. Between 1774 and 1777 Americans first created a new union and began to construct its political institutions. Union developed from the united commercial policy of 1774 organized on principles of voluntary association. It incorporated both the formal Declaration of Independence and the extended process of drafting the Articles of Confederation. Beyond these documents, it encompassed the extra-textual authority that

the Congress exercised in pursuit of American liberty up until its formal ratification in 1781. This unwritten, informal constitution provided for Americans their first organic law.

Keith Whittington persuasively argues that "not all constitutional activity in the United States deals … explicitly and obsessively with the document itself." Most attention to constitutions in American history focuses on the problem of interpretation, usually focused on the text and performed by the judicial branch. Whittington challenges scholars to pay careful attention to the often political process of constructing constitutional meaning in areas where the text itself does not provide clear guidance. According the Whittington, there are distinct levels of constitutional deliberation: interpretation, construction, creation, and revolution. Interpretation offers a largely familiar judicial model for revealing the meaning of constitutional texts. Constitutional construction mandates working beyond the text to "mak[e] constitutional meaning more explicit without altering the terms of the text itself." Beyond interpretation and construction lie the more radical acts of creation and revolution. Revolution leaves old constitutional models behind to create wholly new systems. Creation retains the influences and models of the old system, but founds a new system on new documents.[7]

The history of the Union during the Revolution should be understood as a history of constitutional creation and construction. Revolutionary statesmen did not have recourse to a judiciary. Their decisions were deeply political. The constitution they

[7] Keith Whittington, *Constitutional Construction, Divided Powers and Constitutional Meaning* (Cambridge: Harvard University Press, 1999), 1-7. Americans were principally engaged in the task of creating a new constitution from British models. To the extent that they drew upon the intellectual currents of natural right, they engaged in constitutional revolution as well. Whittington's major contribution is to demonstrate the extent to which constitutions require constructions from the political branches of government. This dissertation focuses process of constitutional creation and revolution.

created was not written, and hence lacked the formal legitimacy of ratification. Yet it was a constitution nevertheless—a kind of fundamental law in the making, based on English Common Law traditions, federal theories of association, and Lockean natural right. Normative constitutional theorists insist that real constitutions must provide more than set procedural rules; constitutions should secure the liberty of the citizen. In the "Declaration and Resolves" and the Declaration of Independence, Congress focused the objects of union on precisely those ends. The Constitution of federal association was designed to defend traditional and natural rights against both Imperial and American government.[8] In treating the voluntary federal union of the Articles as a constitution of purpose, this analysis meets the criteria of normative theorists that constitutions should secure liberty as well as describe institutional arrangements.

This chapter traces the national and federal elements in the Revolutionary American Constitution. First, it examines the political grammar of union, treating in detail compact theory, the federal language of association, the ends of union, and the appropriate means for achieving the ends. Next, the Articles of Association are presented as a moderate solution to the crisis of Imperial Union. Upon the decisive break with Britain, Congress decidedly established the national principle with the Declaration of Independence. Finally, when the delegates tried to establish a formal constitution, the tensions between the federal and national ideas precipitated a contentious debate. By analyzing this debate on the nature on the Union, this chapter will demonstrate how the

[8] Giovanni Sartori, "Constitutionalism: A Preliminary Discussion," *American Political Science Review* 56 (Dec. 1962): 853-64. Revolutionary constitutionalism, while partly unwritten, meets Sartori's criteria of a *garantisme* feature: that the *telos* or end of constitutionalism is not the preservation of the state. A true constitution should promote liberty under law.

political grammar of union was articulated in a federal structure through the Articles of Confederation.

The Political Grammar of Union (1774-1776)

It is difficult for the twenty-first century mind to understand the revolutionary idea of association because so many of its core principles appear alien to it. The statesmen of the Revolutionary period believed they could authoritatively know principles of government and society through rational science. Words like justice, nature, virtue, compact, liberty, happiness, and association dominated their lexicon. They believed that constitutional government ought to be expressed in a normative framework that tried to mold people and society into the form they ought to assume.[9] As the colonists formed the American Union, their constitutional grammar drew heavily upon the Lockean description of the social contract, confederal ideas in international law, natural and customary right, and the colonial experience of an imperial union.

Compact theory

Of these components, social contract theory provided the most common metaphors for the Revolutionary idea of union. Constitutional historians have long recognized that political actors of the Revolution employed an "American expression of the old social contract theory."[10] This doctrine included the component parts of 1) a state of nature 2) a social compact, 3) the subsequent formulation of natural rights, 4) a

[9] I am indebted to Graham Walker for his acute analysis of normative constitutional thought. Graham Walker, *Moral Foundations of Constitutional Thought: Current Problems, Augustinian Prospects* (Princeton, N.J.: Princeton University Press, 1990).

[10] Elizabeth Kelley Bauer, *Commentaries on the Constitution, 1790-1860* (New York: Columbia University Press, 1952), 254.

documentary basis for the compact, and 5) government by consent. Finally, contract theory included an escape clause. 6) If any party violated the contract, society returned to its original, natural state. Every major American thinker was familiar with these ideas, but most could not agree on how these principles should be implemented. Few Americans even came to these ideas through the same source. Citations to Locke are rare, although the adaptation of his language is unmistakable. Instead, the ideas of social contract were just as frequently mediated through the treatises of Johannes Althusius, Emmerich de Vattel, Jean Jacques Burlamaqui, Hugo Grotius, Jean-Jacques Rousseau, and Samuel Pufendorf.

While the language of a social contract was widely disseminated, it did not provide a common set of axioms for political reasoning. Few thinkers could be said to utilize all six parts with any consistency. Andrew McLaughlin supports the claim that social contract thinking could be remarkably fragmented. "The important fact is not so much that men thought of the Constitution as a social compact as that they thought of society and the state in general as artificial and based on intellectual consent."[11] McLaughlin's comment captures the extent to which early Americans understood that their communities were the product of popular agreement. Consent implied that society was based upon agreements to associate, voluntarily entered into. Political associations, in particular, were formed by the people to protect their natural rights. The founding documents of state and federal constitutions are suffused with this language of consent and contract. In 1768, Massachusetts referred to the "original contract between the King

[11] McLaughlin, "Social Compact and Constitutional Construction," 467-490, 478.

and the first planters" as the surety for their rights as Englishmen.[12] The preamble to their constitution affirmed the principle that "the body politic is formed by a voluntary association of individuals: it is a social compact."[13] Participants in the convention at Philadelphia in 1787 with views as diffuse as Luther Martin, James Madison, and James Wilson shared this basic idea. Agreement about the meaning of consent within social compact theory did not mean that they universally accepted the other principles. In fact, very few Revolutionary thinkers embraced all six components of social compact theory. These ideas provided a common intellectual grammar for early American theorists.

When Americans argued from these principles, they frequently reached starkly different conclusions. Many theorists even employed concepts that contradicted core principles of compact theory. For instance, Nathaniel Chipman and "Americanus" shared the classical conviction that man was a political animal. Like Aristotle, they asserted that social organization was a natural phenomenon, not an artificial agreement.[14] Chipman successfully reconciled Lockean contract theory to Aristotle by borrowing Althusius' distinction between a civil and a social contract. The civil contract could be artificial, even if rights and society were entirely natural. Chipman could theorize that Americans were members of one organic society, while using Locke to argue that political union was

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[12] The Massachusetts House to the Agent of the Province in England, January 12, 1768, in Alden Bradford et al., *Speeches of the Governors of Massachusetts, 1765-1775* … (New York: Da Capo Press, 1971), 138.

[13] Massachusetts Constitution, 1780, Preamble.

[14] Nathaniel Chipman, *Sketches of the Principles of Government* (Rutland, Vermont: J. Lyon, printed for the author, 1793), 55; and "Americanus" [Timothy Ford], "The Constitutionalist," (Charleston, 1794) in Charles S. Hyneman and Donald S. Lutz eds., *American Political Writing during the Founding Era, 1760-1805* (Indianapolis: Liberty Press, 1983), 904. "Americanus" argued "Now, it is manifest, that such a state as is called a state of nature never in fact existed since the creation of Adam and Eve. Man was no sooner born, than he was associated under some common tie, which bound the human race together. The first knowledge he had of himself was this. Nature implanted the ties, habit confirmed them, and experience proved them. Man knew his powers and rights before the fancy of philosophers ever engendered this idea state…" (902).

rooted in an artificial constitutional agreement. The idea of a civil compact allowed American thinkers a basis for establishing civil government without getting bogged down in debates about a hypothetical state of nature. They could theorize an organic society, while insisting on a liberal, Lockean state.

Americans appealed to ideas of national union that were fraternal, ascriptive, and organic at the same time they espoused explicitly contractarian ideas. They adopted this language because simple compact theory was insufficient for their needs. The political grammar of Lockean liberalism offered ready justifications for revolution or resistance to tyranny, but provided a weaker basis for inspiring individual sacrifice for the common good.[15] In many cases, the nascent national identity provided more workable metaphors for political community than an artificial liberal community. Eminent contract theorists like James Wilson frequently appealed to fraternal myths. "We are now one nation of Brethren," he pleaded. "We must bury all local interests and distinctions."[16]

Although compact theory was pervasive and readily understood by political actors, it was not uniformly applied. Religion, in particular, offered an alternative source of governmental authority. In England, traditional religious authority was used to defend

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[15] Fraternal ties are ascriptive because they include people in the community based on birth and membership in a common struggle against the crown. They are organic because they reject ties based on artificially created communities of liberty. Rogers M. Smith suggests that these ascriptive myths are necessary because liberal and republican myths are so weak at binding a nation together. I will prefer the terms fraternal and organic, because the colonists used the national idea to unite colonials based on common experience and culture, far more than they were intended to exclude "others." Rogers M. Smith, *Civic Ideals: Conflicting Visions of Citizenship in U.S. History*, The Yale ISPS series (New Haven: Yale University Press, 1997).

Liberal theory, as articulated by Locke, wrestles heavily with the problem of the individual and the state. Smith correctly identifies the tensions between liberal theory and nationalism. However, Republican theory provides a better justification for individual sacrifice for the common good, because it draws upon the ancient and medieval political philosophy of the polis (Aristotle) or the heavenly city (Augustine and Aquinas). Because Smith misses the strong fraternal ties that this brand of republicanism creates, I believe he overestimates the extent to which ascriptive ties are necessary for sustaining strong modern nations.

[16] United States, Constitutional Convention, *The Records of the Federal Convention of 1787*, ed. Max Farrand (New Haven: Yale University Press, 1911), 1:166.

Tory power and paternalist theory. Yet American theorists frequently cited traditional ideas of government, even though the core of their argument remained government by consent. Associations were forms of civic life either "self-created, or sanctioned by government, or by the God of nature."[17] John Leland accepted the revolutionary definition of government as "the mutual compact of a certain body of people, for the general safety of their lives, liberty, and property." Yet he offered a detailed description of Biblical patriarchy as the first form of government and the prototype of monarchical government.[18] An election sermon by John Tucker (1771) advanced the Calvinist position that ultimate sovereignty rested in God. For both Leland and Tucker, social contract republicanism triumphed over paternalism. The election sermon in particular reveals the extent to which pre-Lockean theory was assimilated into modern political theory. Even though Tucker's text emphasized obedience to authority as obedience to God (I Peter 2:13-16), he reasoned from the condition of natural man. Fundamental law, property rights, and government by consent, all key elements in the Revolutionary thought, were deftly connected to the state of nature while avoiding a contradiction with his scriptural text. He taught that subjection to authority in a free state "is a medium between slavish subjection to arbitrary claims of rulers, on one hand, and lawless license on the other."[19] Tucker evidences the easy compatibility of traditional religion and revolutionary ideas that one scholar has identified as "Christian Republicanism."[20] His sermon demonstrates that the language of social contract was so widespread that it was

[17] Peres Forbes, "Election Sermon" (Boston, 1795), in *American Political Writing*, 990-1013.

[18] "Jack Nips" [John Leland], "The Yankee Spy" (Boston, 1794), in *American Political Writing*, 971-972.

[19] John Tucker, "An Election Sermon, (Boston 1771), in *American Political Writing*, 158-171.

[20] Mark A. Noll, *America's God : from Jonathan Edwards to Abraham Lincoln* (New York: Oxford University Press, 2002).

used to discuss politics, even by those who had traditionally used scripture as the final authority.

The Federal Theory of Association

While the political actors of the Revolution repudiated paternalism and divine right, they drew deeply from their own colonial traditions of corporate charters, covenants, and associations. The language of covenanted association continued into the early Republic and provided a basis for political action close in style but different in theory from the Lockean idea of contract.[21] It focused on the natural ties that bound society, preferring Aristotle's teaching that man is a political animal over a modern belief in the autonomous self-contracting individual. Existing social and political institutions were more important than abstract ones. Covenantal theory did not necessarily rely upon a state of nature, but rather upon a real association between men in the present.

Society itself was the principle form of association. Early modern language of association emphasized membership in a social body. Grotius and Pufendorf had labeled this community the *Pactum Unionis* to distinguish it from the civil compact.[22] The social compact was the form of association that made up a society, while the civil compact formed a polity.[23] In England, social union had required membership in the polity. In contrast, immigrants to the colonies had left their old associations to form corresponding new political compacts. As participants in new associations, Americans believed that no

[21] As Donald Lutz has demonstrated, political theory in colonial New England rested upon federal, covenant theology as much as upon the idea of social contract. (Donald S. Lutz, *The Origins of American Constitutionalism* (Baton Rouge: Louisiana State University Press, 1988)).

[22] Winton U. Solberg ed., *The Constitutional Convention and the Formation of the Union*, 2nd. ed. (Chicago, University of Illinois Press, 1990), xxx. (Hereafter referred to as CCFU).

[23] By polity, I mean the political organization of a state.

one compelled people to enter a civil compact. It was a voluntary covenant. Once in a union, a member was expected to take into account the good of the community. This theory presumed that the participants would act virtuously, and not selfishly; they would have access to the right course of action through "natural reason and unbiased justice." Members could determine not only what is in their own interest, but also the interest of their community. Although an individual could expect the union to preserve his or her liberty, that individual was duty bound to use his or her liberty to improve both his or her rights and the rights of others.[24]

Membership in one union did not prevent a person from having other associations to which he or she was bound. The increasingly powerful British state was only the most powerful among many forms of association. This understanding of union had much in keeping with the multi-layered medieval institutions that Althusius described. One could simultaneously be the member of a church, a citizen of England, a member of a trade guild, and the subject of a feudal lord. Membership in one union was not mutually exclusive with other associations.

By the 1770s, the traditional federal associations came into conflict with the developing English doctrine of sovereignty, culminating in revolution. As Parliament began to govern the colonies actively, it consolidated sovereignty on behalf of the nation state. Blackstone explained, "There is, and must be in every state a supreme, irresistible, absolute, uncontroulled authority in which the *jura summi imperii* or the rights of

[24]"The very essence of compact is *mutual obligation.*" Americanus, "The Constitutionalist" in *American Political Writing,* 907-909.

sovereignty lie."[25] Within the existing empire, Parliament provided the only locus of that sovereignty. In contrast, the long experience under a colonial policy of "salutary neglect" accustomed Revolutionary thinkers to the problem of *imperium in imperio* (divided sovereignty). Civic union had a variety of connotations: the British Empire, the Union of Scotland with England, their own colonial corporations or commonwealths, and even fabled the New England town. James Wilson explained, "All the different members of the British Empire are distinct states, independent of each other, but connected together in the same sovereign in right of the same crown."[26] To the English, who by the late eighteenth century were consolidating political power in Parliament, there could be only one state: the British Empire. Wilson's theory of union was political heresy because dividing sovereignty was a political absurdity.[27]

In 1776, however, the American experience of autonomous colonial associations trumped the theoretical critique of divided sovereignty. Sovereignty, for the colonists, was a fundamentally relational idea. The Massachusetts House wrote in 1768, "The original contract between the king and the first planters here, was a royal promise on

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[25] William Blackstone quoted in James Wilson, *Selected Political Essays of James Wilson,* ed. Randolph Greenfield Adams (New York: Knopf, 1930), 48.

[26] Wilson, *Selected Political Essays,* 81, note 24.

[27] The charge that sovereignty could not be divided was easily employed to support unity and sovereignty in either the states, the central government, or even social unity. Samuel Adams, in 1772, demonstrated his familiarity with the argument. He employed it to secure the cultural homogeneity of his own colony against religious dissenters that by teaching loyalty to another faith, threatened "that solecism in politics, *imperium in imperio*, leading directly to the worst anarchy and confusion, civil war, discord, and bloodshed." (Samuel Adams, *Report of the Committee of Correspondence to the Boston Town Meeting,* Nov. 20, 1772 [Boston, Directors of the Old South Work, 1906]). Until the Civil War, it would always be a potent theoretical argument against federalism. Calhoun deployed this argument to great effect in the South Carolina *Exposition* and *Protest* and nearly triggered the Civil War a generation before it actually started. (See chapter five).

behalf of the nation."[28] The Stamp Act Congress declared the personal loyalty of every member of the Congress to the Crown. As individuals, they owed allegiance to the Crown. As the representatives of "these colonies," they owed it to God, the Crown, and country to refuse consent to unconstitutional measures. The delegates acted both as men and as representatives of the colonies.[29] When the colonies declared their independence from the Crown, the king ceased to be a party to the contract. Loyalty in society then assumed the character of an ordinary civic association. The people contracted with each other within the several states to form state constitutions, and as "one people" they broke the bonds with England and consented to recognize themselves as "free and independent states." Immediately their corporate assembly—the Continental Congress—began the trying task of constituting their government upon a fundamental legal agreement, but found that they could not agree as to whom would be the best parties of government. Some, including Benjamin Franklin, acted on the national principle, that only a political union of the whole people could only protect the liberty of the people. Others, like Edward Rutledge, assumed that Union would preserve the existing federal arrangement. This disagreement reflected the fact that for nearly two centuries they had grown accustomed to union with Britain while preserving the integrity and autonomy of their local political associations.

[28] The Massachusetts House to the Agent of the Province in England, January 12, 1768, *Speeches of the Governors of Massachusetts*, 138.

[29] "Declaration or Rights of the Stamp Act Congress," *CCFU*, 5-7.

Ends of Union

Early modern political language stressed the purposeful character of association.[30] Revolutionary thinkers believed that the political associations were intended to promote certain basically liberal ends. The first legal commentator of the Revolution, James Wilson, argued that "the happiness of society is the first law of government."[31] "Happiness" itself is a widely used term in political theory, featuring prominently in Aristotle's *Politics* as well as the utilitarian writings of Jeremy Bentham. Wilson had neither of these concepts in mind. He advocated the liberal contractarian idea that the people enter society to protect their natural rights of life, liberty, and property. Government exists not for the classical end of justice and virtue, but to protect the freedom people need to pursue the ends they desire. This is the idea enshrined in the Declaration of Independence:

> That all men are created equal, that they are endowed by their creator with certain inalienable rights, that among these are life, liberty, and the pursuit of happiness; that to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed. That when ever any form of government becomes destructive of these ends, it is the right of the people to alter or abolish it, and to institute a new government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to affect their safety and happiness.

The pursuit of happiness became the end of society, for which purpose governments are created. Civil compacts can be overthrown when this purpose is abrogated by government. These rights existed in nature, and through consent, citizens create government to protect them. Everything else is usurpation and tyranny.

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[30] Associate "To join (persons, or one person *with* (*to* arch.) another), *in* (*to* obs.) common purpose, action or condition; to link together, unite combine, ally, confederate." *Oxford English Dictionary*, 2nd ed. See also Onuf and Onuf, *Federal Union, Modern World.*

[31] James Wilson, "On the Legislative Authority of Parliament," *Selected Political Essays*, 49. Wilson secured his reputation, not by producing original theory, but by applying his thorough command of European legal and political theorists to the American situation. In this case he cited the authority of Burlamaqui, that "the right of sovereignty is that of commanding finally – but in order to procure real felicity, for if this end is not attained, sovereignty ceases to be a legitimate authority."

The revolutionary focus on natural rights (life, liberty, and happiness) did not repudiate virtue or justice as important characteristics of a good society. Rather they dethroned the classical natural rights and assigned them to a secondary role. Virtue and justice are necessary tools for promoting the happiness of society, rather than qualities that every person must be made to acquire for his or her own sake. Revolutionary thinkers insisted upon virtue because their citizens were the ultimate sovereigns and must make wise decisions when choosing representatives. All citizens must practice justice to protect the rights of the entire community. The voluntary, non-coercive politics of the time required that citizens possess the capacity to sacrifice their interests to protect the liberty of all.[32]

Because the exposition of natural rights in the Declaration of Independence has become, in a sense, our national creed, it is easy to miss the prominent place of English liberty in the Revolutionary analysis. For many Americans, these rights were grounded in their own traditions as well as in nature. In fact, until 1776, complaints against the crown were usually against the imperial repudiation of colonists' claims to traditional rights.[33] This was the main argument in over a decade of petitions to the Crown and Parliament. It had become so frequently recited by 1775 that petitioners referred to the

[32] For more on the liberal ends of government, see Thomas L. Pangle, *The Spirit of Modern Republicanism: The Moral Vision of the American Founders and the Philosophy of Locke* (Chicago: University of Chicago Press, 1988).

[33] For instance, the Declaration of Independence charged the crown with, "abolishing the free system of English laws in a neighboring province, establishing there in an arbitrary government, and enlarging its boundaries so as to render it at once an example and fit instrument for introducing the same absolute rule into the colonies."

ancient rights of Englishmen without elaborating them. Everyone knew what they included. Congress simply defined them as "the freedom that is our birthright."[34]

The most fundamental of the customary rights was consent. Starting in the seventeenth century, Locke had provided republicans a way to justify consent as a natural right. The English, however, traditionally possessed the right to participate in the law making process. Colonists frequently justified claims to consent with an appeal to tradition instead of an appeal to the social contract. They believed that upon immigration, they carried with them the right of consent. Because actual representation in Parliament was impractical, they were given provincial legislatures to express their consent to British sovereignty.[35]

Colonists complained most frequently about their loss of representative consent. The Boston Town Meeting of 1772 listed as their first three grievances the right of legislative consent to internal legislation, internal taxation, and the appointment of local officials. They did not dispute the authority of Parliament to pass general laws for the whole empire, but they expected they would have a chance to consent to taxation. Colonists also defended traditional rights of trial by jury, freedom from standing armies, and the inviolability of their colonial charters. When these rights were stripped away by the Coercive Acts, none of them had been given the chance to consent.[36] Imperial coercion violated the colonists deeply held sensibility that they had both a natural right

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[34] "Declaration of the Causes of Taking up Arms," *Journals of the Continental Congress, 1774-1789*, ed. Worthington C. Ford, et. al. (Washington, DC, 1904-37), 2:156 (Hereafter referred to as JCC).

[35] Thomas Jefferson to Virginia Delegates to the Continental Congress, August 1774, "A Summary View of the Rights of British America," *The Papers of Thomas Jefferson,* eds. Julian P. Boyd et al. (Princeton: Princeton University Press, 1950), 1:121-135.

[36] Samuel Adams, "Proceedings of the Town of Boston," Samuel Eliot Morison ed., *Sources and Documents Illustrating the American Revolution, 1764-1788, and the Formation of the Federal Constitution*, 2d ed. (New York: Oxford University Press, 1965), 91-96.

and a customary right within the English constitution to consent to the law. The First Continental Congress espoused both natural rights and customary English liberties as the ends of a good government. They acted by the authority of "the immutable laws of nature, the principles of the English constitution, and the several charters or compacts."[37] When the colonists formed new governments, in response to the abuse of their liberty, it is not surprising that the forms of association they adopted were structured to promote these ends. As they constituted a new union, they drew upon both traditions to safeguard their rights of association.

The Constitutional Means of Union

The colonists increasingly believed that their union provided only way to force constitutional concessions from Britain. Coordinated economic pressure had worked well against the Stamp Act in the 1760s. Given their complaint against English colonial government, colonists expected that a Continental Congress would be able to protect their customary liberties through unified action. "The grand object of the Union of the Colonies," Wilson wrote in 1776 is "the re-establishment and security of their constitutional rights."[38] When re-established, Wilson expected them to be protected by the rule of law.[39] Indeed, when colonists later formed new constitutions, they usually prefaced them with elaborate bills of rights, enumerating each of the natural and customary rights they expected their new governments to uphold. The bill of rights was

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[37] "Declaration and Resolves of the Continental Congress," JCC, October 14, 1774, 1:63-73.

[38] James Wilson, "An Address to the Inhabitants of the Colonies Submitted to the Continental Congress" (1776), *Selected Political Essays*, 120.

[39] Here Wilson's source is Samuel Pufendorf. True loyalty to the sovereign required keeping the Crown obedient to the rule of law. "Our loyalty has always appeared in the true form of loyalty–in obeying our sovereign according to law." (Wilson, "An Address Delivered in the Convention of the Province of Pennsylvania Held at Philadelphia in January 1775," *Selected Political Essays*, 99, quoting Pufendorf).

also a powerful tool of the Continental Congress. They frequently petitioned the Crown with lists of grievances against liberty in hopes that persistent pressure would induce a change in imperial policy. Colonists also took great care that associations they created protected their rights of representation. Their treasured rights of consent were defended by constitutions that mandated frequent elections.[40] They would expect their governments to allow a broad and free enjoyment of the natural rights of life, liberty, and property, as many believed these natural rights were retained by people in civil society. Above all, governments must be structured with such safeguards and limitations as to prevent sources of tyranny or corruption from creeping in.

The initial governmental bodies produced by the revolution lacked legal standing. They were neither drafted by a constitutional convention nor ratified by the people. Instead, they were informal coalitions of influential citizens who could use their oratory and influence for moral suasion. The committees of correspondence lacked any legal coercive power. Their authority rested on the voluntary consent of the participants and on the assumption that they would virtuously sacrifice their private interests (i.e. commercial gain) for the good of the commonwealth. Because so much Parliamentary legislation concerning the colonies was believed to be unconstitutional, the Continental Congress felt it was their duty to inform the colonists that no obedience was due to Parliament for an act that violated their ancient liberties. The Coercive Acts, in particular, were disregarded; Parliament lacked the authority to dissolve a colonial charter or appoint colonial officials. Although the Congress lacked the formal jurisdiction, they acted on their own authority to declare Parliament's actions null and void. In the legal parlance of their descendents, Congress interposed themselves between the national

[40]Wilson, "The Legislative Authority of Parliament," *Selected Political Essays*, 43-83.

(British) authorities and the citizen to prevent violations of the English constitutional law. When the Crown withdrew the colonies from its protection, Congress desired that existing associations might continue under the rule of law. They recommended that the colonies form their own assemblies until the Crown sent a governor who would rule within their fundamental colonial laws. [41] Congress was instrumental to the creation of the very states that would later dominate it.

New revolutionary governments cited the Crown's abandonment of its constitutional authority and the Congress' assumption of it, to justify their own revision of organic law. New Hampshire, for instance, claimed that "the preservation of peace and good order, and … the security of the lives and properties of the inhabitants of this colony" required a new constitution. The flight of Governor Benning and his counselors left them "destitute of legislation" or judicial authority. Their constitution of January 5, 1776 complained that they were forced to this step by the Crown, claiming to be loyal subjects, "happy under her protection while we could enjoy our constitutional rights and privileges." Even six months before the Declaration of Independence, they hoped that Congress could negotiate reconciliation with Britain.[42] When Vermont drafted their constitution the following year, they likewise appealed to Congress for direction as they formed a government.[43] Many of the other states also referred to the authority of Congress to guide them and act on their behalf. Recognizing that they needed to buttress

[41] JCC, June 9, 1775, 2:83-84.

[42] New Hampshire Constitution, 1776.

[43] Vermont Constitution, 1777. "Therefore, it is absolutely necessary, for the welfare and safety of the inhabitants of this State, that it should be, henceforth, a free and independent State; and that a just, permanent, and proper form of government, should exist in it, derived from, and founded on, the authority of the people only, agreeable to the direction of the honorable American Congress."

their claims to govern on behalf of the people, they appealed to the *de facto* authority of Congress.

This authority came into existence only gradually. In 1774, colonists still believed that liberty could be secured within the empire by voluntary association against the unjust acts of Parliament. The Stamp Act had been brought to ruin by the united policy of non-importation of British goods. Perhaps united action against the Coercive Acts could preserve both colonial liberty and union with England. In response to calls for another embargo from Boston, the New York Committee of Correspondence understood that colonial union was the only security for their common liberty. The cause of liberty, they wrote, "concerns the whole continent." The appropriate colonial response was a congress of delegates who could act in concert. Previous efforts at an embargo had collapsed dramatically in 1770. "No remedy," they were assured,

> could be of effect unless it proceeds from the joint act an approbation of all; from a *virtuous and spirited union* which may be expected while the feeble efforts of a few will only be attended with Mischief and disappointment to themselves and triumph to the adversaries of our liberty.[44]

Very early, the colonies understood that their individual liberty depended on their ability to maintain a spirit of disinterested cooperation.

In response to appeals for union, twelve colonies sent representatives to a Continental Congress in September of 1774. This Congress rejected a moderate plan of Union by Joseph Galloway by a 6-5 vote. Though narrowly defeated, the plan demonstrated the depth of desire for a multi-layered political union, "not only among themselves, but with the mother states, upon those principles of safety and freedom which are essentials in the constitution of all free governments." In its federal character

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[44] New York Committee of Correspondence, May 23, 1774, in *American Archives,* ed. Peter Force, (New York: Johnson Reprint, 1972), 1:297-298. (Emphasis mine).

the plan foreshadowed what would become one of the hallmarks of the American system. It reserved to the colonies their present constitutions and the traditional police powers "in all cases whatsoever." To the Crown, it gave control over the executive, but defended the "rights, liberties, and privileges" as synonymous with those that the House of Commons exercises.[45] It is not surprising that Galloway's plan would fail. Parliament would never have surrendered this much of its authority to the colonies, or allowed them to unite in such a way that would make them so difficult to govern. Neither did the advocates of independence, led by Samuel Adams, support such a moderate solution.

In place of Imperial constitutional reform, Congress adopted two documents. First, they submitted a "Declaration and Resolves" that listed their grievances against Parliament, and the causes for which they had united. Union with England entitled them to possess rights which they believed Parliament had denied them. They claimed the Lockean rights of life, liberty, and property. Americans had never surrendered "to any sovereign power whatever, a right to dispose of either without their consent." They also claimed these rights by virtue of their English ancestors in the likely event that Parliament would not recognize a claim rooted in natural right. Hence, colonists possessed all of the traditional rights of Englishmen, the rights of their charters, and the protections of the English Constitution.[46]

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[45] "Joseph Galloway's Plan of Union," September 28, 1774, *Sources and Documents Illustrating the American Revolution*, 116-118.

Jack Rakove's analysis suggests that the Moderates were preempted by a wave of local resolutions, most famously the Suffolk County Resolves, demanding that Congress adopt a more militant posture than the Union with England advocated by Galloway. (Jack N. Rakove, *The Beginnings of National Politics: an Interpretive History of the Continental Congress*, 1st ed. (New York: Knopf: distributed by Random House, 1979), especially chapter 2).

[46] "Declaration and Resolves of the First Continental Congress," JCC, October 14, 1774, 1:63-73.

Second, they formed their own union for the sole purpose of securing both their English and natural rights. The Articles of Association provided the only *de jure* constitution for an American Government until the Articles of Confederation were finally ratified seven years later. The Articles embodied the revolutionary idea of a voluntary compact.

> And we do bind ourselves and our constituents, under the ties aforesaid, to adhere till this association … and we recommend it to the provincial conventions, and to the committees in the respective colonies, to establish such further regulations they may think proper, for carrying into execution this association.[47]

It formed a union for a limited purpose, which relied heavily upon the co-operation of colonial and town governments. Although the association was formally an agreement between the colonies, the delegates assumed that they were pledging on behalf of the people who sent them. The agreement pledged the individual colonists to a voluntary course of economic boycott and frugality designed to convince the Parliament of their resolve and secure their liberties. It stipulated that local committees be chosen to enforce the boycott and granted them the right to seize goods purchased in violation of it. Remarkably, the provisions for enforcement lacked further coercive authority: The offenders' names would be published in the regional papers, "to the end, that all such foes to the rights of British-America may be publicly known and universally contemned as the enemies of American liberty." Because they believed that government was rooted in consent, they created a wholly voluntary union which depended on every person's consent and participation. The coercive power of the early union depended largely on the power of moral persuasion.[48] In this way, the association would lack the power to

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[47] "The Association," October 20, 1774, *Sources and Documents Illustrating the American Revolution*, 125.

[48] "The Congress, like other legislative bodies, have annexed penalties to their laws. They do not consist of the gallows, the rack, and the stake. These punishments belong to vindictive states, and are proper only for

threaten the liberty of the colonists. The association did not claim to be perpetual. Once "the repressive acts of Parliament [were] repealed," the association would come to a successful end.[49] At the same time union between the colonies was proclaimed, they believed themselves to be part of another, imperial union which they were reluctant to destroy.[50] The purpose of the Articles of Association was not to form a new nation but to preserve their existing union with the Crown on a footing that protected their natural and customary liberties. Association was a practical measure designed to secure each person's membership in the broader imperial union. So long as that union supported the ends of colonial liberty, while remaining a loyal part of Imperial union, they would also support it.

In a way, Lincoln's analysis of the Articles of Association as the genesis of American union was correct. A *de facto* union could be said to exist in 1774 even though it could not yet be considered a formally constituted nation. The First Continental Congress, acting on the joint authority of the colonies, brought into being a union (the Association) that bore several marks of sovereignty. It raised armies, levied war, managed national finances, negotiated alliances, and directed the constitution making process in the colonies. Congress formulated first the commercial posture, then the foreign affairs, and eventually the military policy of the Union. Although the body

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corrupted people. They have held out not punishments but infamy, a species of infamy which sound more dreadful to a freeman than the gallows, the rack, or the stake. It is this; he shall be declared in the public papers to be an enemy to his country." "Political Observations without Order," *Pennsylvania Packet* [Philadelphia], November 14, 1774, in *American Colonial Documents to 1776*, ed. Merrill Jensen, vol. IX, *English Historical Documents,* ed. David Douglas (New York, Oxford University Press, 1955), 816-818.

[49] "The Association," October 20, 1774, *Sources and Documents Illustrating the American Revolution*, 122-125.

[50] "Lest this declaration should disquiet the minds of our friends and fellow-subjects in any part of the empire, we assure them that we mean not to dissolve that union which has so long and so happily subsisted between us, and which we sincerely wish to see restored." ("Declaration of the Causes of Taking up Arms," JCC, 2:156).

lacked constitutional status, the colonists believed that they possessed the sovereignty to consent to an intermediate union between themselves and the crown that could act on their behalf. This union would finally claim to act on behalf of the nation when it assumed independence in 1776.

Until the states belatedly ratified the Articles of Confederation (1781), Congress lacked *de jure* authority. The colonies were ever suspicious of tyranny, so they did not grant many powers to the Union. They did expect it to direct general affairs. The Articles of Association only granted the authority for a joint non-importation agreement. However, Congress grew to exercise real governmental power. By 1780, they had so long exercised this authority that English pamphleteers sympathetic to the revolutionary pushed for the recognition of the *de facto* authority of Congress as the government.[51] The Union was swiftly recognized as a legislative body, bearing the joint power of the people to act on their behalf. Structurally, Congress operated as a federal body. Initially, the delegates believed they represented both their colony and its inhabitants. Although the members were selected by and acted on the instruction of the colonial assemblies, they exercised authority on behalf of the citizenry. By the end of the war members increasingly spoke of their state as their constituent.

The Articles of Association contained the seeds of the national principle. A few recognized the nationalist possibilities of union; one editor wished that he could witness the "jubilee in the year of 1774" when people would memorialize the foundation of

[51] Thomas Pownall, *A Memorial Most Humbly Addressed to the Sovereigns of Europe on the Present State of Affairs, between the Old and New World*, 2nd ed. (London, 1780). "North America is *de facto* an independent power which has taken its equal station with other powers, and must be so *de jure*."

Congress. "We are now laying the foundation of an American constitution."[52] This editor was far ahead of his fellow colonists. Most merely recognized that "the cause is general and concerns a whole continent."[53]

This common cause was the cause of liberty. Americans hoped to secure the common good of all British subjects: to those in England as well as those in the colonies. Wilson made this comparison explicit. "We saw a breach made in those barriers, which our ancestors, British and American, with so much care, with so much danger, which so much treasure, and with so much blood, had erected, cemented, and established for the security of their liberties and –with filial piety let us mention it-of ours." No less a defender of traditional liberty than the English Whig Edmund Burke defended the American cause in Parliament.[54] Most, like John Jay, recognized that their common ancestral ties lay in England and simply sought their birthright. If colonists would be permitted to exercise their liberties freely, Jay promised, "We shall ever esteem a union with you to be our greatest glory and our greatest happiness."[55] The Articles of Association provided a way for Americans to protect their own liberty. Before 1775, they hoped that their union with the Crown would secure their natural and customary rights. But if they were faced with a choice, they were determined not to give up their liberty as the price of that union.

The Loyalist Persuasion

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[52] "Political Observations without Order," in *American Colonial Documents to 1776*, 816-818.

[53] New York Committee of Correspondence, May 23, 1774, *American Archives*, 1:297-298.

[54] Wilson, "An Address Delivered in the Convention …" (1775), *Selected Political Essays*, 89. See also Burke's celebrated speech "On Conciliation with America" in the House of Commons, March 22, 1775.

[55] John Jay, "Address to the People of Great Brittan," *The Correspondence and Public Papers of John Jay*, ed. Phelps Johnston Henry (New York, London: G. P. Putnam's sons, 1890), 1:17-31.

Not all Americans accepted the Revolutionary ideas of union. For loyalists, Parliament was the only possible guarantor of individual rights. What distinguished the loyalists' idea of consent was their own belief that the colonies had no way to justify independence. They rejected the radical natural rights of consent and social compact to which the revolutionaries had recourse. Loyalists preferred to fight for their liberties from within the existing inter-colonial Union. John Dickinson devoted considerable energy to petitions to the crown and moderate plans of union; he considered parliamentary policy to be abusive of American liberty. Yet when the question of independence what put before him, he offered principled opposition to independence.[56]

Loyalist objections tended to fall into two categories. First they challenged the constitutional arrangements that the revolutionaries created, believing that traditional English institutions were based on sounder principles. Some, like "Massachusettensis", opposed colonial federal structures asserting, "two supreme or independent authorities cannot exist in the same state. It would be what is called *imperium in imperio* and the height of political absurdity."[57] How could a colony claim to exercise local sovereignty by electing delegates to Congress, and at the same time recognize the sovereignty to Britain? The loyalist critique also disputed colonial assertions that the Crown and not Parliament was their sovereign. Dominion theories of the empire frightened loyalist Whigs, because sovereignty was traditionally vested in the corporate authority of Crown in Parliament, not in person of George III. The constitutional settlement of 1688 had

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[56] John Dickinson, Second Continental Congress, July 1, 1776, Hezekiah Niles ed., *Centennial Offering. Republication of the Principles and Acts of the Revolution in America* (New York: A. S. Barnes, 1876), 400-402.

[57] "Massachusettensis" [Daniel Leonard], "Number 5," (Boston: Mills and Hicks 1775), in *Early American Imprints*, Series I, Evans (1639-1800), [New Canaan, CT]: Readex), 14157.

secured for Parliament the power to defend English liberty against the usurpations of the crown. The idea of being outside Parliamentary authority "destroy[ed] the idea of very idea of having a British Constitution."[58] Liberty, for loyalists and Britons, rested on the authority of Parliament. The Revolutionary appeal to English customary rights was not compatible with any attempt to sever themselves from Parliament.

Second, Loyalists were deeply suspicious of attempts to make government more "republican." While the term has lost most of its controversy in contemporary scholarship, in the 1770s the term still evoked the Cromwellian interregnum and the martyrdom of Charles I. Many, especially in the English clergy, regarded republican ideas with outright hostility.[59] Bishop Samuel Seabury challenged a colonial appeal for representation as "republican in its very nature, and tend[ing] to the utter subversion of the English monarchy."[60] Republicanism was suspect because it seemed outside the British tradition of mixed government. Dickinson challenged the whole idea of independence on these grounds. "It is not as independent, but as subject; not as a republic, but as a monarchy we have arrived at this degree of power and greatness."[61] Union with England invested many colonists with strong ties of patriotic nationalism. One pamphleteer appealed to common ties of "religion, kindred, and country" to end the

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[58] Ibid.

[59] All the attention received by the "republican synthesis" has blinded scholars to the controversial nature of republican ideas even in the 1770s. Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge: Belknap Press of Harvard University Press, 1967); Gordon S. Wood, *The Creation of the American Republic, 1776-1787* (Chapel Hill: Published for the Institute of Early American History and Culture at Williamsburg, Va., 1969); and J. G. A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton: Princeton University Press, 1975). Especially for Tories and traditionally minded clergy, republicanism still evoked civil war and anarchy. For a well developed version of this argument see Noll, *America's God*, ch. 4 and 5.

[60] Samuel Seabury. *A View of the Controversy Between Great-Britain and Her Colonies*. (London, reprinted for Richardson and Urquhart, 1775)

[61] John Dickinson, Second Continental Congress, July 1, 1776, Niles, ed., *Centennial Offering*, 400-402.

spilling of British blood. Another opposed an alliance with France as the treacherous, ancient enemy of England. Union with Britain was the natural association. "Our language, our laws, and manners being the same with those of the nation with which we are again to be connected, that connection will be natural."[62] Many theorists of the loyalist persuasion supported the armed struggle against the Crown and even participated in plans for an American union, but could not make the final break because it would undermine the source of their rights. They trusted for the security of their liberties in their "natural" connection with Great Britain.

Many loyalists could support a limited, inter-colonial union organized on the federal principle to lobby Parliament for fidelity to the constitution. Yet they starkly opposed forming an American union on the national principle, whether as a confederation of states or an organic American state. After 1776, independence rendered irrelevant their principled defense of English liberty under an Imperial union.

"This Confederate Country": (1776-77)[63]

The Idea of Independence

As the dissent of the loyalists demonstrated, the contest of 1776 was as much about what sort of union that would best protect liberty, as about the growth of nationalist sentiment. It was a constitutional as well as a political debate. Even moderates were gradually pushed toward separation by the impassioned rhetoric of 1776. Mounting

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[62] The first pamphleteer is Charles Inglis, *The True Interest of America Impartially Stated, in Certain Stictures [!] on a Pamphlet Intitled Common Sense*, (Philadelphia.: James Humphreys, Jun., 1776). The second is Rev. William Smith, "The Advantages of Union with England," *American Archives*, 5:514-517. Both authors wrote against Thomas Paine and the idea of independence early in 1776.

[63] John Hanson (President of Congress), Circular Letter to the States, December 17, 1781, JCC, 21:1175. Edmund Randolph chaired the committee that drafted the letter.

sentiment for independence shifted the idea of union toward the federal principle, and rooted it in the logic and arguments of natural right. As the revolutionaries faced the loyalists theory of union, they rallied to the defense of the federal idea against the critique of *imperium in imperio.* In forming a civil government, they modeled the Union closely on the existing constitutional form of Congress in the Articles of Association. At the same time, revolutionaries defended the idea that they were "one people," who by "the Laws of Nature and of Nature's God" could dissolve pre-existing political connections and aspire to independence. In organizing the American polity, they recognized that the social union of all Americans. They incorporated the "good people of these colonies" into a nation. To protect the liberty of people, they created a voluntary federal union.

Pamphleteers provided the immediate impetus toward a formal breach with the Crown. The strongest blow for independence came from Thomas Paine's bestselling pamphlet *Common Sense*. His repudiation of monarchy sensationalized the colonies and challenged them to take the Revolution in a boldly republican direction. Upon reading it, Abigail Adams urgently wrote to her husband John,

> Tis highly prized here and carries conviction wherever it is read. I have spread it as much as it lay in my power, every one assents to the weighty truths it contains. I wish it could gain credit enough in your assembly [Congress] to be carried speedily into execution.[64]

In reply John Adams criticized Paine's plan for continental government (which was not English enough for his liking), and his emotional demagoguery. But he admitted, "all agree there is a good deal of sense, delivered in a clear, simple, concise, and nervous

[64] Abigail Adams to John Adams, February 21, 1776, *Adams Family Correspondence*, ser. II, L. H. Butterfield, et. al. (Cambridge: Belknap Press of Harvard University Press, 1963), 1:350.

style. … His sentiments of the abilities of America, and of the difficulty of a reconciliation with Great Britain are generally approved."[65]

As John Adams suggested, Paine challenged the foundation of union with Britain. He argued from reason and contract theory that the basis of all government was the will of the people. When society was formed, the people initially made laws for themselves. As the extent of society grew too large, they delegated this power to their representatives, who legislated on their behalf. Paine believed that elements of republican representation still existed in England, but that infrequent elections and the presence of hereditary privilege had corrupted them. Paine turned his harshest critique against George III. Revolutionary theorists had been emphasizing that they owed loyalty only to the Crown in under the dominion theory of empire. Paine argued that there was no natural or rational basis for monarchy. It was rooted in tyranny and centuries of usurpation.[66]

To replace the imperial union, Paine proposed what Congress was already practicing: government centered in a continental union. By founding the Union on purely republican principles, Paine believed the colonies could operate in harmony and peace.[67] Congress ignored his proposal for a national assembly, but they implemented three of his other suggestions. First a "Continental Charter" would be approved in the form of the Articles of Confederation. Next, the Declaration of Independence was adopted along

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[65] John Adams to Abigail Adams, March 19, 1776, *Adams Family Correspondence*, 1:363.

[66]Thomas Paine, *Thomas Paine: Representative Selections*, ed. Harry Hayden Clark, rev. ed. (New York: Hill and Wang, 1961), 3-18.

[67] Paine asserted, "The colonies have manifested such a spirit of good order and obedience to continental governments is sufficient to make every reasonable person easy and happy on that head. No man can assign the least pretense for his fears on any other grounds than such as are truly childish and ridiculous, viz., that one colony will be striving for superiority over another" (30). Paine's idealism proved bitterly false. Within a decade the union almost disintegrated because of disorder, disobedience, and fears that their neighbors sought superiority.

lines very similar to those he suggested on a basis of natural right, not English custom. Finally, just as Paine assured his readers that foreign alliances could easily be secured, foreign aid became the military catalyst for a successful revolution.[68]

The terms of union also shifted for practical reasons, independent of Paine's influence. When George III declared the colonies to be no longer under his protection, many royal governors took this as an excuse to flee. In Massachusetts, the assembly assumed control and asserted its authority through local committees of correspondence. In several colonies, however, the assemblies felt uncomfortable governing without the guidance of a fundamental law. New Hampshire and South Carolina wrote new constitutions in January and March, and Virginia and New Jersey produced theirs weeks before the Declaration of Independence. The states defended their action with social contract theory: they possessed the right to frame a new government since the Crown had broken its contract with them. New Jersey explained,

> … whereas George the Third, king of Great Britain, has refused protection to the good people of these colonies; and, by assenting to sundry acts of the British parliament, attempted to subject them to the absolute dominion of that body; and has also made war upon them, in the most cruel and unnatural manner, for no other cause, than asserting their just rights-all civil authority under him is necessarily at an end, and a dissolution of government in each colony has consequently taken place.[69]

All of the states cited the resolution passed by Congress encouraging them to frame their own governments.[70] Although some, like Virginia, referred to the colony as

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[68] Paine, 18-44.

[69] New Jersey Constitution, 1776, Preamble.

[70] New Hampshire and South Carolina seem to cite a general Congressional admonition to govern themselves in the absence of just government from Britain. But the later constitutions (Virginia and New Jersey) refer to a resolution of May 10 that "Where no government sufficient to the exigencies of their affairs have been hitherto established, to adopt such a government as shall, in the opinion of the representatives of the people, best conduce to the happiness and safety of their constituents in particular, and America in general." JCC, 4:342. See the Virginia, New Jersey, New Hampshire, and South Carolina constitutions of 1776.

their "country"; all acknowledged the binding authority of Congressional resolutions and Congress' sole authority to negotiate with foreign powers on their behalf. Despite Paine's predilection for entirely new governmental structures, the states largely tried to preserve English legal and personal freedoms. However, they significantly altered the structure of government. An emphasis was placed on frequent elections, accountable executives, and an independent judiciary with judges accountable to good behavior standards. The customary rights of the English constitution and colonial charters were largely preserved.

Concurrent with the process of framing constitutions, both colony-wide and local assemblies urged the Continental Congress to take immediate steps toward independence. As early as May of 1775, Mecklenburg County had resolved that North Carolina "of right ought to be a free and independent state." Their resolves anticipated a federal structure of sorts. North Carolina would enjoy the power to legislate in internal matters, but would have to accept vetoes from a "continental senate" regarding its "external connections and foreign commerce." The Mecklenburg Resolves also grounded the independence of the state in natural right, just like *Common Sense*.[71] Other local resolutions employed the grammar of natural rights to justify independence, while assuming that the resulting states would continue to protect their customary and charter rights. A Boston town meeting defended independence as "necessary to the very existence of the state."[72] In Malden, Massachusetts, citizens echoed Tom Paine's denunciation of royalty, asserting

[71] Mecklenburg Resolves. May 31, 1775. <URL: http://www.yale.edu/lawweb/avalon/states/nc06.htm> (July 8, 2006).

[72] Boston, "Instructions to its Delegates" May 23, 1776, *American Archives*, 5:556-558.

that Congress would be neglecting their duty if they failed to establish "an American Republic."[73]

By May of 1776, several dramatic changes in the revolutionary idea of association had brought pressure to bear on Congress to form an independent union. Virginia's request was not for the republican government that Malden desired, but for a "confederation of the colonies." Initial demands for a national government eroded in favor of confederal designs.[74] As the colonies became states, the states became more assertive of their sovereignty. Most were willing to let Congress direct military and foreign policy, but assumed that they would be left to themselves in most other matters. In its 1776 constitution, Virginia avoided potential territorial disputes by renouncing its right to territory also claimed by Maryland, the Carolinas, and Pennsylvania. Most states assumed that future disputes would be settled by the logic of association. Each state believed it could make the virtuous sacrifices necessary for the common good. Finally, the new governments resorted to the right of revolution found in Lockean contract theory and natural law. The people acting through their state and local governments began to increasingly demand that Congress employ these ideas to secure their joint independence from the British Empire.

Securing Independence

The debate at Independence Hall in the summer of 1776 remains one of the most intensely studied moments in American political history. But few scholars have

[73] "Instructions of Malden, Mass, "To their representative in Congress," May 27, 1776, Niles, ed., *Centennial Offering*, 131-132.

[74] Virginia, "Preamble and Resolution," CCFU, 30-31.

appreciated the importance of the constitutional debate that surrounded the Declaration.[75] Independence itself is analyzed as a moment, rather than the culmination of long effort to formally constitute the Union. Even historians of the Confederation explain the constitutional debate in terms of the immediate political context. Merrill Jensen analyzes the Confederation as the product of the same radical moment that produced independence and the fiercely democratic state constitutions (i.e. Pennsylvania).[76] Jack Rakove correctly recognized the "halting, and at times haphazard" progress of confederation, but missed the connection between the idea of union and revolutionary philosophy.[77] Rakove incorrectly identified the essence of union before confederation as an agreement about political tactics, not as a purposeful colonial project designed to secure liberty. Robert Hoffert's analysis takes ideas more seriously, but he misapprehends the close connection between the Declaration of Independence and the broader revolutionary constitution.

> The Declaration of Independence is constitutional vis-à-vis the American nation – it expresses the constituting of the American people. This is especially important for revolutionary America, even if it did not constitute any formal government or "state." The state was to be established within a well-formed community. Political society had to be constituted before proper political authority in government could be established.[78]

The Declaration did, in fact, "express the constituting of the American people." But so did the process of state constitution formation and the extended debates over the Articles of Confederation. Americans understood themselves to be a people, initially as Britons.

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[75] Robert W. Hoffert, *A Politics of Tensions: The Articles of Confederation and American Political Ideas* (Niwot, Colo.: University Press of Colorado, 1992), 67. I am indebted to Hoffert's connection of the ideas of voluntary association to the structures of the Articles of Confederation. His work hinted that an even broader connection might exist between the normative political grammar of the Revolution and Revolutionary constitutionalism.

[76] Merrill Jensen, *The Articles of Confederation; An Interpretation of the Social-Constitutional History of the American Revolution, 1774-1781* (Madison: University of Wisconsin Press, 1948).

[77] Rakove, 136.

[78] Hoffert, 68.

Then gradually, one by one, they came to see that they had more in common with one another than they did with their "mother country." Prominent intellectuals, like Paine, were the first to call for a decisive break. He was followed by local and state petitions to break decisively with the crown. Finally, Congress acted as "the Representatives of the united States of America in General Congress, Assembled" on behalf of the people of the colonies. In this realization, the desire for formal association preceded the desire for independence.

Early in 1775, Franklin had submitted a plan for union to the Congress. Leaving the states with only those powers that Congress chose not to surrender, it would have created a more centralized government than the Confederation. It suggested that the assembly should represent the people, rather than the states, and gave Congress too much coercive power for the sentiments of the time. Franklin's plan was neglected because moderates hoped they could achieve reconciliation with Britain, and they believed that the existing association was sufficient for that end.

When independence appeared to be gaining momentum, Richard Henry Lee introduced a resolution on behalf of Virginia that would provide the means to secure liberty through a *de jure* government. The resolution of June 7 called for independence from the crown, confederation between the colonies, and assistance from European powers as part of a comprehensive plan to secure the union.[79] Independence received the most attention, because delegates had already debated that issue with some passion.[80] The proposals for confederation and alliance passed quietly, as if they were assumed.

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[79] JCC, June 7, 1776, 5:425.

[80] John Adams later complained to Samuel Chase, "Nothing was said but what had been repeated and hackneyed in that room before a hundred times for six months past," July 1, 1776, *Papers of John Adams*, ed. Robert Taylor, et. al. (Cambridge: Belknap Press of Harvard University Press, 1971), 4:353.

They were delegated to committees to compose the preliminary documents. The proposal for independence was postponed until the beginning of July at the pleading of delegates from the middle states.[81] It was referred to a committee for drafting and debated in the meantime by the committee of the whole. These debates were just as heated and difficult as those that took place eleven years later. Some delegates from Pennsylvania threatened secession from the Union if independence were agreed to before their instructions permitted them to join. Advocates of independence, in turn, threatened to pursue their plans anyway. They suggested that wayward states might rejoin the Union when their legislatures sent new instructions. At this point, John Adams and Richard Henry Lee discerned that their opponents had stopped debating the right of independence, but only challenged the question of timing. Adams suggested that the Union was already independent from the crown. "The question was not whether, by a declaration of independence, we should make ourselves what we are not, but whether we should declare a fact which already exists."[82] This debate reveals that both parties believed they already possessed a union. Pennsylvania could not secede if it was not part of a real and voluntary union. Fortunately, by July 2, new instructions reached the delegates. The states unanimously approved independence.[83]

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[81] Maryland and Pennsylvania were proprietary colonies whose governments were still hesitant to break with the crown, and the New York delegates possessed outdated instructions from 1775 which required them to be neutral on the question of independence. After persistent lobbying, Pennsylvania and Maryland changed their instructions quickly, and New York was able to gain a change in the instructions within months.

[82] See Jefferson's notes on the debate (Thomas Jefferson, *The Writings of Thomas Jefferson*, ed. H. A. Washington (Philadelphia: Lippincott, 1869), 8:12-26). Much of what we know about the debates on the Articles of Confederation, we owe to Jefferson and John Adams extensive notes.

[83] New York delegates were still bound by its instructions not to vote one way or the other. After hearing that independence had already been declared, New York swiftly reversed its instructions and its delegates were able to sign the completed instrument.

The Declaration of Independence set the foundation of the Revolution primarily on natural rights. It justified separation not only with the customary complaint that the Crown had abandoned them, but also with the new claim that it was their "duty, to throw off such Government." When the Crown ceased to secure their happiness and showed no sign of giving up its despotic rule, the people resumed their natural sovereignty, and began the process of instituting a new government. These deliberations continued this task in the committee on the confederation which met concurrently with the committee to draft the Declaration. The claims of natural right obscured the long arduous labor of constituting a government that Congress had been engaged in since 1774. Both revolutionary and antebellum writers would argue from the language of the social compact that independence had returned the people to a condition of original sovereignty. In a practical sense however, the people did not begin from a state of nature. They shared customary colonial governments, new state constitutions, and as a community of "united States" who met in Congress. This union was already powerful before independence; Americans hoped it would become the source of victory and security for the new states.

It is significant that the Declaration was produced as a joint act of the states' union, rather than as separate acts of individual colonies. Although some states, particularly Virginia and Vermont, vocally asserted their rights of revolution in their constitutions, they still deferred to the instruction and guidance of Congress. The federal idea of union was secure and entirely compatible with the idea of "nation," even as the nation was being created. Significantly, the Declaration made the states "free and independent." It claimed for them the power to wage war, negotiate peace, form alliances, trade, and generally behave as sovereigns in the community of nations. But

most of these marks of sovereignty were aspects that the states bore collectively in their union, not as individual nations. War, peace and alliance were only properly wielded by the collective sovereignty, while commerce was regulated by both the states and Congress. States were only free and independent to the extent that the national union could provide collective security. Practically speaking, rebellion by a lone state would be crushed by the British army without the support of union. Consensus on the need for collective independence did not resolve the difficult questions of how far the powers of sovereignty would be exercised collectively, and how far the states themselves would exercise sovereignty. That the Congress did not have to decide these issues to declare independence made political agreement much easier.[84]

The Belated Confederation

The committee assigned to "prepare and digest a form of a confederation" did not have this luxury. [85] The idea of a confederation had universal assent earlier than independence (as early as June 17) but the practical application proved much more difficult. Facing the constitutional questions of sovereignty and representation, the delegates engaged in "warm disputes" particularly on the question of whether Congress should vote by states or by population as the earlier Franklin plan had suggested.[86] The delegates were completely occupied by their duties, frequently meeting until after seven p.m. In mid-June, they began forgoing debate on Saturdays, just so that the delegates would have more time to complete their committee work. John Dickinson, a moderate

[84] An excellent treatment of the issues of independence, union, and empire can be found in David C. Hendrickson, *Peace Pact: The Lost World of the American Founding* (Lawrence: University of Kansas Press, 2003).

[85] JCC, June 11, 1776, 5:431.

[86] Josiah Bartlett to John Langdon, June 17, 1776, Edmund Cody Burnett, *The Continental Congress* (New York: Macmillan Co., 1941), 214.

with loyalist sympathies, had been made chair of the committee and dominated its proceedings. The draft he presented to the Congress on July 12 has been criticized by scholars as too centralized for the sympathies of his fellow delegates.[87] In fact, the plan simply followed the general thrust of the Franklin plan in reserving to the states the powers of internal sovereignty and granting to the Congress as much power as needed to win the war. The plan was entirely consistent with the prevailing idea of union, which emphasized granting Congress the means necessary to secure the ends of union while trusting in voluntary co-operation and non-coercive power. In theory, the states would consent to union out of republican virtue, and give whatever was necessary for the success of the revolutionary cause.

This is not what transpired. As the colonies became states, they contended for their newly acquired state liberties with all the vigor and jealously with which they had opposed the crown. As state governments gained the experience of sovereignty, they began deferring to Congress less and asserting their power more. The power that Congress had initially enjoyed while the states struggled to find a legitimate basis for government had diminished.[88] When the Dickinson draft was first proposed, it represented an attempt to secure to Congress the power that it was already exercising.[89] By the end of June 1776, Edward Rutledge charged that the Dickinson plan was in favor of "destroying all provincial distinctions … making every thing of the most minute kind

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[87] Hoffert, 84-85. At this point, analysis becomes more difficult because records are so sparse. Congress' two compulsive note takers, John Adams and Thomas Jefferson, had been assigned to the committee on Independence.

[88] Rakove suggests that by 1777, when Congress finally approved the Articles, the states had grown more accustomed to their sovereignty and insisted on greater limitations than they might have could agreement have been reached in 1776. See Chapter 8.

[89] Hoffert, ch. 5.

bend to what they call the good of the whole."[90] Subsequent drafts were able to retain Dickinson's idea of a perpetual union, but many of his ideas, particularly the questions of voting in Congress, the question of sovereignty, and the disposition of Western territories, were not easily accepted. The unity exhibited in June would, by August, turn into suspicion and acrimony. Delegates began to lament not having settled the question before they started on independence, when the spirit of unity was greater.[91] Their failure to achieve unity was interpreted as a failure of the ideal of a "virtuous and spirited union."

"Three great difficulties occur," Samuel Chase wrote on July 30th,

> representation, the mode of voting, and the claims to the South Sea. The whole might, in my opinion, be settled if candour, justice, and the interests of America were attended to. We do not see the importance, nay the necessity of a confederacy. We shall remain weak, distracted, and divided in our councils; our strength will decrease…"[92]

The first two difficulties closely mirror the debates of the Constitutional Convention of 1787, with the same delegates and states frequently making identical arguments. On the question of whether the states should vote as equals or by another rule, Benjamin Rush made the nationalist argument: "We are now a new nation... the more a man aims at serving America, the more he serves his colony…. If we vote by number [or population], liberty will always be safe." Rhode Island replied for the small states that this would allow four states to dominate the other nine. How would this protect their liberty?[93] On the question of representation, James Wilson and Benjamin Franklin attempted to frame

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[90] Burnett, 214.

[91] "I think it probable that we may split on these great points, and if so our mighty colossus falls to pieces." Joseph Hewes to Samuel Johnston, July 28, 1776, quoted in Burnett, 219-220.

[92] Samuel Chase to Richard Henry Lee, July 30, 1776, quoted in Burnett, 220.

[93] Stephen Hopkins speaking for Rhode Island, quoted in Burnett, 224.

the Confederation as a union of people, not states. In response, John Witherspoon argued that their union was to be a federal union, not an incorporating union. The states should be represented and vote as states, but in the spirit of equity he proposed they could vote by the requisitions they paid.[94] Roger Sherman flatly defended the state's existing power, "We are representatives of the states, not individuals." But in a compromising vein, he suggested that "the vote could be taken two ways; call the colonies and call the individuals, and have a majority of both." This plan could have limited both the power of the states and the people and satisfied everyone. But it was neglected.[95] Sherman's plan was similar in design to the compromise that Connecticut brokered at the 1787 convention: to count representation by both population and states. Ultimately, Congress would be forced to reconcile the competing demands of national and federal representation. In 1776, however, they lacked the sense of urgency necessary to force a compromise.

The bitterest debate erupted over the claims granted in many charters extending colonial boundaries "to the South Sea." Given the revolutionary settlement patterns and the ambiguities of the original charters, many states had conflicting claims. Virginia, in particular, possessed strong claims extending to the Mississippi River that included much of the old northwest. Benjamin Harrison (Virginia) insisted that Congress had no power to limit territory that belonged to them. Wilson, who had taken a strong position in favor of a national jurisdiction and representation, conceded that "Pensilvania [sic] has no right to interfere in those claims. But she has a right to say, that she will not confederate

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[94] John Adams, August 1, 1776, *Diary and Autobiography*, ed. Lyman Henry Butterfield (Cambridge: Belknap Press of Harvard University Press, 1961), 2:246.

[95] Burnett, 225.

unless those claims are cut off."[96] Jefferson quickly stepped in to suggest that Virginia could voluntarily cede its claims. The specter of disunion over territorial disputes proved potent. Small states feared that the states with extensive claims would become so populated and strong as to dominate over the confederacy. Maryland even withheld ratification of the Articles until it had been satisfied that Virginia would cede most of its western claims to Congress.[97] As the delegates considered their state's interests within the union, they became increasingly competitive and could not come to agreement. By August 19, Edward Rutledge would write, "We have done nothing with the confederation for some days and it is of little consequence if we never see it again. We have made such a devil of it already that the colonies can never agree to it."[98] Consideration of formal union was postponed until the next year.

Over the next year, several delegates realized that the union urgently needed a formal constitutional structure. The delegates gradually recognized, with Abraham Clark that "We must apply for pardons if we don't confederate!"[99] Rutledge, one of the defenders of state autonomy, went with Adams and Franklin in September to meet with Lord Howe to discuss terms of peace. Howe offered to re-constitute the terms of the imperial union if they would resume allegiance to the crown. The delegates, of course, refused. The experience seems to have had a transforming impact on Rutledge. He returned with a sense of the urgency of union. The Congress faced great difficulty supplying or organizing the military effort in 1777. General Washington fought a futile

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[96] Adams, *Diary*, July 25, 1776, 2:241-242. The Pacific Ocean was also known as the South Sea.

[97] Peter S. Onuf, "Toward Federalism: Virginia, Congress, and the Western Lands," *William and Mary Quarterly* 34, no. 3 (1977): 353-374.

[98] Edward Rutledge to Robert R. Livingstone, August 19, 1776, Burnett, 227.

[99] Abraham Clark, in Congress, July 29, 1776, quoted in Burnett, 220-221

campaign in late summer to stave off a British advance on Philadelphia. Faced with certain capture, Congress fled to the countryside. By October of 1777, the delegates resumed deliberation in York. [100]

When they resumed negotiations on a plan of confederation, they proved to be in a compromising mood. Within two weeks they had solved most of the critical questions. With only Virginia dissenting, Congress accepted that the delegates represented states and would vote by states. They narrowly agreed to share the burdens of union according to the value of their land and improvements. (New England voted in the negative, presumably because slaves were not counted). By November 15th, the finished document was approved and recorded in the journal.

The Articles of Confederation embodied the revolutionary idea that the best means to protect liberty was a government founded on voluntary consent and virtuous participation. Deeply suspicious of tyranny, the colonists had placed strong limitations on their governments. Franklin's attempt to create a union bounded only by powers necessary to achieve the ends of union and the powers the states reserved to themselves proved too expansive. Instead they created what the Virginia resolution of June 7 had requested: a system of perpetual union that was more a "firm league of friendship" than a national government. In this, the Articles also embodied new developments in Revolutionary politics. The states had grown jealous of their rights as states, not merely of their citizens' individual rights. Article II secured the rights of the states far more deliberately than either the Franklin or Dickinson plans. Each state retained 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

[100] Burnett 220-229.

assembled." They retained the existing voting structure of the Continental Congress, where each state was equally represented. In many ways, their promises to respect each other's citizens, laws, and territory had more in common with the principles of international law, than of government. The states, which in the first years of the war had deferred to Congress, had now acquired considerable formal sovereignty which they were loathe to surrender.[101]

Despite the strongly federal character of the new constitution, the Confederation retained all of the important governmental powers that Congress had acquired during the early Revolution. It had exclusive treaty making power. States were prohibited from making private wars. Congress would manage the navy, weights and standards, the post office, public finance, and would be held accountable for its debts. Article XIII declared that the states shall adhere to the decision of Congress and stated "the union shall be perpetual." If the Congress lacked real coercive power, it was because no coercion was believed to be really necessary. Just Virginia expressed a willingness to surrender the Northwest Territories for the common good: other states would make the necessary sacrifices for union. If the Confederation required unanimous consent for amendment, then this indicates that the states had formed a new civil compact between themselves. Any change in the compact—an amendment—must be approved by each of the contracting states.[102]

Notwithstanding the informal ties of union and patriotism that had provided a *de facto* union for the colonists, in a constitutional or contractarian sense, the Articles of Confederation formally established the new American polity. The nation, once embodied

[101] Articles of Confederation.

[102] Ibid.

by a voluntary association of colonies, was now established as confederal union. The formal constitution superseded the largely *de facto*—although, to some extent, *de jure*—constitutional union based on the Articles of Association and the Declaration of Independence.

The Revolutionary union was transitory. The idealistic vision of a voluntary non-coercive union of virtuous citizens failed to meet the harsh economic and political strife of the 1780s. New forms of union would prove necessary. Once the specter of British conquest was removed, Americans found they could not agree on how to balance the federal and national principles. Their failure to reach agreement nearly destroyed the fragile union.

Chapter 2: Association Transformed: (1777-1800)

The Revolutionary hope that the voluntary association of the virtuous would be able to sustain the union proved a utopian dream. While the revolutionary grammar of association, compact, and liberty remained persuasive, the statesmen of the Constitutional Convention of 1787 realized that new institutional mechanisms were necessary to secure both liberty and the national union against the failures of state governments. Despite a widely shared consensus on the need for national union, statesmen held opposing viewpoints on the nature of that union. Afterward, Americans lacked consensus on what the Constitution had accomplished. Nationalists believed that they had created a union of one people and thus enacted constitutional mechanisms to protect the liberty of the whole people. In contrast, the Anti-Federalists aimed to preserve the principles of voluntary association in the new compact by expecting the states to play a continuing role as bulwarks of liberty. Their disagreement culminated in the heightened political tumult of 1798. Jefferson turned to the Anti-Federalist reliance upon the voluntary association of the states as a way to defend the rights of political dissent and of liberty itself. With Jefferson's victory in 1800, the role of the states as vital and important participants in the constitutional defense of liberty was secured.

"A Cask without Hoops" (1777-1787)

One of the primary strengths of the Revolutionary union had always been the faith that states and citizens had placed in its importance, but participation in formal union could not compel the states toward virtuous sacrifice. The major problem that the

confederal government faced was the lack of a secure stream of income with which to fight the war and pay off its debts. The states were, in fact, paying the requisitions from Congress in direct proportion to the benefits they received. States that stood to gain Congressional protection from British armies contributed heartily. Georgia, which benefited little after the cessation of hostilities and the end of the British military threat, stopped sending contributions.[1] "The crisis calls for exertion," the Congress wrote to the states in April of 1780. "The whole of the moneys due on the quotas of taxes to the first of March last, are become of immediate and indispensable necessity."[2] The following November they sent out another requisition, hoping that, this time, it would be met. Not convinced that the states would reply, it reminded them of the ends of union. "Our object is of the greatest magnitude – the security, and freedom, and independence of the United States; and experience evinces that no nation can promise itself a safe and honorable peace which is not in a condition to maintain a war with vigour."[3] By 1786, the lack of funds threatened a loss of public credit with European powers. When insurrection swept western Massachusetts, Congress unanimously agreed that they should send troops to prevent the threat of civil war. However, once it was discovered that they lacked the money to pay the army, it was decided not to arm them. Congress feared they would turn their guns on Congress in an attempt to receive their pay![4]

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[1] Keith L. Dougherty, *Collective Action under the Articles of Confederation* (Cambridge University Press: New York, 2001).

[2] April 24, 1780, *Journals of the Continental Congress, 1774-1789*, ed. Worthington C. Ford et. al. (Washington, D.C., 1904-1937), 16: 385-86.

[3] JCC, Nov. 9, 1780, 18:1039.

[4] United States, Constitutional Convention, October, 21, 1786, *Secret Journals of the Acts and Proceedings of Congress* (Boston: Thomas B. Wait; 1821), 1:267-270.

When George Washington retired from military office in 1783, he sent a circular letter to the governors urging them to secure the ends of their union. Americans were faced with a choice: they could "give such a tone to our federal government as to enable it to answer the ends of its institution" or to weaken it, "annihilating the cement of the confederation, and exposing us to become the sport of European politics. … [I]t is not yet decided whether the Revolution will be a blessing or a curse." To secure the American experiment in federal association, it was necessary that states both cease their petty jealousies and allow the Congress to exercise the powers granted to them by the Constitution. The Union, Washington argued, was not a threat but a necessity. It possessed no power to coerce. He praised the noble design of the confederacy as "a form of government so free and uncorrupted, so happily guarded against the danger of oppression." Any action, he gently chided, that tended to "dissolve the union, or contribute to violate or lessen the sovereign authority, ought to be considered as hostile to the liberty and independency of America." In Washington's eyes, the solution was for the states to meet their obligations gladly.[5]

In the state assemblies, governors pleaded with the legislatures to virtuously fulfill their obligations. Upon receipt of the 1780 requisition, Massachusetts Governor John Hancock charged the legislature that "our own honor and safety…call upon us to employ every means for forwarding & compleating our military preparations."[6] But after the victory at Yorktown, the states grew less interested in paying. In 1783, Hancock again challenged the legislature to pay "our portion of the national expense." It was necessary

[5] George Washington, *The Writings of George Washington*, ed. John C. Fitzpatrick (Washington, 1938), 26:483-496.

[6] John Hancock, January 5, 1781, in Paul D. Brandes, *John Hancock's Life and Speeches: a Personalized Vision of the American Revolution, 1763-1793*, (Lanham, Md.: Scarecrow Press, 1996), 251.

for public credit, "to the most essential purposes of our sacred league, and to appeasing the loud complaints of those whose just demands on the public credit have long gone unsatisfied."[7]

Despite Hancock's plea, states cooperated in Congress, not out of virtue, but out of self-interest. When dealing with one another, they treated one another as sovereigns. The small states understood that their only governing influence over the Western lands was through Congress, so they actively pursued the policy of expanding the power of the United States in the West and encouraging settlement. The Northwest Ordinance of 1787 stands as one of the few genuine success stories of the Confederation period. Connecticut and Pennsylvania even submitted their disputed claim over Western lands to Congress in 1782. When it served their interests, they would present problems to Congress. In 1781, however, New Jersey, Pennsylvania and Delaware chose to settle their common boundary by commissioners, like sovereign states, rather than submit to a congressional decision.[8] New York used its influence in Congress to block persistent efforts by Vermont to gain recognition as a state, because of its own territorial claims there. The states gladly considered themselves part of an American union, but frequently operated as sovereigns when dealing with their neighbors and behaved as if national sovereignty were, in fact, not divided, but possessed by the states alone in their severalty.

In truth, many people still regarded the federal union as their nation, while believing their states were also sovereign. In a speech on the Peace of Paris (1783) John Hancock expressed joy that his country, the Union, was at last a victor in the

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[7] Hancock, September 25, 1783, *Hancock's Life and Speeches*, 271.

[8] Abraham Clark to the New Jersey Assembly, October, 23 1781, *Letters of Delegates to Congress, 1774-1789*, eds. Smith, Paul H., et al. (Washington, D.C.: Library of Congress, 1976-2000), 18:157-58; and Abraham Clark to Joseph Cooper, September, 16, 1782, *Letters of Delegates*, 19: 156-57.

Revolutionary war. He praised God as the "August Ally" who contributed to the security of "our National Sovereignty and Independence."

> Divine Providence has most kindly put into the hands of these states the means of our political happiness, and nothing seems wanting to compete it but a proper improvement of these means. This is our Palladium.[9] By this we have hitherto been saved, and the preservation of it can alone continue our liberty and safety … But this depends upon the temperament and energy of that general government which was instituted on purpose to combine the Sovereign States into one political body for their common security, and to draft forth in just proportions the United Strength of all for effecting important purposes of their Confederation.

Hancock argued that the states collectively were a sovereign. He recognized that the federal union was originally individual states who had purposed to join to secure their liberty and happiness. If this union were to be successful, it would need to be improved to make it strong enough to achieve its ends. Massachusetts, he hinted, should have been more wiling to pay their share of the national requisitions. It had become necessary to reform the union to end its chronic problems. However, he thought reforms could be implemented for the benefit of all, without depriving the states of their internal sovereignty.[10]

The failure of Revolutionary association was not limited to Congress. Many of the state governments were also in constitutional crisis. The initial constitutional designs concentrated power in the legislature and made the executive dependent on their will. With their emphasis on *consent* as the focus of government, the revolutionary constitutions mandated annual elections, so representatives would not stray far from the will of the people. Problems arose when the people frequently changed their minds about public policy. In Vermont, the revolutionary government passed a Betterment Act to use

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[9] Hancock refers to a classical statute of Pallas Athena, who was the sacred protector of Troy. He implies that Union has been given to men as a means of security or protection against enemies to their liberty.

[10] Hancock, September 25, 1783; and Brandes, 271.

the confiscated lands of loyalists to fund the war. In 1780, it stopped the procedure and then in 1781, began to restore the confiscated lands to their original owners. Purchasers of compensated property demanded money in exchange for improvements they had built on the property. Land titles were embroiled in confusion for years.[11] In Massachusetts, the town of Concord had challenged its own state in 1776 to immediately form a constitution. Since then, Massachusetts had been ruled by its legislature without a new fundamental law. In most other states, the legislatures themselves had drafted the constitution, but Concord urged that the state not follow these other precedents. If the legislature could bind itself to a constitution, then it could also change that constitution, so it was not really under a limited government.[12] Massachusetts did not immediately heed the call, but by 1780 it had drafted its constitution in convention and submitted it to the people for ratification. States began to strengthen their constitutions so that elections took place less frequently and, to prevent abuses of legislative power, governors and judges were granted more independence from the legislature . On the state level, these experiences made statesmen more sensitive to the requirements of a sound intuitional design. When statesmen made real changes to state constitutions they began to push federal reforms as well.[13]

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[11] Austin, Aleine, "Vermont Politics in the 1780s: The Emergence of Rival Leadership," *Vermont History* 42 (1972): 141; and Aichele, Gary J., "Making the Vermont Constitution: 1777-1824," *Vermont History* 56 no. 3 (1988): 166-190.

[12] "The Proceedings of the Town of Concord, Mass.," October 22, 1776, in Massachusetts and William Bennett Munro, *Bulletins for the Constitutional Convention, 1917-1918,* vol. 2 (Boston: Wright & Potter, 1918), bulletin no 35.

[13] The best source on the process of state constitution formation is Marc W. Kruman, *Between Authority & Liberty: State Constitution Making in Revolutionary America* (Chapel Hill: University of North Carolina Press, 1997).

As the crisis of the union came to a head in the early 1780s, political thinkers began to consider new solutions. They insisted that the preservation of the Union depended upon improving its powers. The Union, Pelatiah Webster opined, was "a cask without hoops;" it lacked the effective power to hold its constituent parts together. The problem was not with the federal system itself, but with the balance of governmental powers and the lack of authority to secure the ends of union. The difficulties funding the debt, securing the obligations of its treaties, or even mediating basic disputes between the states demonstrated that the Union lacked legal authority to compel obedience. The dream of a voluntary, non-coercive union that the Continental Congress had first pursued in the Articles of Association rested on the consent of virtuous citizens to sacrifice for the common good. Now the dream appeared to be

> a ridiculous effort of childish nonsense…. To appoint a congress with powers to do all acts necessary for the support and uses of the union; and at the same time to leave all the states a liberty to obey them or not with impunity, is in every view the grossest absurdity, worse than a state of nature, without any supreme authority at all. [14]

State disobedience could eventually destroy the Union: "The government might lose its energy and effect, and of course the empire must be shaken to its very foundation."[15] "Tullius," an anonymous pamphleteer, also despaired that the Congress was growing weaker: "As the government of the several states have acquired vigor and maturity[,] their suspicions have operated like a secret poison … till the constitution itself may be overturned and destroyed."[16] The problem was not the danger of tyranny and corruption feared by the revolutionary theorists, but of impotence. "The Continentalist" (Alexander

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[14] Pelatiah Webster, *A Dissertation on the Political Union and Constitution* … (Hartford: Reprinted by Hudson & Goodwin, 1783), 23, 25-26.

[15] Ibid.

[16] "Tullius, "Three letters addressed to the public…" (Philadelphia: Printed by T. Bradford, 1783), 11, Miscellaneous Pamphlet Collection, Library of Congress.

Hamilton) suggested that "The great danger had been shown that it [Congress] will not have enough power to defend itself and preserve the Union, not that it will ever become formidable to the general liberty." Hamilton's argument was timely.[17] A weak Congress was a greater danger to liberty than the empowered states were.

Contemporary scholars usually interpret these criticisms against the Confederation as the harbingers of a nationalist constitution.[18] While firmly defending the idea of a properly constituted federal union, however, most reformers did not contemplate an entirely new constitution. In 1785, Noah Webster, warned that if the states were permitted to behave as if they were sovereign states, the Union would dissolve. By transforming the Union a into a strong government, with executive and judicial branches, it would gain the means to secure the ends of union. Despite his spirited nationalist rhetoric, the system he proposed was clearly federal. It would preserve local autonomy just as the government of his native Connecticut reserved extensive powers to the town governments. Webster insisted: "A system of continental government, thus organized, may establish and perpetuate the confederation, without

[17] Alexander Hamilton, "The Continentalist, No. VI" *The Works of Alexander Hamilton*, ed. John C. Hamilton, (New York: C. S. Francis, 1851), 194-201. Although Hamilton frequently took his ideas to Congress, his proposals were too threatening to the revolutionary mind because he proposed that, by giving Congress the power to regulate trade, the Union would gain a stream of independent revenue it so desperately needed, and would prevent trade wars between the states. But Hamilton, as usual, went too far. His recommendation that Congress be given control of all mines, and precious metals was a direct affront to the territorial sovereignty of the states. Furthermore, his proposal for creating federal customs officers appeared too much like the hated patronage systems of imperial Britain.

[18] For instance, Max Savelle argues that, "The progress of American thinking toward the achievement of a national image is to be seen in the writings of many leaders such as Hamilton, Wilson, Washington, Pelatiah Webster, Madison, and others." "Nationalism and Other Loyalties in the American Revolution," *The William and Mary Quarterly*, 3rd ser. 67 (July 1962): 917.

infringing the rights of any particular state."[19] "Tullius," like Pelatiah Webster, believed that a genuine federal system already existed. Congress possessed the "power of making war and peace," exhibiting one of the primary traits of sovereignty. The states, to be sure, were sovereign, but they only possessed a "separate, limited, juridical sovereignty."[20] Federal structure was determined primarily by the different ends of central and local government. The Union was concerned with "the public safety," while the states secured "private happiness."[21] Pelatiah Webster likewise divided the powers of government according the respective ends of Union and states: "Each particular state shall enjoy its sovereignty and supreme authority to all intents and purposes," excepting those powers granted to Congress for a general purpose.[22] A federal union remained at the heart of American political theory, despite the crises it encountered.

The specific policy recommendations of the pamphleteers to strengthen the union bear out this argument. Pelatiah Webster recommended increased legislative authority and coercive power. In particular, he supported a five percent duty on imports that would have given the Congress an independent source of revenue.[23] (Rhode Island blocked it by refusing to ratify an amendment granting Congress the power to enact it). In Noah Webster's plan, the Union would gain an executive branch with departments of states and a committee of three executives drawn from the three regions (New England, mid-

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[19] Noah Webster, *Sketches of American Policy …* (Hartford: Printed by Hudson and Goodwin, 1785), 47-48. Noah Webster's recommendations mirrored what Publius defended in Federalist Ten: a national republican solution to the problems of state republican government.

[20] Tullius, 8-9.

[21] Ibid.

[22] Pelatiah Webster, 23.

[23] Ibid, 6-10.

Atlantic, and Southern states). The division of legislative and executive power would provide safeguards against tyranny. He also recommended safeguards for the liberty of the states by allowing them to veto Congressional legislation if a majority petition for repeal.[24] Later, after the defeat of the impost plan, Noah Webster called for an even more expansive national government, with veritable enforcement powers and easier amendment procedures. Webster represented a growing consensus among political statesmen that the federal union was dysfunctional. While his specific proposals were neglected, he helped to bring the Union to a solution: strengthen the national institutions while preserving the federal character of the union.

The understanding of "union" was itself transformed by the crisis. The early national theorists appropriated Emmerich de Vattel's comparison of social contract theory to the law of nations. According to Vattel, just as an individual man joined civil society to protect his liberty, so too the states acceded the Articles to protect the liberty of societies. Federal union could protect state liberties or rights as well as personal liberty.[25] This understanding of union was dramatically different from the pre-1776 social theory of association: since confederation by compact depended entirely on artificial agreement, not organic association, its authority was not derived from ancient traditions or even in common fraternal struggle against Britain. If it was voluntarily entered into, it did not rest on the virtuous sacrifice of self to the community. And while binding, the Confederation required institutional checks and safeguards, and consequently, citizenship rested in rational, calculating interest. As Noah Webster explained, the union was a

[24] Noah Webster, 33-47. The idea of a state veto was later advocated in the Virginia and Kentucky Resolutions of 1798.

[25] Tullius, 7.

matter of necessity, not romantic nationalism: "Self interest is, and ought to be the ruling principle of mankind; but this principle must operate in perfect conformity to social and political obligations … provincial interest is inseparable from national interest."[26]

The crisis had tempered their revolutionary optimism in the form of human association. Inflationary monetary legislation, property confiscation, and popular unrest led them to distrust human benevolence. Tyranny, Noah Webster argued, was a human fault, not an institutional one, and thus the states were just as vulnerable as Congress. Pelatiah Webster agreed that a more robust federal structure could not only protect against the excesses of the people, but the dangers of foreign machinations and eventual civil war: "We have, without the Union, no security against the inroads and wars of one state upon the other, by which our wealth and strength, as well as ease and comfort, will be devoured by enemies growing out of our own bowels."[27]

By arguing that the union was "a cask without hoops," Pelatiah Webster argued that something stronger was needed to bind the union together. The revolutionary idea of union presumed that ties of virtue, voluntary association, and the importance of their common cause would continue to bind them together when the conflict with Britain subsided. Instead, self-interest and petty jealousy had induced states to contribute to the union mostly when it served their individual interests. The proposals for a genuine republican government for the union could secure federal liberty where a federal union had floundered.

[26] Noah Webster, 48.

[27] Pelatiah Webster, 27-28.

"Partly Federal and Partly National" (1787-1798)

When the delegates assembled at Philadelphia in May of 1787, they shared the conviction that reform of the national government was imperative and were concerned with securing a more solid foundation for their liberty than existing constitutions offered. The question the Founders faced, as one Virginian expressed it, was "How are the state rights, individual rights, and national rights [to be] secured?"[28] All three categories of rights need to be protected for liberty to be preserved. The major debate at the convention faced this issue directly. Would the Federal government represent the states, and so protect primarily state rights, or would it represent the people directly and secure personal liberty?

The supporters of the federal principle immediately became defensive upon the introduction of the nationalist Virginia plan.[29] When events carried the convention well beyond their instructions, the state rights supporters devised a plan that would retain the basic structure of the Confederation. At its essence, the federal position, summarized by Gouvernor Morris, contended for the idea of union as "a mere compact, resting on the good faith of the parties."[30] If the states engaged in compact, then they treated with one another as equals. The very basis of the union was their sovereignty. As Luther Martin

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[28] Jonathan Elliot, United States, Constitutional Convention, and James Madison, *The Debates in the Several State Conventions* …, 2d ed. (Philadelphia: Lippincott, 1937), 3:513.

[29] On May 30th Randolph was able to set the agenda with three resolutions asserting that 1). "a Union of States merely federal will not accomplish the objects proposed by the articles of Confederation" (those objects being common defense, security for liberty and the general welfare) 2). No treaty between the states as national sovereigns would be enough, and 3). "a *national* Government ought to be established consisting of a *supreme* Legislative, Executive and Judiciary" (Winton U. Solberg, *The Constitutional Convention and the Formation of the Union*, 2nd ed. (Urbana: University of Illinois Press, 1990), 80-81). On the state rights side of the question stood New Jersey, Delaware, New York, and Connecticut with the delegates William Paterson, Luther Martin, Oliver Ellsworth, Gunning Bedford, and John Lansing offering an especially spirited defense of state sovereignty.

[30] Gouvernor Morris, May 30, CCFU, 81.

passionately and repeatedly asserted, "an equal vote of states is essential to the federal idea."[31] This idea quickly became the primary assertion of the smaller states. For Paterson, union meant either the federal or the national principle, not both. He did not anticipate that a union could include both federal and national elements: "A confederacy supposes sovereignty in the members composing it and sovereignty supposes equality."[32] Paterson even threatened disunion, suggesting that New Jersey would not confederate on a national basis. Captain Dayton argued that the thirteen states had "entered into the compact." He inquired, "Will you now undermine the thirteen pillars that support it?"[33] Some of the delegates openly suggested that their defense of state rights was tied to the interests of their own, smaller states. Bedford defended the "equal right of suffrage" as the only mechanism that would defend the smaller states from tyranny at the hands of larger states.[34] They assumed that the large states hoped to improve their own place within the union. Martin pointed out that the large states, who had insisted on a democratically elected congress, were quick to defend "The sacred obligation of State rights" when the small states tried to break them into smaller segments."[35] They argued that the Union had been constituted to protect state liberty and should be continued on these terms.

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[31] Luther Martin, June 19, June 27-28, CCFU, 157, 179-181.

[32] Paterson insisted, "If the sovereignty of the states is to be maintained, the representatives must be drawn immediately from the states, not from the people: and we have no power to vary the idea of equal sovereignty. The only expedient that well cure the difficulty, is that of throwing the states into the hotchpot." (CCFU, 121, 136).

[33] Elliot's Debates, 1:471.

[34] June 8, CCFU, 118-119.

[35] Luther Martin's letter to the Maryland Legislature on the Constitutional Convention of 1787. Elliot's Debates, 1:384.

The apologists for the federal idea were not against an expanded government per se. They agreed that the Confederation needed drastic reforms and supported an expansion of Congressional power. But they demanded that even in national government, representation should be apportioned by the federal principle. If given an equal vote, even New Jersey would have acquiesced to a national government. The plan proposed by Paterson on behalf of New Jersey made significant improvements to the Articles, within the boundaries they believed they were authorized to act. Congress would be empowered to raise its own revenue, it would possess a plural executive, and a national court with jurisdiction over cases arising under admiralty, national treaties, and impeachments. It even contained a supremacy clause. But most importantly, the New Jersey Plan vested the legislative power in a Congress composed of delegates from state legislatures who would vote by state. It embodied the Revolutionary sense that a national union should be expressed through a federal system of government. The New Jersey plan suggests that the Confederation could potentially have been reformed while retaining an essentially federal structure. However, Paterson lacked the votes to preserve it. By 1787, pressure had been created for significant reform, and the delegates in Philadelphia did not believe a purely federal plan would work. Paterson's plan was indefinitely postponed.[36]

The nationalists, like their erstwhile adversaries, drew upon the Revolutionary political grammar of association to articulate their proposed reforms.[37] James Madison used contract theory to buttress his arguments. Much of Madison's analysis focused on modern ideas of interest group pluralism and an extended sphere for republican

[36] June 14-19, CCFU, 130-155.

[37] Largely, the nationalists consisted of men from Pennsylvania, Virginia, and Massachusetts, and included Hamilton, Madison, Wilson, Randolph, Mason, Morris, Butler, Read, and Gorham.

government. Yet he used the older language of contract theory to persuade fellow delegates. Madison prudently employed the core idea of consent to promote a basis for national government in the people, rather than the states. Successful statesmanship required sensitivity to the universal language of contract theory. Madison opposed a provision to allow the use of force against recalcitrant states because such a union would "be considered by the party attacked as dissolution of all previous compacts."[38] Madison implicitly acknowledged that the states would interpret the use of force as a violation of the civil contract. The Convention would be unwise to include any provisions that would rouse the states to resistance.

On other occasions Madison preferred to apply contract theory as if the union was bound by international law. The Union, he argued in 1787, was not analogous to a social contract, but rather to an international convention between individual states. The law of nations dictated that a breach of an agreement did not automatically dissolve it. Instead the injured party could retire or compel the offender to repair the breach. On yet another occasion, Madison vociferously opposed an argument derived from the law of nations that only the states, as parties to the compact, held absolute sovereignty: "The fallacy of the reasoning drawn from the equality of the sovereign states in the equality of compact, lay in confounding mere treaties … with a compact by which authority was created paramount to the parties & making laws for the government of them."[39] His opponents

[38] May 31, CCFU, 85-86.

[39] June 28, 1787, CCFU, 182-183. International law provided a major body of political theory for Americans who sought to understand the nature their union. Even the strongly nationalist Wilson argued from an internationalist brand of contract theory: "Federal liberty is to states, what civil liberty is to private individuals. And states are not more unwilling to purchase it by the necessary condition of their political sovereignty, than a savage to purchase civil liberty by the surrender of his personal sovereignty which he enjoys in a state of nature." (United States. Constitutional Convention (1787) and Max Farrand, *The Records of the Federal Convention of 1787*, (New Haven: Yale University Press, 1911), 1:166.) The

looked at the Articles of Confederation as a system of treaties or compacts between sovereign states. Madison argued that a real compact would rest in the consent of the people to form a new national government.

If the defenders of state rights reasoned from social compact theory that the states were sovereign, then the nationalists placed ultimate political authority in the people. Wilson repeatedly employed the same arguments he had used eleven years earlier: that sovereignty was vested in the people and that their consent should be secured for the union by proportional representation.[40] Nationalists repudiated the idea that the states were sovereign. One delegate suggested that the states were "intoxicated with the idea of sovereignty."[41] The rhetorical strategy of the nationalists was to meet their opponents' use of social contract theory with historical evidence. Madison explained that the states had never possessed the absolute sovereignty ascribed to them:

> Some contend that States are sovereign, when, in fact, they are only political societies. There is a gradation of power in all societies, from the lowest corporation to the highest sovereign. The States never possessed the essential rights of sovereignty. These were always vested in congress. Their voting, as States, in congress, is no evidence of sovereignty. … The states at present are only great corporations, having the power of by-laws and these are effectual only if they are not contradictory to the general confederation.[42]

Founders' use of compact theory in the context of international relations will be treated in more detail in chapter three. The major theorists of the law of nations include Grotius, Pufendorf, Vattel, and Burlamaqui. Madison speaking, June 19, CCFU, 149-55.

[40] June 10, CCFU, 122-123.

[41] Gerry, June 29, CCFU, 191.

[42] The speech as recorded by Yates, captures the rhetorical force of the argument in a way that Madison's notes do not. See footnote 8 by Solberg, CCFU, 189.

The Union had always possessed sovereignty, but not the indivisible legislative sovereignty described by Blackstone.[43] Sovereignty under The Union was limited by fundamental law and divided into spheres of influence. The nationalist argument reflected the revolutionary idea of federalism that accepted "gradations" of sovereign power. States possessed internal sovereignty, but no absolute rights. Rufus King also challenged their understanding of the term "sovereignty" by asserting that the states were not purely sovereign in the sense of European powers. Since they could not make war, alliances, or treaties and were thus dependent upon the Congress for these things, the Union should be understood as a "consolidation."

> A Union of the States is a Union of the men composing them, from whence a *national* character results to their whole. …If the states therefore retained some portion of their sovereignty, they had certainly divested themselves of essential portions of it. If they formed a confederacy in some respects, they formed a nation in other.[44]

Based on the structure of the Articles of Confederation alone, the nationalists believed that the states were not absolutely sovereign.

The nationalists were able to pose themselves as the defenders of the divided sovereignty created by the Articles of Confederation. If they sought to expand the sphere of government and strengthen its powers, they would nevertheless maintain aspects of federal power. All of the nationalists, except Hamilton, quickly refuted the charge that they would destroy the states. George Mason declared that "he would never agree to abolish the state gov^{ts}. or to render them absolutely insignificant. They were as necessary

[43] Wilson had always opposed the Blackstonian style of legislative sovereignty as incompatible with the idea of fundamental law. Wilson, "Considerations on the Nature and Extent of the Legislative Authority of the British Parliament, 1774," *Selected Political Essays*, 43-82.

[44] June 19, CCFU, 157.

as the Gen[l]. Gov[t]."[45] Their opponents wanted to know how the federal and national principles could be balanced. How could they "leave the states in possession of a Considerable, tho' a subordinate jurisdiction" while preserving the "the general sovereignty and jurisdiction, which they proposed to give to the general government?"[46]

Despite their insistent defense of state liberties, the nationalists were deeply suspicious of the states. Two of the initial ideas in their program were the use of coercive force against the states and a national veto over state law. Madison quickly abandoned the first notion because states would interpret it as a violation of the contract and leave The Union. Force was better applied to disobedient citizens than recalcitrant states.[47] But Madison deemed a national veto absolutely essential to the success of The Union. The ends of The Union, for Madison, included "the security of private rights, and the steady dispensation of Justice," not merely the liberty of the states. The states themselves had become a nuisance to private liberty. Majorities, freed from the restraining influence of the Crown, had begun to persecute minorities. In particular, factions of debtors had used representative government to try and prevent their creditors from collecting debts. Religious factions might persecute other sects. Madison feared: "Was it to be supposed that republican liberty could long exist under the abuses practiced in some of the States?" A national government offered a solution by diluting the factions to the extent that they could not endanger liberty.[48] In the end, however, the question of a national veto failed,

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[45] June 20, CCFU, 160. Between the June 19 and 21, Madison, Wilson and Randolph also tried to re-assure the convention that they would not abolish the states.

[46] William Samuel Johnson, June 21, CCFU, 163.

[47] May 31, CCFU, 89.

[48] June 6, CCFU, 108-110; June 21, CCFU, 164-165.

with only three votes in favor (Massachusetts, Virginia, and Pennsylvania). The delegates believed the veto to be a fundamental threat to state liberty and would not give the national government a "power [that] may enslave the states."[49]

The most intractable dispute between the advocates of state sovereignty and national power was the question of representation. James Wilson and Madison fiercely supported a bicameral legislature constituted by proportional representation while Paterson insisted that only the states should be represented. The Convention nearly failed over this issue. Early in the Convention, Roger Sherman (Connecticut) repeated his proposal of 1776 that both the federal and national principles be taken into account, but neither side was ready for this compromise.[50] Later, after the composition of the House of Representatives was assured on the national principle, Oliver Ellsworth (also of Connecticut) proposed that the Senate be constituted on the federal principle as a compromise measure. The resulting system, he explained would be "party national; partly federal."[51] The debate on his resolution forced the federal and national ideas into direct confrontation. Luther Martin insisted he would never confederate except on "just principles," while Wilson offered an extended proof of the popular basis of government. Neither side surrendered its principles, but the delegates possessed a growing sense that compromise was necessary if they were to proceed at all. Caleb Strong pleaded, "If no accommodation takes place, The Union itself must soon be dissolved." [52] Gerry also proved amenable to compromise. Although a supporter of the nationalist position, he

[49] Gerry, June 8, CCFU, 117.

[50] June 11, CCFU, 124. "As the state would remain possessed of certain individual rights," a state vote in the legislature would give it a mechanism to protect its interests.

[51] June 29, CCFU, 191.

[52] July 14, CCFU, 220.

understood that they must make concessions. The Union was paramount. Gerry was "utterly against a partial confederacy, leaving other State to accede or not accede." All of the states must be joined together.[53] When the question was polled on July 16, Strong and Gerry voted for the Connecticut compromise, dividing Massachusetts vote. The measure passed (5-4).[54]

The remaining work of the framing a national government proceeded along the lines of the compromise. Neither party was completely satisfied, but each received enough of what they found essential to hope that the new Constitution could succeed. Governmental powers were limited to those necessary for the function of a national government and enumerated to please those suspicious of centralized power. The states, too, were limited in their ability to pass arbitrary legislation by protections of contracts, property, and prohibitions on *ex post facto* laws. A supremacy clause was written to help address the weakness of confederate legislation. Because the powers of government were strictly enumerated, many argued that no bill of rights was necessary, but this alarmed a few nationalists as well as the advocates of state rights. On September 19, hoping that

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[53] Ibid.

[54] The vote on July 2 and been 5-5-1 with Massachusetts, Pennsylvania, Virginia, North Carolina, and South Carolina voting in the negative. Georgia was divided. On July 16, Georgia voted no, while North Carolina switched to yes. Neither of these states gave an indication for the change. New York did not vote. (Hamilton's instructions prevented him from casting New York's vote alone, after his colleagues left in disgust in early July). By splitting Massachusetts' vote, Gerry and Strong assured that the measure would pass 5-4-1. (CCFU, 199, 222).

Madison records an informal debate that occurred that morning before the deliberations began. Madison was still concerned that "the side comprising the principal states, and a majority of the people of America" would not prevail. Some nationalists firmly believed that "no good government could or would be built on that foundation [of state equality], and that a division of the Convention into two opinions was unavoidable…" They even contemplated leaving the Convention and submitting their own plan directly to the states. "Others seemed incline to yield to the smaller sates, and to concur in such an act however imperfect & exceptionable, as might be agreed on by the convention as a body, tho' decided by a bare majority of States and by a minority of the people of the U. States." (CCFU, 222-223).

the new government would be sufficient, the Convention sent the finished Constitution to Congress, then to the states to be ratified.

Although they achieved compromise, neither side was entirely persuaded by the other. Defenders of state sovereignty still believed their social compact analysis to be valid, while Wilson and Madison stressed that government should be national in character, drawing on the people's sovereignty and governing them directly. Compromise was achieved by determined efforts of a few moderates to compromise for the sake of union. Both sides believed that the government would be better equipped to protect both federal and individual liberty, but disagreed on how that liberty would be protected. As a result, the nature of The Union was ambiguous.

Two Theories of Union (1787-1798)

Two theories of union had been expressed in the founding. The first drew on the national project and Federalist politics, while the second built upon the revolutionary idea of association and Anti-federalist politics. These ideas were by no means mutually exclusive. In fact, they were usually articulated in ways quite complementary to one another. Despite bitter disagreement through the 1790s, the political thinkers of the Early Republic tried to reconcile their differences. Yet the differing emphasis that they laid on the national and federal ideas, arising both out of their firm political convictions, their understanding of what had been achieved by the new Constitution, and the policy needs of the republic led them to construe the meaning of the Constitution in increasingly divergent ways. Ultimately, the disagreement over the nature of The Union planted the seeds of future constitutional conflict.

The Nationalist Theory of Union

James Wilson's writings after the Convention recognized that "the people" had joined "the states" as the fundamental units of political analysis. Wilson believed that all governments were formed by social contract for the liberty of every individual member. The government of the United States posed a unique problem because of its federal character. It sought to protect a new kind of liberty, "federal liberty," as well as the rights of the people. Just as natural man surrenders some of his liberty in the state of nature (i.e. the right to judge his own cause), so "states should resign to the national government that part and that part only, of their political liberty, which, when placed in that government, will produce more good to the whole an if it remained in the several states." The states retained all of their powers so far as they did not undermine the "welfare of the general superintending confederacy."[55] Yet contract theory led Wilson to defend the national principle in the end. Because he believed that the people were the ultimate sovereigns, the national principle is superior because it represents the people of the whole union, rather than the people in their separate states.[56] Wilson's argument neglected the voluntary consent of individuals and associations (especially state and local governments)

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[55] James Wilson, "Speech in the Pennsylvania Ratifying Convention," November 24th 1787, in *Selected Political Essays*, 176.

In his law lectures, Wilson underscored the essentially federal character of the union. He suggested that the international law of nations might apply to the states. It would not apply in most aspects of their relationship to other nations, because the constitution handled all matters of war, peace, and confederation. "The law of nations respecting agreements and compacts between two or more states; between a state and the citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states; and between a state, or the citizens thereof, and foreign states, citizens, or subjects will still be applicable, as before the national constitution was established, to controversies arising in all those different enumerated cases." The federal judiciary, Wilson suggested, should adjudicate these cases with international law as a guide. That he believed international law at all applied to the states is a clear indication that they possessed many aspects of sovereignty even under the Constitution. (Wilson, "Of the Study of Law in the United States" (1790), *Selected Political Essays*, 340-341).

[56] Ibid, 170-171, 181.

that was such an important part of the Revolutionary idea of union and which played such a prominent role in his early writings against parliamentary authority.[57] Instead, one nation could be constituted based on the sovereignty of the whole people, who would limit the government in their collective capacity. The idea of a compact between national people became especially important weapon against the Jeffersonians. By asserting that the people, not the states created The Union, Federalists were able to contest the Anti-Federalists (1798) tendency toward state sovereignty.[58] Among Federalists, individual rights of voluntary association, or even states rights had given way to the rights of a national people.

As the patriotic idea of "the people" in the Early Republic found its expression as a newly minted national community, it neglected the historical roots of the nation in the Articles of Association and colonial charters. The Declaration of Independence and Constitution became the twin monuments of American nationhood, and the roles that the Articles of Association and Articles of Confederation had played in forming a real union were neglected. Jonathan Maxcy's 1799 Independence Day referred to July 4 as "the birthday of our sovereignty." It alluded to the Constitution as "the establishment of an energetic government," but makes no mention of earlier government.[59] Other orations repeated the same pattern. An 1802 speech given by Zephaniah Smith Moore began by praising the Declaration, but described the Revolution as a period of anarchy: "Without law and without government, every man did that which was right in his own eyes." After

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[57] See Wilson, "Considerations on the Nature and Extent of the Legislative Authority of the British Parliament, 1774," in *Selected Political Essays*, 43-82.

[58] Alexander Addison, "Analysis of the Report of the Committee of the Virginia Assembly," (Philadelphia, 1800) in Charles S. Hyneman and Donald S. Lutz eds., *American Political Writing during the Founding Era, 1760-1805* (Indianapolis: Liberty Press, 1983), 1055 – 1098.

[59] Jonathan Maxcy, "An Oration," (Providence, 1799), *American Political Writing*, 1042-1054.

the war closed, the Constitution was established, which was able to secure natural rights under the administrations of Washington and Adams. The Constitution remained "the sheet anchor of our peace at home, and safety abroad."[60] But the speaker neglected the importance of confederation in his history of the Union. Frequent praise is offered for the Constitution in the political literature of the period, but references to the Articles of Confederation were rare.[61] The place of the Articles of Association and Articles of Confederation in constructing a voluntary union were forgotten for a generation.

Federalists successfully posed the contest of ideas as one between national union and disunion. In the first Federalist essay, Publius skillfully posed the choice between "the Advantages of Union" and the "certain evils" that would visit the states upon its dissolution.[62] Subsequent essays especially emphasized a strongly national vision of America, united in one people, tied by common customs, and the long and costly struggle for independence. The glory of a national union he compared to the federal government they created under the pressure and desperate circumstances of war. Publius explained: "It is not to be wondered at, that a government instituted in times so inauspicious, should as an experiment be found greatly deficient and inadequate to the purpose it was intended

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[60] Zephaniah Smith Moore, "An Oration on the Anniversary of the Independence of the United States of America" (Worcester, 1802), *American Political Writing*, 1206-1219. Moore quoted directly from Jefferson's Inaugural address.

[61] Alexander Addison offered a reasonably accurate picture of the confederation but the legal nature of his analysis limited its impact on the popular rhetoric of union. Alexander Addison's detailed reply to the Virginia Report of 1800 included a history of the confederation period that comprehended the real power congress possessed. Although the Declaration created "no superintending government", Congress operated under "a sort of common law for the good of all concerned." Addison seems to have drawn this idea directly from the Virginia Report (authored by Madison), which asserted that no legal basis existed for union during the revolution. Addison hoped to refute this claim by arguing that a common law could be said to exist that justified the gradual growth of Congressional power. (Alexander Addison, *American Political Writing*, 1078-1079).

[62] Alexander Hamilton, Federalist One, in Alexander Hamilton et al., *The Federalist: a Commentary on the Constitution of the United States* (New York: Modern Library, 2000).

to answer." Intelligent men in more peaceful times were able to secure both The Union and liberty against the failure of the old government with a "national government more wisely framed." [63] They neglected both the federal character of the Constitution and the alternative of a Union strengthened along the lines Paterson had suggested. The old constitution had erred by granting too much power to the states. "A sovereignty over sovereigns," wrote Publius, "a government over governments, a legislation for communities as contradistinguished from individuals… is a solecism in theory, so in practice it is subversive of the order and ends of civil polity."[64]

Nationalist theorists founded the legal authority of the new government in the legal institutions created by the people. Nathaniel Chipman, in *Sketches on the Principles of Government* (1793) stressed how the binding law of the Constitution arose out of the failures of the recent Confederation.[65] Association itself was the product of the Revolution, culminating in the Constitution. Chipman clearly explained that the Revolutionary union not failed; the people had improved it through the Constitution. In the colonial period, no connection existed between the colonies. They possessed similar manners, but limited national feeling. Only the requirements of mutual defense led to Union, which according to Chipman "was the germ of that general union of councils and sentiments, which produced the American Revolution."[66] The several states as "free and

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[63] John Jay, Federalist Two.

[64] James Madison, Federalist Twenty.

[65] As a resident of Vermont, Chipman was not eligible to be a delegate to the constitutional convention of 1787. However, he remained active in Federalist politics in Vermont, colluding with Alexander Hamilton to bring Vermont into the Union, and eventually received an appointment as judge to the U.S. District Court from the Washington administration.

[66] Nathaniel Chipman, *Sketches on the Principles of Government* (Rutland, Vermont: J. Lyon, printed for the author, 1793), *241*.

independent" actors entered into the Articles of Confederation for "their mutual defense and the direction of national measure."[67] Congress, argued Chipman, possessed little more power that a group of ambassadors. Thus, state governments behaved as independent sovereign powers, neglecting The Union, with the resulting crisis in public credit and civil disorder that led to the Constitutional Convention. Here, Chipman believed the critical innovation was not so much national representation in the House of Representatives, but the clear enumeration of powers. These were divided between "the general and particular powers, not so much by a subordination of one to another, as by a precise limitation in respect to their several objects, and rendering them mutually subservient, and even necessary to each others efficiency." The resulting government was national in scope, but it belonged to the states "collectively."[68]

Chipman and Wilson, though nationalists, recognized that the constitutional settlement of 1787 created a government of broad national objects but limited means. The states, within this structure, possessed considerable sovereignty and independence, but were ultimately under the authority of the national government. Neither paid much respect to the Confederation, considering it a failed experiment. Both could agree that the new Constitution was not simply a sovereign nation or a confederation of states. Publius, likewise, respected the federal character of the new government. "In strictness," he argued, it was "neither a national nor a federal constitution." The foundation of The Union was clearly federal, but the powers given to The Union were to operate nationally, on all citizens. The powers delegated to The Union had been strictly enumerated and

[67] Chipman, 244.

[68] Chipman, 249-250.

limited, protecting the federal rights of the states. In terms of the "sources from which ordinary powers of government are drawn, it is partly federal and partly national."[69]

Nationalists understood that voluntary association was not sufficient to hold The Union together. Union required, not only national unity and federal co-operation, but also properly arranged institutions to guard both state rights and the national government against corruption. Madison, as Publius, understood that the forces of self-interest and faction had gained control of the states and nearly dismembered The Union.[70] As Madison had warned in the Convention, the states had become a serious threat to liberty. Debtors rose up against creditors; in parts of the nation, the frontier rose up in open rebellion against duly constituted legal authority. The problem jeopardized the liberty of the entire union.

> There are again two methods of removing the causes of faction: The one, by destroying the liberty which is essential to its existence, the other, by giving to every citizen the same opinions, the same passions, and the same interests.[71]

The former would mean tyranny, the latter uniformity of thought.[72] The revolutionary generation had hoped that their virtue and honor would enable them to choose the good of their communities over selfish interest, but Madison argued that good government could not take virtue for granted, noting that "Enlightened statesmen will not always be at the helm." The solution was not to get rid of self-interest but to accommodate

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[69] Madison. Federalist Thirty Nine, 246.

[70] In Federalist Ten, Madison defined faction: "By a faction, I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community." (54).

[71] Madison, Federalist Ten, 54.

[72] Madison did not seriously contemplate legal efforts to ensure equality. "…the diversity in the faculties of men, from which the first rights of property originate, is not less an obstacle to uniformity of interests. The protection of these faculties is the first object of government." (Federalist Ten, 55).

government to human nature.[73] Republican institutions helped to control the effects of factions by choosing men who had a broad understanding of the interests of the whole country as representatives. Second by constituting the government on a national basis, politics became a coalition building enterprise between pluralistic interest groups, none of which had the power to dominate the others. The institutions of a national government provided "a republican remedy for the diseases most incident to republican government."[74]

The national government itself must be protected from faction. A proper scale of representation would help to produce good rulers, but virtue could no longer be presumed. Instead, Madison proposed that self-interest could be taken into account to strengthen institutions. The presidency and Congress were made to oppose one another so that the respective ambition of politicians would counter-act one another and protect the institutions that guarded liberty. Legislative power proved especially powerful, so it was divided into a bicameral legislature. Even the state and the Federal government were set against one another so that each would keep the other accountable. Nowhere was it assumed that the voluntary goodwill of the either the states or the national people would sustain The Union. "Hence, a double security arises to the rights of the people … the different governments will control each other, at the same time, each will be controlled

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[73] Madison, Federalist Ten, 57.

[74] "Extend the sphere," prophesied Madison, "and take into account a greater variety of interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who fell it to discover their own strength, and act in unison with each other." (Federalist Ten, 60-61). David Ericson's analysis of Publius and the rise of pluralism proved beneficial in my own analysis of Publius. David F. Ericson, *The Shaping of American Liberalism: the Debates over Ratification, Nullification, and Slavery* (Chicago: University of Chicago Press, 1993).

by itself."[75] Institutional mechanisms, Madison hoped, could help to ameliorate the failure of "the virtuous and spirited union." These institutional checks and balances between state and national governments would later become an indispensable component in the cause of state rights.

The State Rights Theory of Union

The national and federal principles sprung from different kinds of sources. Nationalism developed as the articulate theory of the American political elite. It found expression in the letters and speeches of James Wilson, and Nathaniel Chipman's treatises, and the commentary of Publius. These men demonstrated the moderated character of nationalist thought with its roots in the theory of popular government and the text of the Constitution. In a curious twist of fate, the nationalists successfully assumed the mantle of the cause of federal union. They placed the advocates of the federal principle on the defensive, labeling them with the deceptive moniker, Anti-Federalists. The Anti-Federalists appealed to the old revolutionary grammar of association but adapted it to face the challenges of the Federalist argument. It was in this sense, both older and newer than the nationalist ideals of the Federalists.

Although the dream of a union secured by voluntary association had collapsed by 1787, many still believed that the normative ends of The Union could be secured by the revolutionary principles of association. Anti-Federalist opponents of the Constitution offered two devastating critiques of the proposed Constitution. First, they challenged its direct departure from the principles of local government, small republics, and voluntary association that the Revolutionary grammar of union had stressed. Fortunately for the

[75] Madison, Federalist Fifty One, 333.

Federalists, the critics themselves were disorganized and badly divided as to their actual ideology and policy preferences.[76] Most agreed that constitutional reform was necessary, but that the new Constitution was likely to subvert the federal principle. Elbridge Gerry, who had voted for the Connecticut Compromise, ultimately opposed the Constitution because it lacked traditional republican features.[77] Many feared that the valuable role played by state governments would be eroded. Robert Yates and John Lansing of New York complained that reform of the Articles of Confederation ought to be premised on "the preservation of the individual states, in their uncontrouled constitutional rights."[78] By securing state rights within The Union, they argued, the Convention could have solved the financial, commercial, and diplomatic crises of the Confederation. "Instead of being thirteen republics, under a federal head," "Federal Farmer" complained that the Constitution was "clearly designed to make us one consolidated government." Great faults could be found in the Confederation itself, but the critical failure was the corruption and abuses in the state governments, not the structure of the Articles of Confederation. If the states had lived up to their end of the bargain, the old federal union would have thrived. Anti-Federalists, then, disagreed with the nationalists' contention that revolutionary idea of voluntary union had failed.[79]

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[76] See especially, Saul Cornell, *The Other Founders: Anti-Federalism and the Dissenting Tradition in America, 1788-1828* (Chapel Hill: Published for the Omohundro Institute of Early American History and Culture Williamsburg Virginia by the University of North Carolina Press, 1999).

[77] Eldridge Gerry to the Massachusetts General Court, October 18, 1787; and George Mason, "Objections of the Constitution of Government formed by the Convention, November 1787, Michael G. Kammen, ed., *The Origins of the American Constitution: a Documentary History* (New York, NY: Penguin, 1986), 253-258.

[78] Ibid., 260.

[79] Federal Farmer I, October 8, 1787, in Herbert J. Storing and Murray Dry eds., *The Complete Anti-Federalist,* (Chicago: University of Chicago Press, 1981), 2.8.1 – 2.8.14.

Second, Anti-Federalists hoped that a new constitution would allow the pursuit of liberty under the old federal practices of voluntary association. Many feared that the contractual grant lacked sufficient textual guarantees for the customary rights that Americans had traditionally enjoyed. Unlike most of the states, the federal Constitution lacked a bill of rights. Federalists argued that a bill of rights was superfluous, because the general government would only possess delegated powers and no others could be claimed or exercised. But the Anti-Federalist argument could not be so easily answered. Both "Brutus" and "Federal Farmer" feared that the new union lacked safeguards for the customary English rights that they enjoyed at the state level. Congress' expansive taxing power, control over armies, and supremacy over existing state institutions meant that customary rights of property, militias, or legal procedure could potentially be overturned. George Mason, despite his nationalist stance, eventually opposed the Constitution because it lacked the protection to liberty that a Bill of Rights could offer. He believed liberty was best protected by explicit limitations on federal power.[80]

The Anti-Federalist critique enjoyed limited success. Federalists successfully persuaded the public that the central government would only possess powers to manage tasks that were national in scope and character, particularly war, diplomacy, and fiscal policy. The national government would be limited by the federal nature of The Union and the limits contained in the contractual grant of power.[81] Anti-Federalists, however, won the public debate over whether the National Government needed to be limited further by a bill of rights to prevent abuses to liberty. With the understanding that

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[80] See Federal Farmer III and Brutus XIV, *Complete Anti-Federalist*, 2.8.24 – 2.8.43, 2.9.168 – 2.9.175.

[81] See Wilson's argument below. James Wilson, "Speech in the Pennsylvania Ratifying Convention," November 24, 1787, *Selected Political Essays*, 176.

proposed amendments would be forthcoming, enough Anti-Federalists agreed to join with the Federalists to secure ratification.

The example of Virginia bears out this argument between nationalists and Anti-Federalists. A pointed and decisive debate occurred in the Virginia ratification Convention as to the nature and the structure of The Union. Patrick Henry passionately argued from the floor of the convention that the Constitutional Convention had exceeded its authority:

> Who authorized them to speak the language of 'We the people,' instead of 'We the states?' States are the characteristics and the soul of a confederation. If the states be not agents of this compact, it must be one great consolidated, national government of the people of all the states.[82]

He assumed, as an Anti-federalist, that liberty could only be preserved by the states. If the principles of federal union were abandoned, tyranny would emerge out of the consolidated government. Edmund Pendleton countered that "Who but the people have the right to form a government?"[83] Pendleton understood that the new system was something more than a confederation, which required a grant of power from the people. Other state resolutions echoed the nationalist foundation of the constitutional compact. Pennsylvania's convention ratified the Constitution "in the name and by the authority of the …people." Other states used nearly identical language.[84] Virginia likewise acted

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[82] Patrick Henry, June 4, 1788, *Documentary History of the Ratification of the Constitution*, Merrill Jensen, ed. (Madison: State Historical Society of Wisconsin, 1976 – [2004]), 9, 930. (Hereafter referred to as DHR).

[83] Edmund Pendelton, June 5, 1788, DHR 9:945.

[84] DHR 2:324. Delaware's convention acted as "deputies of the people of the state of Delaware." (DHR 3:5) Georgia and Connecticut used identical language. (DHR 3:275, 3:560). Only New Jersey, despite its strongly pro-constitution stance, did the delegates identify themselves as representatives "of the New Jersey, chosen by the people." (DHR 3:184).

through the delegates of the people and declared that "the powers granted under the Constitution [were] … derived from the people of the United States."[85]

Anti-Federalists like Patrick Henry objected to this language strenuously. They proposed, as a substitute for ratification, that a declaration of rights, together with amendments to "the most exceptionable parts of the said constitution of government, ought to be referred by this convention to the other states in the American Confederacy for their consideration." [86] Henry argued that disputes on the meaning and structure of federalism ought to be referred to the other states as the contracting parties. The Federalists convinced the Virginia convention delegates that Henry's proposal was a poor substitute for their proposed government. Consequently, the new Constitution was ratified in necessarily nationalist language and terms. The sovereign people granted power to the central government to perform a limited but essential set of tasks.

The ratification of the Constitution was a further expression of the spirit of compromise that had animated the Convention of 1787. Although the state conventions agreed with the Federalists on the popular and national source of ratification, they adopted the Anti-Federalist concern that liberty would diminish under a central government. Virginia's convention resolved that the power granted to Congress by the whole people, could be resumed by them "at their will." It specified that Congress would not have the power to interfere with religious liberty, except as the Constitution explicitly provided.[87] Virginia's concern in 1788 was not so much for state sovereignty, which they

[85] DHR 10:1537.

[86] DHR 10:1538.

[87] DHR 10:1537-1538. "…Among other essential rights, liberty of conscience and the press cannot be cancelled or abridged, restrained or modified by any authority of the United States."

did mention, or of the rights of revolution, which they vested in the whole people and took for granted, but for the liberty of the whole people and the danger that Congress might usurp the liberty that the states had previously protected. Virginia, and other states proposed amendments to the new Constitution designed to further limit the extent of national power. Under the leadership of Madison, these concerns became embodied in a Bill of Rights, the strict construction of the Constitution, and a habit of state vigilance of the limits of federal power. The Anti-Federalist concern for state and local liberty as well as their suspicion of power would become as much a part of the constitutional order as the popular basis of national power in the sovereignty of the people.

After Virginia's convention disbanded, a group of disgruntled Anti-Federalists retired to the state legislative chamber to plan their continued resistance and opposition to the Constitution. When he learned of the gathering, Patrick Henry quashed the nascent resistance to the Constitution with one speech. Henry admonished them that "the question had been fully discussed and settled, and as true and faithful republicans, they had better go home!" He insisted "that they should cherish [the Constitution] and give it fair play…."[88]

Former Anti-Federalists, then, became devoted supporters of the Constitution. They brought into the government their suspicion of corruption and the Revolutionary predilection for voluntary, federal theories of association. For instance, "Brutus" had challenged the broad powers of the "Necessary and Proper" clause in Article I section 8. He expected that, "in forming a constitution, great care ought to be taken to limit and

[88] DHR 10:1562. This account draws upon David Meade Randolph's later recollection of Patrick Henry's speech.

define its power, adjust it parts, and guard against abuse of authority."[89] They insisted that textual limits on power and the Bill of Rights be scrupulously applied against national power. As H. Jefferson Powell suggests, opposition politics in the Early Republic viewed the government through a "constitution of suspicion." They knew that that "the preservation of liberty required that the Constitution be read with a bias against power."[90] With its ratification Massachusetts specified that a new article be drafted clearly defining "that all powers not expressly delegated by the aforesaid constitution are reserved to the several states to be by them exercised."[91] This principle was not simply a "truism."[92] It expressed their deeply held conviction that only institutional safeguards against national corruption could prevent corruption and tyranny. The Anti-Federalists' fear of consolidation, focus on enumerated powers, and concern for customary rights, along with the Revolutionary idea of a social contract, were all ideas that were enfolded into the Jeffersonian political project.

Anti-Federalists soon found a target for their suspicions in the new administration. Hamilton's 1790 plan for the new treasury department assumed that the national government possessed broad authority over economic development, drawing upon the new Constitution's provisions that allowed direct taxation and the power to borrow and

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[89] Brutus I and II, *Complete Anti-Federalist*, 2.9.1 – 2.9.33.

[90] H. Jefferson Powell, "The Principles of '98: An Essay in Historical Retrieval," 80 *Virginia Law Review* (1994): 722-727.

[91] DHR 3:5.

[92] Chief Justice Stone's opinion in United States v. Darby, 312 U.S. 100, 124 (1941) Stone claimed of the Tenth Amendment that "The amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers."

spend. He proposed that the national Revolutionary War debt be paid at full value, to the considerable profit of speculators who had purchased the debt at a discount. He proposed a national bank, an excise tax, and a policy for developing and supporting domestic manufactures. Hamilton believed that the interests of the financial classes ought to be wedded to the survival of the national union. Local men of finance would thus be financially invested in the success of the nation as a whole.[93]

Initially, the most controversial aspect of Hamilton's plan was the assumption of state war debts. The system of debt, like the whole of political economy in the 1780s, had been unevenly distributed. Several prominent states, including Massachusetts and South Carolina had left their entire debt unpaid. Many of the Southern states—Maryland, Virginia, North Carolina, and Georgia—had responsibly retired most of their debt. These states took up the cause of state fiscal authority in Congress. While they feared they would suffer at the expense of debtor states, they offered a broader objection that assumption would centralize financial power in Congress at the expense of the States.[94]

It appeared, in 1790, as if the differing interests of the states might triumph over the national principle and cripple any rising national power. Yet Jefferson and Madison, recognizing the need to buttress the fragile central institutions, agreed to compromise. They rallied support for the assumption of state debt in return for Hamilton's future support for a permanent seat for the capitol on the Potomac River. No doubt they hoped that a Southern location for the capital would help to insulate it from the atmosphere of a

[93] The best treatments of Anti-Federalists growing suspicion of the national government can be found in Lance Banning, *The Jeffersonian Persuasion: Evolution of Party Ideology* (Ithaca, NY: Cornell University Press, 1978); Drew McCoy, *The Elusive Republic: Political Economy in Jeffersonian America* (Chapel Hill: Published for the Institute of Early American History and Culture, Williamsburg, Va. by the University of North Carolina Press, 1980); and James Rogers Sharp, *American Politics in the Early Republic: The New Nation in Crisis* (New Haven: Yale University Press, 1993).

[94] Sharp, 35-36.

royal "court" which they feared might grow up in a major city. Jefferson, in any case, believed that without a compromise, no agreement on the public debt would be reached. It would be "the end of the government."[95]

To many former Anti-Federalists in the states, including Virginia's Patrick Henry, the Hamilton plan threatened the federal liberty which the states required to protect the people against coercive central power. Virginia immediately returned to the revolutionary model of non-coercive state association to oppose the Hamilton plan. At the instigation of Patrick Henry, the Virginia House of Delegates complained that the new government had already transgressed the boundaries that the Constitution had assigned to it. The assumption of state debt was "repugnant to the Constitution of the United States, as it goes to the exercise of a power not expressly granted to the central government…."[96] Strict construction of the enumerated powers became a rallying cry against federal power. Virginia believed itself to be a part of a federal union purposed on the preservation of both public and private liberty. The Revolutionary threat to liberty had been met by voluntary association and pleas to Parliament and the Crown to abide in the existing constitution. Now Virginia drafted a remonstrance, deliberately modeled on these revolutionary models.

The report suggested that the new government was already abandoning the ideal of the virtuous union for corruption, trying to recreate the British system of "enormous debt" and "unbounded influence" of the executive branch, which had limited the rights of

[95] Quoted in Sharp, 37.

[96] Virginia, *Journal of the House of Delegates*, 1790, 36.

the opposition and threaten the tradition of "English liberty."[97] Virginia initially hoped that the people's representatives would meet general threats to liberty with a virtuous response. But when the threat to liberty had become the national government itself, the Virginia legislature assumed the role of the petitioner, explaining to the national government its constitutional errors.

Virginia believed it had the right to participate in a just constitutional union. This union would not allow speculators to dominate over the agricultural classes or burden the people with heavy debt and high taxes. Hamiltonian policy had removed from the states a right that was justly theirs—"the power of taxing their own constituents for the payment of their own debts in such a manner as would be best suited to their ease and convenience."[98] The assumption of debts meant an increase in federal taxation and a denial of control to the states as to how those taxes would be levied.

Virginia understood the Revolutionary grammar of association to require that power be exercised toward the proper political ends and with the appropriate constitutional means. Assuming the role of a watchdog, the states should hold the central government to the strict terms of the agreement. Here the language of the states shifted significantly. The state ratifying convention had insisted on its right to defend the normative ends of constitutionalism because it embodied the people. Now the Virginia Legislature claimed the same right, not for a ratifying convention but for the legislature itself. They expounded their own duty "as the guardians, then, of the rights and interests of their constituents, as sentinels placed by them over the ministers of the Federal Government, to shield it from their encroachment, or at least to sound the alarm when it

[97] Virginia, *Acts Passed at a General Assembly … 1790*. (Richmond: John Dixon, n.d.), 59-61.

[98] Ibid.

is threatened by invasion."[99] The remonstrance spoke in defense of the states as contractual parties of The Union. Virginia insisted upon the rights to taxation as one of the fundamental reserved rights secured by the terms of its entry into The Union. Assumption further violated the constitutional provision guaranteeing the obligation of existing debts. The states could not remain silent, according to the Virginia Legislature, since "The rights of the states, as contracting parties with the United States, must be considered as sacred."[100]

Virginia's remonstrance demonstrates the republican constitutional response to the centralization of administrative government in The Union. When Hamilton proposed to form a centralized national bank within the executive branch, opposition quickly gathered against his plan. As Secretary of State, Jefferson advised against the constitutionality of a national bank by citing those reserved rights of the states. Because the power to charter a bank was not expressly delegated to the United States, Jefferson argued that it must have been reserved to the states.[101] Jefferson and Madison decisively moved into opposition against the administration. They formed a Republican caucus in Congress and initiated the founding of the *National Gazette.*

Madison wrote prominently in the *National Gazette* to defend the vision of association that he had described in Publius. Madison explained the source of the danger posed by centralization. Because the legislature was too distant "to regulate all the various objects belonging to the local governments … [it] would evidently force the

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[99] Ibid.

[100] Ibid.

[101] Thomas Jefferson, *Works of Thomas Jefferson,* Paul Leicester Ford, ed. (New York: Putnam's Sons, 1904), 6:285-87.

transfer of many of them to the executive department." Republican feared that the concentration of power and pageantry would encourage the ambitious to establish a monarchy and eviscerate representative government. Madison understood that the remedy to the dangers of consolidation was national as well as federal. Like his revolutionary forbearers, Madison distinguished the powers of government, which he feared would be consolidated, from the social union of all Americans, which he knew would benefit from a "consolidation" of "interests and affections." Only as the people found their interests in common could they oppose a budding tyrant. Madison explained:

> The less the supposed difference of interests, and the greater the concord and confidence throughout the great body of the people, the more readily must they sympathize with each other, the more seasonably can the interpose a common manifestation of their sentiments, the more certainly will they take the alarm at usurpation or oppression, and the more effectually will they *confederate* their defense of the public liberty.[102]

Nationalists and republicans each had a vital role to play in securing liberty. The Republicans should guard valiantly against encroachment, while the nationalists would work to harmonize the people.

> And let it be the patriotic duty of all, to maintain the various authorities established by our complicated system, each in its reflective constitutional sphere, and to erect over all the whole, one paramount Empire of reason, benevolence and brotherly affection.

Madison tried to maintain the harmony of federal and national principles against the spirit of the times, but his appeal was precluded by mutual distrust.[103] From this point, the constitutional discourse of Hamilton's Federalists and Jefferson sharply diverged from the shared understanding of a "partly national and partly federal" union.

Revolutionary Association Transformed: (1798-1800)

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[102] *National Gazette*, December 5, 1791, 2.

[103] *National Gazette*, December 5, 1791; Sharp, 40-45. For more evidence of the Republican critique see the *General Advertiser*, December 26, 1791.

Jefferson believed the people needed to be mobilized against the threat of corruption and the loss of liberty. The vision of a national government embodied in voluntary federal union was in jeopardy. The Republicans turned to the press, Congress, and the public to combat any further corruption of the nascent republic. The intensity of factional politics helped to convince Federalists that the Republicans were new revolutionaries, bent on destroying their hard won security and traditions of ordered liberty. As the turbulent politics of the 1790s unfolded, Federalists became convinced that their political opponents were the most serious threat to the liberty of the republic. Under the real threat of an imminent war with France in 1798 and an imagined Jacobin conspiracy at home, the Federalist majority in Congress passed sweeping legislation collectively called the Alien and Sedition Acts.[104] The Alien Act granted the President the power to deport any alien he believed was dangerous to The Union. The Sedition Act was directed against their political opposition to silence the increasingly raucous criticism of the Administration. It made unlawful any conspiracy "with intent to oppose any measure of the government of the United States." Congress also prohibited any person from "writing, printing, uttering, or publishing any false scandalous and malicious writing … against the government of the United States."[105] These acts were wielded by

[104] Powell, "The Principles of '98," 703-705. Sedition had always been a punishable crime under the common law, because the English protection of free speech extended to a policy of "no prior restraint" on the press. Authors and printers were still culpable for the effort their writing had upon the public. The sedition laws were designed to give the federal government power to prosecute sedition, although Federalist judges insisted in subsequent cases that they already held sufficient authority under the common law to try sedition cases. The Alien Act was necessary because the Federalists believed the danger they faced was primarily foreign. If a few troublesome or foreign-born editors and politicians like Albert Gallatin or James Callendar could be expelled, Federalists hoped that the threat of insurrection would diminish. As Abigail Adams explained, the editor of the *National Gazette* was "cursing & abusing daily. If that fellow & all is not suppressed, we shall come to civil war." (Abigail Adams to her sister, May 10, 1798, Lance Banning ed., *Liberty and Order: the First American Party Struggle* (Indianapolis, Liberty Fund Press, 2004), 226).

[105] Alien Act. Ch. 58, 1 Stat. 570 (June 25, 1798); and Sedition Act. Ch. 74, 1 Stat. 596 (July 14, 1798).

Federalist judges and prosecutors with a determination to buttress the administration. Even Republican congressman Matthew Lyon of Vermont was convicted and imprisoned for sedition.[106]

Facing restrictions in the press, and fearing that even their private mail might be subject to domestic spying, leading Republicans turned to the state governments. For a generation, citizens had believed that local associations were the surest guardians of their liberty. Now protests secretly authored by Madison and Jefferson were introduced into the Virginia and Kentucky legislatures, respectively. They denounced the Alien and Sedition Acts as a violation of the powers reserved to the states in the design of the Constitution. Congress had taken another step toward the consolidation of all political power in the executive branch. The legislation violated the Republican belief that the police powers had been reserved to the states. Kentucky called the legislation "altogether void, and of no force" while Virginia asserted that the states, as parties to the Constitution, "have the right, and are in duty bound to interpose for arresting the progress of evil, and to maintain within their respective limits, the authorities and rights appertaining to them."[107]

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[106] For a detailed treatment, see Aleine Austin, *Matthew Lyon: "New Man" of the Democratic Revolution, 1749-1822*, (University Park: Pennsylvania State University Press, 1981).

[107] Kentucky (1798) in H. Jefferson Powell ed., *Languages of Power: a Sourcebook of Early American Constitutional History* (Durham, N.C.: Carolina Academic Press, 1991), 130; and Virginia, *Acts Passed at a General Assembly in … 1798* (Richmond: Meriwether Jones & John Dixon, 1799), 33.

Much of the scholarship on the Virginia and Kentucky Resolutions focuses on a republican suspicion of power and neglects the important institutional mechanism that was employed. The "Republican Synthesis" of Bailyn, Wood, and Pocock in particular stresses the fear of the early Republic, although other works, notably Richard Hofstadter's *The Paranoid Style of American Politics* (New York: Knopf, 1965), emphasize the culture of suspicion in American politics as well. The literature focuses on the tumultuous factionalism of the early Republic and the opposition's desperate need to find a platform from which they could campaign for office without threat of arrest (in particular Sharp's *American Politics in the Early Republic* and Banning's *The Jeffersonian Persuasion*). The constitutional deliberation is lost on scholars whose attention is focused largely on the rise of political parties. Scholarship on resolutions is likewise clouded by the twentieth century associations of state rights with segregation and slavery. In this

The substance of the Virginia and Kentucky resolutions drew specifically upon the habits of the "constitution of suspicion" and the Revolutionary grammar of association. Indeed, the parallels between the revolutionary ethos and the language of the resolutions are particularly striking. Jefferson's initial draft called for new "committees of correspondence" to organize resistance to the national government on behalf of the reserved powers of the states. Jefferson himself went so far as to declare that the existing laws were invalid because they violated a higher law.[108] During the Revolution, the people stood as the judge of violations of natural law. Now Kentucky, drawing upon Jefferson's draft, claimed that it held the authority to declare the law. Kentucky deliberately evoked the memory of the Declaratory Acts which had bound the colonies "in all cases whatsoever by laws not made with their consent, but by others against their

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interpretation, the Virginia and Kentucky resolutions "were not defending the abstract authority of the states as an end in itself, but as a practical means to protect the civil rights of living persons." (Adrienne Koch and Harry Amon, "The Virginia and Kentucky Resolutions: An Episode in Jefferson's and Madison's Defense of Civil Liberties," *The William and Mary Quarterly,* 3rd Ser., 5 (1948): 145-176, editor's note. See also John C. Miller, *Crisis in Freedom: The Alien and Sedition Acts,* (Boston: Little Brown and Company, 1951); James Morton Smith, *Freedom's Fetters: The Alien and Sedition Laws and American Civil Liberties* (Ithaca, Cornell University Press, 1956); and Leonard W. Levy, *Emergence of a Free Press,* (New York: Oxford University Press, 1985) for the standard treatment of the civil rights aspects of the conflict). As K. R. Constantine Gutzman notes, Koch and Amon's article was written in the midst of a controversy within the Democratic Party over the constitutionality of anti-poll tax legislation and Hubert Humphrey's speech at the 1948 Democratic National Convention on behalf of "human rights" over and against "state's rights." ("The Virginia and Kentucky Resolutions Reconsidered: 'An Appeal to the *Real Laws* of our Country," *Journal of Southern History* 66 (2000): 488 note 36). Gutzman perceptively suggests that scholars have too quickly connected Jefferson's recourse to natural rights with twentieth-century battles for civil liberties, missing the long trajectory of state constructional reasoning on behalf of strict constitutionalism, reserved powers, and compact theory. Madison and Jefferson shaped republican constitutionalism to stress that states rights were the best means to protect liberty. Virginians believed that these were the safest tools by which the state could prevent the emergence of a powerful and consolidated ministerial state they believed Hamilton would create. State rights proved an integral part of the American constitutional tradition. More recent constitutional scholarship recognizes that the Resolutions are more than a campaign document. As H. Jefferson Powell argues, the resolutions' ultimate significance was found in their impact on Constitutional orthodoxy after Jefferson's victory in 1800 (Powell, "The Principles of '98").

[108] Virginia (1798), 33.

consent." [109] Virginia's language was more moderate. They identified as their enemy the impending threat "to destroy the meaning and effect of the particular enumeration, which necessarily explains and limits the general phrases; and so as to consolidate the states by degrees into one sovereignty."[110] Virginia's appeal conjured up fears of the corrupt and ministerial government of Georgian Britain, not so much a fear of tyranny imposed by force. Both believed that the revolutionary struggle had not ended. They turned to meet the threat with the stratagem of virtuous and voluntary association that had succeeded against the crown.

It is critical to note that the Republicans turned to the states as the legitimate agents of protest and action whereas modern opposition movements would have turned to mass protest, political organization, or media outlets. To the Republican mind, these outlets still lacked the virtue and disinterested spirit that could be found in a state legislature. As John Taylor explained, only state legislatures could genuinely represent the people. Anti-Federalists had argued that federal representation in Congress was on too small a scale, and elections were too infrequent to be accountable to the people. Now they contended that the state legislators more accurately represented the people. State legislators lived in small districts where they knew their constituents and faced annual elections.[111] State government offered the true expression of republican principles, and the best constitutional defense of liberty. As Jefferson wrote, "The true barriers of our

[109] Kentucky, *Languages of Power*, 133.

[110] Virginia (1798), 33.

[111] Gutzman, 482.

liberty in this country are our state governments."[112] States provided "the most competent administrators for our domestic concerns, & the surest bulwarks against anti-republican tendencies."[113]

State protest was justified because Republicans felt that a legitimate constitutional power was being stripped from their jurisdiction. As Jefferson wrote, "The power to create, define, and punish such other crimes is reserved, and, of right, appertains solely and exclusively to the respective states, each within its own territory."[114] The law explicitly violated the general principle of the Tenth Amendment, of the reservation of rights in the Virginia ratifying resolutions, and of Virginia's remonstrance of 1790. In addition it violated explicit provisions of the Bill of Rights which prohibited Congress from making laws respecting the freedom of speech or of the press. Virginia persuasively quoted from its own ratifying resolutions to the effect that freedom of the press was to be untouched by the federal government.[115]

The most far reaching impact of the Virginia and Kentucky resolutions was their incorporation of the language of social compact theory into constitutional deliberation. While compact theory had been a staple of Revolutionary constitutional deliberation, the Virginia and Kentucky Resolutions ensured that compact theory would remain an enduring component of American constitutional analysis. Because the constitutional compact was the product of consent, and the states were believed to be the parties through which consent was given, Madison and Jefferson reasoned that the states

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[112] Thomas Jefferson to A.L.C. Destutt de Tracy, January 26, 1811, quoted in David N. Mayer, *The Constitutional Thought of Thomas Jefferson* (Charlottesville, University Press of Virginia, 1994), 199.

[113] Jefferson, quoted in *Constitutional Thought*, 185.

[114] Thomas Jefferson, "Draft of the Kentucky Resolutions of 1798," *Works, 8:*463.

[115] Virginia (1798), 33.

remained the best vehicle for consent to the constitutional actions of the general government. The Virginia resolutions stressed that the states were parties to the compact that formed The Union, while Kentucky posed a stark alternative between total submission to the government, or a compact in which each state acceded as an "integral party" to The Union.[116] The subtle differences between these two expressions of the character of consent would have far reaching consequences. Madison's language in the Virginia resolutions implied that the states held the power to consent collectively, so that constitutional deliberation was only authoritative if the states together expressed their vision of the constitutional order. This limited the power of a single state. Jefferson's draft, and the eventual Kentucky resolutions, theorized that the constitutional compact was between an individual state and the rest of the states collectively. Thus an individual state was entitled to declare that a law was "null and void" because it was an equal contracting party to the rest of the states.[117]

The states clearly presented themselves as interpreters of the Constitution, over and against Congress, which had unconstitutionally restricted free speech and the press. Virginia and Kentucky were also fearful that the executive had consolidated its power over the judiciary. Ultimately, the Alien Act was an abuse of due process that stripped domestic aliens of their right to trial by jury by presidential fiat.[118] The loss of legal rights, and the consolidation of a judicial power in the executive, appeared to Republicans as imminent tyranny. The states, not content with their announcement of constitutional violations, assumed for themselves the power of a constitutional court.

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[116] Virginia (1798), 33 and Kentucky (1798), *Languages of Power*, 233.

[117] Powell, "The Principles of '98," 715-722.

[118] Banning, *Liberty and Order*, 234.

They believed that they could act as arbiters between citizens and the federal government. Virginia proclaimed that it had the duty to "interpose" to end the practices of the Adams administration. Seemingly, Virginia intended to interpose its political power to bring to an end the questionable constitutional practices of the administration. But later, states would call out the militia (as Pennsylvania did, resisting the result of *U.S. v Peters* in 1809) or use the state courts to actively thwart the federal interpretation of the Constitution (as the Wisconsin Supreme Court did in *Re Booth and Rycraft* in 1855).[119] Kentucky, took the radical position immediately arguing that "Each party has an equal right to judge for itself" whether the Constitution has been violated.

Given the Revolutionary lessons about the value of associations in politics and the "constitution of suspicion" that prevailed among Republicans in the 1790s, it is not surprising that state politicians would assume the right to interpret the Constitution on behalf of the state governments, particularly when liberty itself was perceived to be at risk. The Constitution did not provide a "common umpire" for determining constitutional meaning in a dispute between branches of government. It clearly established the supremacy of the national over the federal government, but then meticulously protected the reserved powers of the states. Madison, in particular, had long argued that the state governments were as necessary to the preservation of liberty as was the popular unity of "interests and affections" between all of the people.[120] The Virginia and Kentucky Resolutions simply assumed that the states were equally powerful constitutional actors, they were constitutionally empowered to speak more authoritatively than the judicial or

[119] Pennsylvania's interposition will be treated in the next chapter. For more on the Wisconsin's use of state rights in resisting the Fugitive Slave Law of 1850, see Thomas D. Morris, *Free Men All: The Personal Liberty Laws of the North, 1780-1861* (Baltimore, The Johns Hopkins University Press, 1974), 173-78.

[120] *National Gazette,* December 5, 1791.

executive branches, because they were more representative of the will of the people and could better protect their liberty.

From the perspective of constitutional history, the passage of the Virginia and Kentucky Resolutions were a critical moment American federalism. The Resolutions took the Revolutionary suspicion of power, welded it with the Anti-Federalist hermeneutic of strict construction, and produced a model of constitutional deliberation that permeated the politics of the next three generations. They contended that the states, as integral parts of the American constitutional structure, possessed the authority to review the actions of the other units of government. The theory of states rights emphasized that the states were vital and essential constitutional actors, with powers to call for constitutional amendment and clarify constitutional meaning. Virginia and Kentucky contended that the states could speak definitively as to what the Constitution meant. Constitutional disagreements in the early Republic were particularly thorny because practical institutional mechanisms for determining constitutional meaning had not yet been established. Judicial review, while emerging as a definitive voice on the state courts, had not yet been comprehensively embraced by the Supreme Court. Those who espoused judicial review did not claim judicial supremacy over the Constitution.[121]

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[121] Judicial review was an implicit part of the rule of law as it was practiced in America. (Kemper v. Hawkins, 1 Virg. Cas., 74, App. and Calder v. Bull, 3 US 386 (1798)). But although the Supreme Court grew willing to act as a co-equal branch of government, judicial review had not yet acquired its modern role as the sole authority over constitutional texts. (See Christopher Wolfe, *Rise of Modern Judicial Review: From Constitutional Interpretation to Judge-Made Law* (New York: Basic Books, 1986). When the court, in Marbury v. Madison, 5 US 137 (1803), claimed the authority to overturn a part of the Judiciary act of 1789, it still only claimed to speak about its responsibility to interpret the Constitution for itself as it applied to the judiciary. This was no more than Hamilton had done with his opinion on the national bank—he had argued for the power to interpret the Constitution as to its power on behalf of the independent branch (the Executive) on which he operated. For the cases in question, the Constitutional opinion of the court was decisive, but not until the twentieth century did the court claim undisputed supremacy over the constitution. In Cooper v. Aaron 358 US 1 (1958), the court posed a new interpretation of *Marbury* that "this decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a

According to the logic of state rights, the judgment that the states were superior to the president or the courts in their power to determine constitutional meaning gave considerable power to the political branches of the states. State legislatures weighed whether the circumstances were extreme enough to justify interposition. When one state determined that a violation had taken place, it could send resolutions to the other states, protesting the grievance and appealing for political and constitutional aid in resolving the crisis. Theoretically, the states could resolve the problem by applying political pressure to Congress, by ratifying a constitutional amendment, or even by organizing a constitutional convention. Yet considering the deep political factionalism of the 1790s, it is not surprising that the state legislatures themselves were too deeply divided to offer Virginia and Kentucky much aid. If the states could not practically act as an arbiter of constitutional meaning, then who was to decide ultimately? The states were, in times of crisis, unwilling to cede that power to any branch of the federal government, either the President, the federal courts, or even Congress. But given the political diversity of the states, it is difficult to imagine that any other mechanism could be consistently effective in difficult constitutional disputes.

The responses to the Virginia and Kentucky Resolutions refused to accept the resolutions' claims. Congress believed the resolutions were a campaign speech and responded to them as such. In response, their resolutions dismissed the "acrimonious remonstrance" as an illegitimate, foreign-driven effort to weaken their strength against

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permanent and indispensable feature of our constitutional system. It follows that *the interpretation* of the Fourteenth Amendment *enunciated by this Court in the Brown case is the supreme law of the land*, and Art. VI of the Constitution makes it of binding effect on the States" (18, emphasis mine). The courts held a more circumscribed role in the eighteenth century. Republicans preferred to grant power over the supreme law to the people alone, so state legislatures could claim, with some credibility, to interpret constitutional meaning.

France. The Alien and Sedition Acts, they explained, were vital to national security. They provided "Parts of a general system of defense, adopted to a crisis of extreme difficulty and dangers." Congress explicitly defended the Alien and Sedition acts against the charge that they were an unconstitutional usurpation. Congress argued that the laws only clarified the broad authority of the President. The power to remove aliens, the Resolutions suggested, was incidental to the power the President held to defend The Union, while the Sedition Act enacted existing common law prohibitions against seditious speech. The freedom of the press cited by the Republicans in the First Amendment simply granted "permission to publish without prior restraint." Congress, in essence, argued that the national government already held the broad power that Virginia and Kentucky charged they were usurping.[122]

Because Virginia and Kentucky argued that the states could judge the limits of the reserved powers, only the other states could refute their claim. The states, like the Congress, charged that the resolutions were a political act destabilizing to the government. New York denounced the "inflammatory and pernicious sentiments and doctrines" contained in the resolutions.[123] But the states questioned the very right of Virginia and Kentucky to make judgments with authority about the nature of the Constitution. New York challenged the theory that the Constitution was a compact between the states. It explained that "the people of the United States have established for

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[122] Congress, United States, 5th Cong., 3rd sess., "Repeal of the Alien and Sedition Laws," February 21, 1799, *American State Papers*: *Miscellaneous,* 1:181-184. Congress assumed that the common law had been federalized, which is what the states where fighting so strenuously to prevent. Republicans contended that, if the Constitution were construed to include the common law, then very little power would remain for the states.

[123] New York, March 5, 1799, *State Documents on Federal Relations: The States and the United States,* ed. Herman V. Ames (New York, Da Capo, 1970), 23 (Hereafter referred to as SDFR); and Pennsylvania March 11, 1799, SDFR, 22.

themselves a free and independent national government."[124] Massachusetts agreed that the people had made the central government the judge of its powers, not the states: "The people, in solemn compact, which is declared to be the supreme law of the land, have not constituted the state legislatures the judges of the acts or measures of the Federal Government, but have confided to them the power of proposing… amendments."[125]

The other states had argued that the Virginia and Kentucky legislatures had assumed a function that state legislatures were not competent to perform. As Vermont explained, "It belongs not to state legislatures to decide on the constitutionality of laws made by the general government, this power being exclusively vested in the judiciary courts of The Union."[126] Rhode Island, New York, Pennsylvania, and New Hampshire agreed that the courts were the proper institution to declare the meaning of the law. The New York Senate declared its own "incompetancy, as a branch of the legislature of this state, to supervise the acts of the general government."[127] The states were above all concerned with the instability that might arise if each state would speak with a different voice on the meaning of the Constitution. Rhode Island even suggested that too great a diversity of state opinion risked "hazarding an interruption of the peace by civil discord."[128] Massachusetts agreed that while vigilance for liberty was admirable, Virginia and Kentucky had gone too far. No state supported Virginia and Kentucky's

[124] New York, Senate, March 5, 1799, SDFR, 22.

[125] Massachusetts, Senate, February 2, 1899, SDFR, 18.

[126] Vermont, House of Representatives, October 30, 1799, SDFR, 26. See also the New York resolution cited above and New Hampshire (*Liberty and Order*, 238). They argued that the state legislature was "not the proper tribunals to determine the constitutionality of the laws of the general government." New Hampshire's argument was ironic considering the argument they made in Penhallow v. Doane, 3 Dall. 54 (1795), which I will discuss in chapter three.

[127] New York, Senate, March 5, 1799, SDFR, 23.

[128] Rhode Island and Providence Plantations, General Assembly, February 1799, SDFR, 17.

claims, and given the risk of war and the fears of revolution, it is not surprising that the states carefully dissented from the Virginia and Kentucky doctrines.

The challenge posed by the states' replies required Republicans to defend their states' right to challenge the central government's interpretation of the Constitution. Madison, in particular took the challenge of vindicating his doctrines before the public. After the heated criticism of the Virginia resolutions of 1798, Madison ran for the Virginia House of Delegates to play a prominent role in their defense. The Virginia Report of 1800 clearly elaborated Madison's principles on state action and the degree to which the states could challenge the general government. His formulation deserves special treatment, because Madison had played such a prominent role in creating and defending the national government against the Anti-Federalist critique. Just as in Federalist Thirty Nine and his essay in the *National Gazette*, the Virginia Report advanced the axiom that the government was "partly national and partly federal." The Constitution had been ratified in Virginia with the understanding that "the power not delegated to the states … were reserved to the states, respectively, or to the people."[129]

The nature of the Constitution itself, as a compact, was the source of Madison's argument. Because it was a compact, "the parties themselves must be the rightful judges in the last resort whether the bargain made has been proposed or violated."[130] The assertion that the states, as parties to the Constitution, could review the constitutionality of the central government's actions had been greeted with considerable alarm in other states. Madison clearly emphasized that when the "states" were properly defined, the Virginia doctrine was less alarming. Constitutionally speaking, "states" meant not the

[129] Virginia (1800), *Liberty and Order*, 243.

[130] Ibid., 244.

territory, societies, or even the governments of the "separate sections" of The Union, but "the people composing those political societies in their highest sovereign capacity."[131] Because the parties were the states in their highest sovereign capacity (the people of each state severally), Madison was arguing that the people were the highest authority in American Constitutional deliberation. Madison appealed to the fundamental principle of consent. By consent, the people had granted governments powers to protect their liberty and set up Constitutions to oversee that grant. Federalists arguments that the vigilance of the people was inappropriate, dangerous, or suggestive of exotic European revolutionaries contradicted what Madison felt was the essence of republican constitutionalism. "The authority of constitutions over governments, and of the sovereignty of the people over constitutions," Virginia declared, "are truths which are at all times necessary to be kept in mind; and at no time perhaps more necessary than at the present."[132]

Virginia's report, then, was not a call to sovereign power, or unilateral action, but the reasoned attempt on behalf of the people to restore the constitutional principles of the American Revolution. The state governments stood as an advanced warning "to descry the first symptoms of usurpation."[133] Aware that the republicans were deeply suspected of being Jacobin revolutionaries, Madison hastened to add that this case of action was lawful. He stressed the "warm affection" for The Union and scrupulous fidelity to Constitution which characterized Virginia.[134] But the people were jealous of their state

[131] Ibid.

[132] Ibid., 245.

[133] Ibid., 260.

[134] Ibid.

government, and had created constitutions to protect them. Now they acted to police the limits they had set on the federal government. Madison hoped that the people of Virginia would be affirmed by the other states and that the excess of the Federalist administration would be decisively curtailed. His hope was in the people of The Union, acting severally through their state legislatures. Virginia proclaimed with Madison: "There can be no tribunal above their authority to decide, in the last resort, whether the compact made by them be violated."[135]

Interposition provided a middle way for Virginia.[136] Interposition would allow the state government to "arrest the progress of evil," deny to the federal government powers that it had assumed, and thus protect the Constitution and the liberty of the people. It allowed Virginia a way to protect liberty under law without endangering that liberty through violent resistance against federal government that might imperil The Union or a docile submission to federal supremacy. State legislatures ought to interpose to defend the revolutionary project of liberty under law that they had pledged to protect in their own bill of rights and constitutions. Only a constitutional violation should produce state interposition. "In the case of an intimate and constitutional union," Virginia explained, "it is evident that the interposition of the parties in their sovereign capacity can only be called for by occasions only deeply and essentially affecting the vital principles of their political system."[137]

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[135] Ibid., 244.

[136] The expression, "middle way" is John Taylor of Caroline's from the Virginia legislative debates on the Resolutions of 1798. See Gutzman, 493-496.

[137] Virginia (1800), *Liberty and Order*, 244.

The states were understood as a critical counterbalance to federal power. The full context of the Report of 1800 suggests that the purpose of interposition was to declare that the law was unconstitutional, on its face, and to refuse to co-operate with it, calling on the other states for support in repealing it.[138] But the states had not supported Virginia. In answer to his critics, Madison explained that state declarations of unconstutionality were not judicial because they did not bind the states with finality in the way that a judicial decree bound the parties to a suit. In cases of state review, states resolutions are "expressions of opinion, unaccompanied with any other effect than what they may produce on opinion, by exciting reflection."[139] They were intended to persuade the collective sovereign, the people operating in their sovereign capacity (the states) together,[140] that the Constitution should be construed strictly. The right of a state to organize with other states and invite concurrence was at the heart of the revolutionary tradition of association. Madison believed that liberty required the right to "free communication" among the states, where the Constitution imposes "no restraint." The states themselves could take the appropriate and constitutional measure to amend the

[138] In the debates in the Virginia house over the passage of the resolutions, the majority suggested that the framers had intended this form of collective action, citing Federalist Twenty Eight. See Gutzman, 491.

[139] Virginia (1800), *Liberty and Order*, 259.

[140] The language of the Virginia Report of 1800 emphasized the collective sovereignty of the states and the sovereignty of the people against the threat of consolidation into a singular national sovereign. Compare the "interposition of the parties [plural] in their sovereignty" (244) and "sovereign parties [plural] to the constitution" (245) referring to the states, with "sovereignty of the people over constitutions" (245) and "the people, not the government, possess the absolute sovereignty" (353). Sovereignty belonged to the people together, or, defined another way, to the states collectively, with the states understood as being "the people composing those political societies in their highest sovereign capacity" (244). In contrast, when sovereignty was referred to as a singular entity, Madison referred to the danger of consolidating all sovereignty in the general government. This was the very evil that the Virginia Resolutions had been calculated to avert (246).

Constitution.[141] According to the Virginia Report of 1800, the judiciary cannot be the sole bulwark, because issues will arise over which it had no jurisdiction: "The decisions of other departments, not carried by the forms of the Constitution before the judiciary, must be equally authoritative and final with the decisions of that department."[142] Thus the states, as a vital constitutional institution, could speak with equal authority to the other branches of government. Madison's response was an elaboration of the federal principle of his "partly federal and partly national" republic. He sought to preserve the balance of power between the branches of government and between the federal and state governments through a measured political and constitutional protest.

Despite his political optimism and his love of The Union, Jefferson's treatment of state review took a more radical form than Madison's.[143] Jefferson contended that the

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[141] The states themselves had already organized to overturn what they believed was an extra-constitutional action by the Supreme Court. Chisholm v. Georgia, 2 Dallas 419 (1793) reinforced the power that the federal principle maintained well into the Federalist era. The decision itself struck the first in a long series of blows by the Supreme Court in favor of the jurisdiction of the courts against state sovereignty claims. The facts concerned a dispute between a South Carolina merchant and the state of Georgia over the value of goods he had supplied during the Revolution. Georgia refused to argue the case, claiming sovereign states could not be brought to suit without their consent. John Jay and James Wilson authored broad proclamations of national sovereignty for the majority, arguing the nationalist position that the people, as the ultimate sovereigns, had vested it in the general government. In the end, the cause of state rights won the day. In response to the nationalist claim, congress proposed and the states swiftly ratified the eleventh amendment, protecting the sovereign immunity of states from suit by citizens of other states or aliens.

[142] Virginia (1800), *Liberty and Order*, 245.

[143] Jefferson was not as radical as the use of his ideas by secessionists would suggest. Jefferson held an easy confidence that the republic would prosper. Despite the rising political fortunes of Hamilton and the Federalists, Jefferson believed that the people would eventually restrain the excesses of the government and protect their liberty. The radical language of the Kentucky Resolution was not a prelude to secession. He knew such a division would be foolish and ultimately destructive. As Jefferson wrote to John Taylor on June 4, 1798, "…in every free & deliberating society there must, from the nature of man, be opposite parties & violent dissentions and discords." The popularity of Washington and the machinations of Hamilton had temporarily given the aristocratic and anti-republican Federalists the upper hand, but the "substantially republican" character of the people could guard against corruption. The "scission of the Union" should not be contemplated because the factional nature of man would inevitably create new parties in any new union they might form. Jefferson posited that New England was an excellent adversary for Republicans because "[t]hey are circumscribed within such narrow limits, & their population so full, that their numbers will ever be the minority…. A little patience and we shall see the reign of witches pass over, their spells dissolve, and the people, recovering their true sight, restore their government to its proper

states had formed The Union by compact under certain conditional terms, which the central government must respect. In this, he agreed with Madison. But Jefferson believed that the Constitution was not formed by the people, acting within the several states, but by each state acting individually. As he asserted,

> to this compact, each state acceded as a State, and is an integral party, its co-states forming, as to itself, the other party…and as in all other cases of compact among powers having no common judge, each party has an equal right to judge for itself, as well as of infractions of the mode and measure of redress.[144]

Jefferson's argument appealed to the natural rights of the states to judge for themselves whether the compact has been violated. It assumed, implicitly, that the states were still in a state of nature regarding the interpretation of the compact. This is not to say that the compact had been dissolved, or that revolution was their only recourse. Jefferson simply could not find any national institution with authority over constitutional interpretation. Instead, it was left to the states and the people to preserve the "real laws" against the usurpations of the executive branch.[145] Because each state acceded to union as a sovereign entity, Jefferson believed that it *could* act alone, to declare that an extra-constitutional act was void and null.

Jefferson did stress the need for collective action against the Alien and Sedition Acts. His original draft proposed that "a committee for conference and correspondence"

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principles" (*Liberty and Order*, 227-28) Jefferson believed it was best to remain united with the Federalist states and to fight for the true principles of union (Gutzman, 484). Despite his strong disagreement with the broad construction Hamilton advocated, he had not resorted to the power of the states because when the Republicans held the administration, they could revise the constitution to prevent such broad construction. Only the direct threat that the Alien and Sedition Act had posed to the political liberty of the Republicans, clearly against the spirit and the letter of the Constitution, justified the theory of nullification that Jefferson proposed.

[144] Thomas Jefferson, "Draft of the Kentucky Resolutions of 1798," *Works, 8:*461. These key differences between the fathers of the Democratic-Republican movement foreshadowed the large differences between their intellectual descendents Martin Van Buren and John C. Calhoun. Jefferson's theory of the compact stressed the sovereignty of the individual states, and so prepared the South for eventual nullification and secession.

[145] Gutzman, 488.

be created in the revolutionary style to co-ordinate voluntary association with the states in resistance to undelegated power. Jefferson believed that the states still were jealous of their powers and would not "submit to undelegated, and consequentially unlimited powers." Jefferson suggested that if the government had merely stretched the bounds of the delegated powers, rather than inventing new powers, he would have patiently waited for the people to correct the error through the political process. But when "powers are assumed which have not been delegated, a nullification of the act is the rightful remedy."[146] Jefferson's argument implies that individual states could nullify federal law:

> Every state has a natural right in cases not within the compact, (casus non foederis), to nullify of their own authority all assumptions of power by others within their limits: that without this right, they would be under the dominion, absolute and unlimited of whosoever might exercise this right of judgment for them.[147]

Congress was not even a co-equal branch of government, but "merely the creature of the compact." It was subject in its powers to the will of the states that created it to serve them.

Jefferson's appeal to natural rights was moderated by the patient strategy he proposed to Kentucky. He called upon the other states to share their beliefs on the Alien and Sedition Acts. Jefferson did not try to steer Kentucky on an individual course against the will of the nation. He sought to convince the other states that the actions of the Adams administration proved that it was unrestrained by the strict enumeration of its powers. Jefferson described a threat identical to the one faced in 1774. The government was

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[146] Thomas Jefferson, "Draft of the Kentucky Resolutions of 1798," *Works, 8:* 471. Ironically, the abuse complained of by South Carolina in 1833 seems to be this kind of power, one which is delegated, but abused—the tariff power.

[147] Ibid.

> seizing the rights of the States, and consolidating them in the hands of the General Government, with a power assumed to bind the States, not merely as the cases made federal (casus foederis), but in all cases whatsoever, by laws made, not with their consent, but by others against their consent: that this would be to surrender the form of government we have chosen, and live under one deriving its powers from its own will….[148]

Jefferson expressed confidence that the states would collectively respond to the looming presence of arbitrary government, by following Kentucky's declaration that the offending laws were "void, and of no force." If no support from the other states was forthcoming, Kentucky would make the declaration alone.

The Kentucky legislature significantly moderated Jefferson's radical language while retaining his criticism of centralized power. It denied his call for a Revolutionary-style committee of correspondence, and avoided his theoretical emphasis on the natural rights of the states. Instead, Kentucky phrased its resolutions as instructions to its delegates in Congress. It also sent the resolutions on to the other states, with the hope that they shared their opinion. Kentucky embraced Jefferson's critique of the monarchical executive. Quoting Jefferson, they hoped to "bind him down from mischief by the chains of the Constitution."[149] They adopted Jefferson's comparison of the central government to the British government in their claim to "exercise power of these states of all powers whatsoever."[150] Kentucky, like Madison and Jefferson, conceded that the administration had the power to bind them with respect to the powers delegated by the Constitution (*casus foederis*), but not in all cases whatsoever. They followed Jefferson's reliance on the states as agents of resistance. They believed that the rights violated were the rights the states held by compact, not the constitutional rights granted by the people.

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[148] Thomas Jefferson, "Draft of the Kentucky Resolutions of 1798," *Works, 8:*477.

[149] Kentucky (1798), *Languages of Power*, 133.

[150] Kentucky (1798), *Languages of Power*, 133.

Kentucky did not really hope to act alone, because it understood that one or two states could not carry their interpretation against the fierce opposition of the other states. They appealed to the states to "concur in declaring these acts void, and of no force" as Kentucky had done and to seek the repeal of the law in Congress. In 1799, after facing harsh criticism by the other states, Kentucky insisted that nullification was still the rightful remedy, but now asserted that this remedy would only be accomplished collectively by the "sovereignties" that formed the Constitution. Kentucky, under the guidance of Jefferson, committed itself to a political solution. It sought to change the laws while conducting its opposition from within the Constitution. An appeal to the states was Kentucky's best hope to restore the constitutional order without a risky recourse to its full natural rights.[151]

According to H. Jefferson Powell, nineteenth-century America would recognize "The revolution of 1800…as real a revolution in the principles of our government as that of 1776 was in its form…. The nation declared its will by dismissing functionaries of one principles and electing those of another."[152] Despite Federalist denunciations, the presidential election of 1800 vindicated Republican principles. Jefferson's victory established the doctrines of strict construction, reserved rights of the states, and compact theory of the Constitution as the orthodox reading of the Constitution.[153] The ideas of

[151] Kentucky (1799), *Languages of Power*, 235-236. "That the several states who formed that instrument, being sovereign and independent, have the unquestionable right to judge the infraction; and that a nullification by those sovereignties of all unauthorized acts done under color of that instrument is the rightful remedy." Kentucky insisted its rights under the Constitution to declare the infractions of the Constitution to not be binding law.

[152] Powell, "The Principles of '98," 694-95. Even the nationalist Henry Clay, in an 1818 speech declared that his political ideas of liberty, popular government, and vigilance against corruption and monarchy were formed in the Virginia Report.

[153] Koch and Amon, 147.

state rights remained the *lingua franca* of constitutional theory, long after the decline of the Jeffersonian political dynasty. State resolutions became a major element in constitutional deliberation as the states attempted to construe the Constitution to protect and support their reserved rights. State rights did not mandate that the states should dominate the central government. Jefferson's Inaugural Address of 1801 directly supported "the preservation of the general government, in its whole constitutional vigour, as the sheet anchor of our peace at home, & safety abroad."[154] Yet for most of domestic policy, he insisted that the states were the proper constitutional vehicle of government. "The support of the states governments in all their rights, [is] the most competent administrators for our domestic concerns, & the surest bulwarks against anti-republican tendencies."[155] The states, then, assumed the task of policing the "partly national and partly federal" character of The Union.

The importance of the resolutions in constitutional history stretches far beyond the immediate context. With the Virginia and Kentucky Resolutions, Madison and Jefferson had given all the states invaluable tools to define and defend the boundaries of their rights. The controversy surrounding the Alien and Sedition Acts was incorporated into the rich political grammar of association and constitutional deliberation. It encouraged states to both interpose and/or nullify when faced with a federal transgression of constitutional limits. The differences between Madison's interposition and Jefferson's nullification proved significant and led to major discrepancies between proponents of state rights in antebellum political theory. Madison's project of cooperative state review more closely followed the Constitution by using the states to propose amendments or a

[154] Quoted in Mayer, 185.

[155] Ibid.

constitutional construction. Jefferson certainly wanted the support of the other states, and understood that a political solution would provide much greater security. But he theorized that any state could act alone when the government assumed a new power not delegated to it.

The differences between Madison's theory of collective state action and Jefferson's theory of nullification by individual sovereign states were significant. By the Jacksonian era, they would serve as two starkly different expressions of the federal principle. Jefferson's doctrine created a thorny epistemological problem. If the states are divided, then who decides whether the assumption of a power by the government was undelegated? In a partisan political and sectional environment, the states would by nature disagree with one another. Nationalists seized upon this disagreement to insist that constitutional deliberation between the states could never be decisive. Meanwhile state resistance became a widely used tactic. Madison's justification for limited interposition influenced the tactic of resistance to federal authority from New Hampshire to Wisconsin, while Jefferson's theories were cited by South Carolina to justify nullification and secession. The language of association became deeply embedded in the cause of state rights.

Chapter 3: "No Common Umpire": Sovereignty and Constitutional Interpretation (1777-1812)

Historians of federalism need to take into account the connections between the doctrine of the law of nations and development of the theory of sovereignty as they developed in the early Republic. The conventional nationalist argument eschews the literature on the law of nations and assumes that sovereignty naturally coheres in a powerful centralized state. Applied to the early Republic, contemporary nationalists assume that Jefferson and Madison re-introduced the idea that states were sovereign parties to a constitutional compact into the Constitution as a political response to the Alien and Sedition Acts.[1] The Virginia and Kentucky resolutions, then, became the basis for the development of a states rights tradition employed, first by New England (1804-1814) and then in the South, through the work of John Taylor of Caroline, St. George Tucker, and John C. Calhoun, and fully tested in the Nullification Crisis (1828-33) and then implemented in 1861.

In contrast, I am advancing a different argument about the idea of sovereignty as it developed in the North. The question of sovereignty arose during the American Revolution, not in 1798. The Virginia and Kentucky resolutions played a vital role in the transformation of the revolutionary grammar of association. Yet the American conversation on the nature of sovereignty largely took place within a context of

[1] The best examples of the nationalist approach can be found in Calvin H. Johnson, *Righteous Anger at the Wicked States: The Meaning of the Founders' Constitution* (New York: Cambridge University Press, 2005) and Bruce Ackerman, *We The People*, 3 vols. (Cambridge, Mass.: The Belknap Press of Harvard University Press, 1991). For instance, Ackerman explains that "the neat system of 1787 did not survive the Founding generation." (1:70) Jefferson's triumph in 1800 swept it away. For a treatment of the national principle more sensitive to its relationship to the federal principle, see Samuel H. Beer, *To Make a Nation: The Rediscovery of American Federalism* (New York: Cambridge University Press, 1993).

international ideas. The law of nations, social compact, Westphalian sovereignty, a distinctly American way of thinking about "the state" called the Philadelphia system, and popular sovereignty all shaped the way that Americans thought about state rights.

The theory of sovereignty, as it developed in the early Republic was rooted in two European ideas: the social contract and the law of nations. Chapters one and two dealt extensively with the nature and rights of consent that states and citizens held under social contract theory. This chapter will explore how American ideas of sovereignty derived from the law of nations. American constitutional actors lacked a clear means of distinguishing where the sovereignty of the state governments ended, and where the sovereign power of the national government began. To the extent that states were sovereign, they operated within a community of sovereigns (The Union) which they understood and analyzed through the law of nations.

This chapter will also focus on the resolutions of state legislatures as evidence of how Americans forged these concepts into their own theory of sovereignty. In particular it will examine who had jurisdiction over admiralty court cases between the Revolution and the War of 1812 and examine the development of the state legislative remonstrance and resolution as a tool for constitutional deliberation and dissent. State legislatures believed they could interpret the Constitution with authority because sovereignty had not been vested wholly in the general government. The division of authority over the Constitution reflected the division of government itself between national and federal elements—a division that reflected the multi-faceted character of American association. As both nation and the states asserted their respective right to construe the Constitution in the dispute over admiralty jurisdiction, the states believed that they lacked a "common

umpire" to adjudicate their dispute with the federal government. They hoped that the states together might act, just as sovereigns acted jointly under the law of nations, to determine constitutional meaning. In this contested legal terrain, Americans conceptualized their own theory of sovereignty.

Theories of Sovereignty

The early American theory of sovereignty was profoundly influenced by European social and political thought, even as Americans developed the European idea of sovereignty in new directions. By the American Revolution, Americans already had a highly articulated theory of association. As discussed in chapter one, Americans embraced a distinct expression of contract theory, blending the Lockean idea of the rule of law and the early modern idea of the social compact. Unlike early modern European theorists influenced by Jean Bodin, Americans did not believe that sovereignty was indivisible or absolute. They also rejected traditional and paternalist theories of a sovereign who ruled by divine right (Charles I) or the desperate consensus of the oppressed (the Hobbesian Leviathan). Americans had clearly separated the government, based upon a civil compact and operating under the rule of law, from sovereignty, which was rooted in the people and society. Like Althusius and Grotius, they believed sovereignty was inalienably vested in the people. To the extent that government exercised sovereignty, it was "with usufruct only."[2]

[2] C. E. Merriam, *History of the Theory of Sovereignty since Rousseau*, Columbia Studies in the Social Sciences, no. 33 (New York: AMS Press, 1900, 1968), 16-30.

For the purposes of this essay, Daniel Philpott's definition of sovereignty is the most helpful: sovereignty is the "supreme authority within a territory."[3] This definition encompasses the relationship between the sovereign and the ruled in the idea of authority. Second, not all authority could be said to be sovereign. Although teachers have pedagogical authority over their students they could not be said to possess sovereignty over them.[4] Third, modern sovereignty varies based upon the territory in which one resides. A British subject had a different kind of sovereign (Crown in Parliament) than an Ottoman subject (the Sultan). Sovereignty has both internal and external faces. This most commonly refers to the authority to govern within a territory (internal), but it also includes the ability to control ones borders, and the ability to work with other international sovereign powers as legal equals (external).

Finally, sovereignty encompasses the Westphalian principle of non-interference within its own territory.[5] The heart of Westphalian system was the direct control that

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[3] Daniel Philpott, *Revolutions in Sovereignty: How Ideas Shaped Modern International Relations* (Princeton: Princeton University Press, 2001), 16.

[4] Philpott's use of the term supreme emphasizes the modern character of sovereignty. Medieval sovereignty meant lordship. It expressed a relationship between the ruler and the ruled, in a never-ending chain of being that stretched from the Divine Ruler to the lowest servant. The Oxford English Dictionary (2nd ed.) defines sovereignty as "One who has supremacy or rank above, or authority over, others; a superior; a ruler, governor, lord, or master (of persons, etc.)." Thus William Shakespeare would write *The Taming of the Shrew*, "Thy husband is thy Lord, thy life, thy keeper, Thy head, thy soueraigne." (Act V. Scene ii. 147). The husband, in relation to his wife was said to have sovereign, supreme power, while the husband himself was subject to the sovereignty of his lord. Usually the term was used to refer to the crowned monarch as in the "dread sovereign lord King James" of the Mayflower compact.

[5] Philpott, chapter 2; and Stephen D. Krassner, *Sovereignty: Organized Hypocrisy* (Princeton: Princeton University Press, 1999), 9-25. The Peace of Westphalia (1648) was designed to secure the peace of Europe against a generation of religious war. Previously, sovereignty was best understood as relational. It expressed the supremacy of one person in a relationship over another. Thus a married woman in Mainz, might have simultaneous loyalties to the Holy Roman Emperor, the Archbishop of Mainz, the pope, and her husband, each of which she might refer to as her sovereign, depending on the context. Sovereignty was diffuse and did not neatly reflect territorial boundaries. The Peace of Westphalia divided up Europe into territorial sovereignties, so that Protestants could worship under the protection of the state, without outside interference. The Holy Roman Empire itself shifted from a diffuse, theoretically sovereign body, to a "deliberate body, little different from contemporary alliance among sovereign states." (Philpott, 31).

rulers were given over domestic institutions, free from outside interference, so that in the realm of a prince, people could practice their faith without interference from a sovereign emperor or church. Westphalian sovereignty meant "the exclusion of external actors from domestic authority configurations."[6]

Americans seeking European wisdom on sovereignty and the state were particularly influenced by two eminent theorists: Christian Wolff and Emmerich de Vattel. While Wolff and Vattel had little influence on the ideas of social compact and sovereignty in the American Revolution, they became prominent sources of republican political theory in the Early Republic. Wolff and Vattel dealt with the same issue: the basis for a law of nations that could govern the behavior of sovereign states. Wolff's *Jus gentium methodo scientifica pertractatum* (1749) was slow to be translated and had little direct impact. His influence reached the United States because his ideas were analyzed and contested by Vattel's *Law of Nations* (1758), first translated into English in 1760. Wolff worked in the traditional, scholastic mode of Aristotelian natural law. International society existed for the good of the whole, to "give mutual assistance in perfecting itself and its condition.[7] This "*civitas maxima*" or great republic[8] had the right to enforce a normative law of nations on its members because the good of its citizens was

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[6] The heart of the system was the direct control that rulers were given over domestic institutions, free from outside interference, so that in the realm of a prince, people could practice their faith without interference from a sovereign emperor or church. According to Krassner, Westphalian sovereignty meant "the exclusion of external actors from domestic authority configurations." (Krassner, 21). Krassner is quick to note that this principle was frequently violated in practice. For instance, until the Seventh International Conference of American States (1933), the United States refused to accept that the principle of Westphalian non-intervention in Latin America.

[7] Nicholas Greenwood Onuf, "*Civitas Maxima*: Wolff, Vattel and the Fate of Republicanism," *The American Journal of International Law* 88 (1994): 285.

[8] This assumes the translation of *civitas* as republic, which is too loose a translation. *Civitas* is the Latin equivalent of the Greek *politea*, connoting a species of voluntary association that it treated as a representational person in political life. (Onuf, 287-292).

the good of the whole world. "Sovereignty rests with the whole, which in the present instance is the human race divided into people and nations."[9] The people of the earth possess only a theoretical sovereignty; justice must be pursued by rules on their behalf through reasonable application of natural law. According to Vattel, "The will of nations [is]… that which they agree upon if following the leadership of nature, they use right reason."[10]

Vattel developed Wolff's doctrine in a thoroughly modern direction. He abandoned Aristotelian natural law as the source of the law of nations. Like Hobbes, he grounded law in modern natural right. The normative law of sovereigns could be found in their patterns of action and the treaties they signed. Europe was thus not a republic, but a community of nations in a state of nature. Vattel explained, "I find the fiction of such a republic neither reasonable nor well enough founded to deduce wherefrom the rules of a law of nations at once universal in character, and necessarily accepted by sovereign states. I recognize no other natural society than that which nature has set up among men in general."[11]

The differences between Wolff and Vattel were differences that the Americans disputed among themselves. Both espoused a kind of sovereignty in the people. Wolff used it to argue for a universal sovereignty of the people. Many Americans, like the Federalist Nathaniel Chipman, followed in his interest in natural law and the sovereignty of the people. Vattel stressed that the sovereignty of a people, transferred directly to particular governments. He emphasized the sovereign independence of the state,

[9] Onuf, 286.

[10] Onuf, 287-288.

[11] Onuf, 297.

constrained by the positive treaty law and by conventional practice, but not by an international civil society. The autonomous, capable sovereign power had much to attract republican American commentators and lawyers who sought to buttress the idea of an absolute sovereign, either a state government's internal autonomy in a Westphalian sense, or the absolute powers of the Federal Government in foreign policy and war powers.

At the same time that the U.S. embraced government by the consent of the people, Europe was repudiating much of revolutionary, social contract theory. "By the turn of the nineteenth century, Europe was repudiating the core principles of the federal union and an international civil society ruled by natural law. As the violence and warfare incited by the French Revolution swept across Europe, the last vestiges of Wolff's *civitas maxima* dissolved. Europe during the Napoleonic wars seemed more a war of Hobbesian sovereigns than a republic "writ large" and took increasingly from Vattel a perspective on international law that stressed the autonomy of sovereign states. "With the reaction against eighteenth century political theory came the development of a doctrine of the organic and personal nature of the state, which was impossible under the dominance of the revolutionary idea."[12] From within this European framework of thought, the American nation has come to be seen as a "stateless" political community. For Europeans, the normative condition of politics was perceived to be the organic, Hegelian nation in which society and the state are collapsed into a centralized bureaucratic apparatus. Sovereignty <u>was</u> the state.[13]

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[12] Merriam, 90.

[13] The question of locating political supremacy has become hotly contested today, as it once at the turn of the nineteenth century. Harold Laski wished, "it would be of lasting benefit to political science if the whole concept of sovereignty were surrendered." (Quoted in F. H. Hinsley, *Sovereignty* (New York: Cambridge University Press, 1985), 211-216. Originally in Harold Laski, *A Grammar of Politics*, (1941)). In the last twenty years the idea of sovereignty has undergone a profound re-evaluation. Prompted in part

For many contemporary scholars share this European perspective that "the dominant units [of political life] are states, which hierarchy order, a monopoly on legitimate violence, and sovereignty."[14] Because the federal government of the early Republic did not have the police power, or undivided sovereignty, they have frequently tried to solve the problem of "Why there is no state in America?"[15] In fact, as Daniel Deudney argues, the "Philadelphia System" of the pre-Civil War period was designed as a counter to the European models. It sought to preserve the states against a consolidation of sovereign authority like that of Imperial Britain. The Constitution also aimed at preventing a re-lapse into the disorder of confederal union. According to Deudney, the Philadelphia system cannot be understood in terms of the European "Westphalian" system. Westphalian analysis vested sovereignty either in an autonomous sovereign state or a confederation of sovereign states—it did not recognize anything in between them. Americans did not so much divide their sovereignty, which was vested in the people of

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by Benedict Anderson's path-breaking deconstruction of "nation," but more especially by the end of the cold war, scholars have come to question whether the sovereign nation state is anything more than a historically contingent construction.

Stephen Krassner challenges scholars that sovereignty is nothing more than "organized hypocrisy." He contends that despite a resilient Westphalian idea of sovereignty, nations have never completely respected one another's internal sovereignty. "The European Union, the practices of international finance institutions, some minority rights agreements after Versailles, and treaties providing for religious toleration in Europe such as the peace of Westphalia have all involved invitations to compromise Westphalian Sovereignty." (Krassner, 238).

[14] Daniel Deudney, "The Philadelphia System: Sovereignty, Arms Control, and the Balance of Power in the American States-Union," *International Organization*, (1995): 192. This captures the approach of the realist school of international relations. In framing their definitions, liberal idealists have been more concerned with what a state ought to do

[15] In classic terms Hegel had insisted that the United States were not a "Real State," and contemporary scholars from Walter Dean Burnham to Allen Steinberg have agreed. Recent scholarship has established that American government was "qualitatively different" from the patterns of Europe, but should not be recognized as stateless. The best treatment of this literature can be found in William J. Novak's *The People's Welfare*: *Law and Regulation in Nineteenth Century America*, (Chapel Hill: The University of North Carolina Press, 1996), 1-9ff; and Stephen Skowronek, *Building a New American State: The Expansion of the National Administrative Capacities, 1877-1920* (New York: Cambridge University Press, 1982), 3-5.

the United States, but they divided the authority to wield that sovereignty between state and central governments. Essential aspects of this sovereignty, including the right to make war, were in part reserved to the state governments to prevent consolidation of authority into one government. Thus, Deudney asserts that the second amendment and state control over their militias helped to prevent the consolidation of the power to make war exclusively in the federal government. The resulting system is not anarchy, as it might have appeared to European visitors, but "negarchy;" it is not the absence of government, but a government whose authorities were designed to negate its own strengths, to keep the balance between confederation and nation.[16]

Many American observers were highly critical of European-style sovereign autonomy. Such was the view of Joel Barlow, who stressed, "there is no absolute independence of nations more than individuals."[17] The international community could then access natural law to rule for the good of the whole community. Many Americans still operated within the normative framework of association and Aristotelian reasoning. Particularly with respect to the law, they endeavored by right reason and a close analysis of constitutional texts and the principles of international justice to apply the law to the problem of inter-state action.[18] But despite their disagreement with Vattel over the nature

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[16] Deudney, 195-210. "What most strikes the European who travels through the United States is the absence of what is called among us government or administration." Alexis de Tocqueville, *Democracy in* America, Trans. Harvey C. Mansfield and Deborah Winthrop (Chicago: University of Chicago Press, 2000), 67.

[17] Joel Barlow, "To his Fellow Citizens of the United States, Letter II: On Certain Political Measures Proposed to Their Consideration," (Philadelphia, 1801) in Charles S. Hyneman and Donald S. Lutz eds., *American Political Writing during the Founding Era, 1760-1805* (Indianapolis: Liberty Press, 1983), 1104.

[18] Right reason was a term frequently employed in political theory for the exercise of Aristotelian reason to discern the natural law. (See Thomas Aquinas,' *Summa Theologica*, Pt I-II, Question 93, Article 3). Early natural law jurisprudence and Nathaniel Chipman's close analysis in the *Principles* followed this normative line of reasoning. As Justice Chase reasoned in Calder v. Bull, 3 Dallas 388 (1798), "It is against all reason and justice, for a people to entrust a Legislature with SUCH powers; and, therefore, it cannot be presumed

of sovereignty, *The Law of Nations* provided the most accessible authority on the application of the federal principle to international law. Vattel became the authority on the law of nations in the states.[19]

American residents of Europe likewise saw the distinctions between the American and European conceptual frameworks. Joel Barlow, longtime observer of French politics, recommended that France needed an American-style system of republics. "For the purposes of local or interior legislation and police," France should be divided into about twenty provinces.

> While for the purpose of general legislation, exterior relations defense, canals, roads, and every common concern, they should remain concentrated in one great union, or community, with a national legislature and executive, restricted in their powers to the simple objects of great national interest, which object should be defined with the utmost precision in their good constitution.[20]

Republican government arranged in a federal system proved to be a great advantage to Americans. France should work with the other republics forming nearby in the wake of the Revolution and form into a general confederation of republics.[21] This American federal system of sovereignty was viewed as a clear alternative to the Westphalian

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that they have done it. The genius, the nature, and the spirit, of our State Governments, amount to a prohibition of such acts of legislation; and the general principles of law and reason forbid them."

[19] The Court of Appeals for admiralty under the Continental Congress employed Vattel in Miller v. the Ship Resolution, 2 Dall. 1 (1781)) to apply a treaty between Britain and France regarding Dominica to American proceedings. In 1793, then secretary of state Jefferson used Vattel as a buttress for his argument on the natural rights of neutral powers. By 1814, Vattel was everywhere. In Brown v. U.S., 8 Cranch 110 (1814), both the majority and dissenting opinions (by Marshall and Story respectively) made extensive use of Vattel. His theory of autonomous inviolable sovereigns came to exert wide influence in the United States. Charles Fenwick, "The Authority of Vattel," *American Political Science Review* 7 (1913): 407-413.

[20] Joel Barlow, *American Political Writing*, 1101.

[21] Barlow, in fact, presages recent changes in European sovereignty by nearly two hundred years. His call for "a great union of republics, which might assume the name of the United States of Europe and guarantee a perpetual harmony among its members" (*American Political Writing*, 1105) closely mirrors the current move toward European integration as necessary for the peace and security of Europe.

sovereignty system. This was a novel idea. Nathaniel Chipman explained the audacity of it:

> … [A] number of integral republics, each claiming and exercising all the powers of internal sovereignty, within the limits of their respective jurisdictions, formed into one general government, with powers of legislation for all national purposes, and the power of exercising all their laws, within the several states, on the individual citizens, and that independently of the local authority. The experiment was new, and the success has hitherto exceeded the most sanguine expectation of its advocates.[22]

So novel was the American experiment that practice forged ahead of theory. Americans wrestled in legislature and courts with the implications of what their system of sovereignty meant, before the constitutional commentators and political theorists had time to meditate on the system. Between 1790 and 1810 the most important developments in the idea of sovereignty were presided over by state legislatures, courts sitting in admiralty jurisdiction, and state governors. They drew upon their revolutionary theories of union, compact and association. Americans also employed the law of nations, which explained how Westphalian sovereigns, operating under natural law and treaties, ought to behave in the international system. Applying this model to the Philadelphia system, they debated how the states should relate to one another under the federal union.

Sovereignty and Revolutionary War Jurisdiction

The influence of the law of nations discourse on sovereignty is particularly evident in the debate between the states and the central government over who had jurisdiction in the Revolutionary war admiralty cases. Because admiralty was traditionally adjudicated under the law of nations, the states used Vattel to assert their own sovereignty within the Philadelphia system. They sought to protect the internal sovereignty they still held by sustaining their Revolutionary War jurisdiction over

[22] Chipman, *Sketches*, 229.

admiralty. In this way, they hoped to sustain their Westphalian sovereignty in the present by claiming they had held even greater sovereignty in the past.

As the last chapter demonstrates, the early process of constitutional development produced deep ambiguities about the nature of sovereignty in The Union. Neither side received what they hoped for. Both believed they had received more than they did receive. Immediately, they took their understanding of the nature of The Union into the new federal courts to resolve complex admiralty cases that dated back to the early years of the Revolution. They quickly resorted to historical arguments about the nature of the Confederation instead of textual debates about the meaning of the Constitution.

Admiralty had traditionally been adjudged according to the law of nations, but given the collapse of formal authority during the early stages of the Revolution, it was unclear where jurisdiction should be vested. In November 1775, Congress recognized that they were already in the midst of naval war with Great Britain and that "the good people of these colonies" had already responded by arming ships for self-defense. Under the law of nations, the taking of prizes without authorization from a government was considered piracy, so Congress authorized commissions for captains who wished to seize British military supplies. They "recommended to the several state legislatures in the United Colonies, as soon as possible, to erect Courts of Justice or give jurisdiction to the courts now in being."[23] They assumed the power to grant commissions as part of their de facto powers to make war, which they had exercised in a concerted fashion since that spring. Yet Congress recommended that the states create courts to try these cases because it lacked the means to establish courts in every major port along the coast. Congress at this point was little more than a committee of public safety; they lacked the

[23] JCC, 1:259, quoted in Penhallow, et. al. v. Doane's Administrators, 3 Dallas. 54 (1795).

authority to govern at a local level. But so that Congress might have oversight over the cases, they permitted an appeal to "the Congress, or such persons as they shall appoint for the trial of appeals."[24]

Many of the states subsequently organized admiralty courts and began to hear cases as the prizes came into port. Generally, the states mandated that juries should determine the facts of the cases, and they provided for an appeal to Congress in the language similar to the Congressional resolution. In January of 1777, Congress finally organized a committee to hear appeals from admiralty cases in the states.[25] Conflicts inevitably arose between the proceedings of the states, who increasingly thought of themselves as sovereign and who conducted their trials by jury, and the Court of Appeals in Congress, who sought to secure the interests of The Union over the interests of the particular states. That the appeal was initially heard by Congressmen, and not a judge or jury, was the subject of much dissention by states who were jealously fighting for the right to a jury trial against the crown.[26]

Two admiralty cases in particular stand out as examples of this growing tension over sovereignty: *Houston v. the Sloop Active* in Pennsylvania, and *Treadwell and Penhallow v. Brig Susanna* in New Hampshire. Both cases were complicated by the presence of claimants from outside their respective states. The libel for the "Active" was

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[24] Penhallow v. Doane, 56.

[25] Penhallow v. Doane, *60.*

[26] Jury trials had been considered a fundamental element of representative government and a check on an unelected, appointed royal judiciary. Parliament, through the enforcement of The Act of 35 Henry VIII had asserted the right to try the violation of the Townsend Duties in England, removing the cases from the protections offered by colonial juries. (1767) Later Parliament included in the coercive acts a provision removing the trials for British officials accused of capital crimes from Massachusetts. (John Phillip Reid, *Constitutional History of the American Revolution*, abridged ed., (Madison, University of Wisconsin Press, 1995), 69-70. 90). For these reasons, local jury trials were considered a fundamental legal right to Americans and they jealously enforced these rights against their own central government, the Continental Congress.

contested between the State of Pennsylvania and the owners and crew of the "Convention" and the "Le Gerard" on the one hand, and a group of seamen, lead by Gideon Olmsted of Connecticut, who had been impressed aboard and then mutinied against their captors. Both claimed the right to the proceeds of the vessel. At the trial in Philadelphia under Judge Ross on November 4, 1778, the jury did not make a statement of the facts, but awarded one quarter of the prize to Olmsted and the rest was to be divided between the original claimants.[27] Subsequent debate reveals that they did not believe that Olmsted had been in full possession of the ship and thought that the mutiny was a British ruse. Olmsted enlisted the aid of Connecticut native and military governor of Philadelphia Benedict Arnold in return for a share of the claim. Arnold wrote to Congress that Judge Ross intended to secure possession of the money, whatever the decision of Congress. Ultimately, he suggested that the State of Pennsylvania would put the money in its treasury in order to secure it from Congress.[28] When faced with a prize worth almost 50,000 pounds for the cargo alone,[29] Pennsylvania acted swiftly to preserve its interests.

Olmsted explained his subsequent course of action:

> We appealed from [the Pennsylvania] Court to the Congress December 18th. It was tried before the Congress. They gave the whole to use and gave orders to Judge Ross to order the money to be paid to us. Judge Ross got all the money into his hands and refused to

[27] The best sources on the long and interesting dispute between Gideon Olmsted and Pennsylvania are Margaret Ruth Reilly Kelly, "State Rebellion, State's Rights, and Personal Politics: Pennsylvania and the Olmsted Case (U.S. v. Peters), 1778-1810," Ph.D. diss. (State University of New York at Buffalo, 2000); Kenneth W. Treacy, "The Olmstead Case, 1778-1809," *Western Political Quarterly* 10 (1957): 675-691; William O. Douglas, "Interposition and the Peters Case, 1778-1809," *Stanford Law Review* 9 (1956): 3-12; and Edward Dumbauld, "Olmstead's Claim: The Case of the Mutinous Mariner," *Supreme Court Historical Society* (1977): 52-58, 69.

[28] Benedict Arnold to Congress, January 3, 1779, in Houston v. the Sloop Active file, Records of the Court of Appeals on Cases of Capture, case 39, National Archives.

[29] Treacy, 678.

> pay us. All the reason he gave was that Congress had no right to try a case that had been settled by the admiralty court of Pennsylvania.[30]

The Committee of Appeals instructed Matthew Clarkson as the marshal to keep the money, pending further instructions from Congress. Clarkson respected the authority of his own state and the court that employed him more than the instructions of the Continental Congress. He gave the money from the sale of the cargo to the court, instead of to Olmsted. Judge Ross passed the money on to David Rittenhouse, the state treasurer, who gave a bond back to the court. [31]

Under the circumstances, Congress was powerless. Having declared that Olmsted and his men were entitled to the entire prize, the committee could not enforce the decree. They were unwilling to charge Judge Ross and Clarkson with contempt, "lest consequences might ensue at this juncture dangerous to the public peace of the United States. [We] will not proceed further in this affair nor hear any appeal until the authority of the court shall be so settled as to give full efficacy to their decrees and processes."[32] Congress tried to mediate the dispute with Pennsylvania, but Pennsylvania insisted the result of the jury was sacrosanct under common law. They refused to overturn it.[33]

The sole right of Pennsylvania to hear the case was loudly contested in Congress, but to no practical avail. A committee to examine the powers of the Committee of

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[30] Gideon Olmsted, *Journal of Gideon Olmsted: Adventures of a Sea Captain during the American Revolution* (Washington, Library of Congress, 1979), 101.

[31] Matthew Clarkson to Congress, January 4, 1779, in Houston v. the Sloop Active file, Records of the Court of Appeals on Cases of Capture, case 39, National Archives. See also Douglas, 6.

[32] Decree of the Committee on Appeals, January 19, 1779, in Houston v. the Sloop Active file, Records of the Court of Appeals on Cases of Capture, case 39, National Archives.

[33] "It is the proper business, and the strict right of juries to establish facts; yet the Court of Appeals took upon them to violate this essential part of jury trial, and to reduce, in effect, this mode of jurisprudence to the course of the civil law; a proceeding to which the State of Pennsylvania cannot yield." Pennsylvania Legislature, quoted in Douglas, 7.

Appeals was formed and claimed that Congress did have the power to examine the facts in Jury cases. It stressed that the rights of appeal were not dependent upon an act of Congress but on the nature of the authority given to Congress. Possessing "the sovereign supreme power of war and peace," the committee claimed that Congress could "compel a just and uniform execution of the law of nations." Appeal to Congress was necessary so the actions of juries would not violate the rights of foreign powers (or implicitly, the rights of a citizen of Connecticut).[34] However, in 1779, Congress lacked the political power to enforce a claim that it possessed the sovereign power to make war. That Pennsylvania owned a share of the "Convention," and was able to successfully defend its interpretation suggests that it possessed de facto sovereignty in admiralty cases. Because it did not consider that the right of jury trial had been respected (though this seems a mere justification), Pennsylvania ignored the ruling of the Committee on Appeals.

The case against the brig "Susanna" proceeded in a similar fashion. A group of twelve citizens of New Hampshire lead by John Penhallow owned the brigantine "M'Clary" which in October of 1777 captured the "Susanna" under a commission from Congress. They duly filed a libel and were contested by three citizens of Massachusetts led by Elisha Doane who claimed "Susanna" as their ship. Like in Houston v. Active, the state court ruled in favor of Penhallow on December 16, 1777. Doane attempted to appeal to Congress but was "refused by said court because it was contrary to the law of

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[34] Congress, resolution proposed March 6, 1779, quoted in Treacy, 679.

Congress consistently maintained that admiralty trials should be conducted "according to the usage of the law of nations and not by jury." In establishing a Special Court of Appeals in 1780 for capture cases, Congress explicitly reaffirmed this principle. (*Journals of the Continental Congress*, 16:61-62). Pennsylvania, together with New Hampshire and Massachusetts unsuccessfully tried to insert the right of jury trials into federal admiralty courts. Later in 1780, Pennsylvania abandoned jury trials in its own admiralty cases. (Treacy, 680-682).

the State."[35] Doane then appealed to the Superior Court of New Hampshire, lost and in October of 1778 petitioned Congress for an appeal. The Court of Appeals ultimately ruled in favor of Doane in 1783, but just as in *Houston v. Active*, the decree was never enforced.

Revolutionary admiralty disputes demonstrated just how fragile co-operation between state and federal authority could be. States readily insisted that due process should be employed in these cases and interposed the sovereign power of the states to protect their rights. The ambiguity in jurisdiction had proved to be intractable for The Union. When the Articles of Confederation were ratified in 1781, Congress gained constitutional authority over foreign relations and the power to make war, except over the militia and naval vessels necessary for defense. The states retained control over these, to be used in cases of invasion and piracy. The United States also assumed exclusive authority over establishing courts and hearing appeals in cases of capture. No one contested that new (post-1781) admiralty cases belonged under federal jurisdiction. But difficult cases initiated before 1781 continued to be bitterly contested under the creation of a new independent judiciary system in the Constitution of 1787. The states continued to use their power to protect their residual jurisdiction in the pre-1781 cases.

Sovereignty in the 1790s: Georgia and New Hampshire

The creation of the federal republic fundamentally changed the forum in which arguments over sovereignty were understood. State resistance to federal authority had enjoyed a decade of success. Legislatures were accustomed to criticizing and resisting

[35] Penhallow v. Doane, 61. In fact, the law establishing the New Hampshire Admiralty Court explicitly allowed for appeals.

the authority of the Congressional admiralty jurisdiction through the Confederation period. Without clear precedent, no one in 1787 knew how the states would react to a truly independent judiciary.

The strategy of state reaction that shaped the subsequent actions of the states was employed decisively in *Chisholm v. Georgia* (1793). When a citizen of South Carolina sued Georgia in federal court over Revolutionary War debts, Georgia refused to appear, claiming immunity as a sovereign state. The Georgia legislature formulated its position. To accept the suit would "effectively destroy the retained sovereignty of the states, and would actually tend in its operation to annihilate the very shadow of state government, and to render them tributary corporations to the government of the United States."[36] Georgia did not rely on a position of absolute sovereignty, but they believed that what sovereignty they possessed placed them in a position of a Westphalian sovereign vis-à-vis an external lawsuit.

Georgia's position proved difficult to sustain before the Supreme Court. The Constitution (Art. III, sec. 2) explicitly gave the federal courts jurisdiction over disputes between one state and the citizen of another. Justice Iredell, dissenting, relied upon the law of nations rather than the Constitution in his defense of Georgia. Iredell did not defend the absolute sovereignty of Georgia, but only that sovereignty not surrendered to The Union. He avoided the constitutional issue by insisting that the text in question required a congressional act to implement it. In the absence of such an act, he argued the Supreme Court had no jurisdiction and the law of nations applied.

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[36] *State Documents on Federal Relations: The States and the United States,* ed. Herman V. Ames (New York, Da Capo, 1970), 7. The resolutions considered by Georgia were not adopted, but they reflect the fears of the state and the strategy that they pursued.

The majority of justices, however, disputed that reserved sovereignty provided immunity for suits. Justice Blair argued that by ratifying the Constitution, Georgia accepted the jurisdiction of the court and, "in that respect, [has] given up her sovereignty." The law of nations was not the authority here, but the Constitution.[37] Justice Cushing dismissed the idea of sovereignty as a distraction. "All states are corporations or bodies politic. The only question is, what are their powers?" He insisted that the people had granted this division of powers and created an independent judiciary to enforce it.[38] Wilson, in his opinion, stressed that the people of the United States, under the Constitution, and not the global society of international law, were the source of legal authority. Wilson, Cushing and Blair downplayed the idea that Westphalian sovereignty was relevant in order to reinforce the authority of the judiciary to hear cases under the people's Constitution.

The opinions of Chief Justice Jay, in contrast, addressed the sovereignty question directly. Instead of applying the text of the Constitution, he stressed that the American people were historically a people before the Declaration of Independence. This people, and not a sovereign monarch, were the source of The Union. According to Jay, the idea of sovereignty advanced by Georgia was entirely monarchical. "That system contemplates him as being the fountain of honor and privileges; it is easy to perceive that such a sovereign could not be amenable to a court of justice, or subjected to judicial control and actual restraint." Under this system, no sovereign could be sued. But Georgia missed the "distinction between the prince and the subject. No such ideas obtain here; at the time of the revolution; sovereignty developed on the people. [They are] … joint

[37] Chisholm v. Georgia, 2 Dallas 419 (1793), 452.

[38] Chisholm v. Georgia, 468.

tenants in the sovereignty."[39] As free and sovereign citizens, then, the people may sue a state.

Despite this emphatic challenge to sovereign statehood by the Supreme Court, Georgia's construction of the Constitution ultimately prevailed in the state legislatures. The states immediately reacted to the decision and collectively lobbied Congress for an amendment excluding the suability of the state. The September session of the Massachusetts General Court denounced the right to sue a state as "unnecessary and inexpedient, and in its exercise dangerous to the peace, safety and independence of the several states."[40] Virginia feared the tendency toward "general consolidation of these confederated Republicks."[41] The shape of the resistance was clear. Massachusetts passed a resolution instructing its Senators in Congress and imploring its representatives to seek a constitutional amendment.[42] It was passed in the next session of Congress and ratified by three-quarters of the states on February 7, 1795.[43]

A mood of uncertainty about the nature of the federal jurisdiction prevailed during the 1790s. Many plaintiffs with outstanding verdicts that had been ignored by state courts filed suit again hoping they could attain a better result. In 1792, Gideon Olmsted

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[39] Chisholm v. Georgia, 471-472.

[40] Massachusetts, State Session Laws, "Resolves," September 1793, XLV, 28.

[41] Ames, ed., SDFR, 8.

[42] Massachusetts. State Session Laws. "Resolves," September 1793, XLV. P. 28.

[43] Georgia was not content to rest with the effort to amend the constitution. In "Act Declamatory of the Retained Sovereignty of the State," the Georgia house determined that any one trying to enforce a judgment against the state of Georgia "shall suffer death, without benefit of clergy, by being hanged." Fortunately for the federal marshal in Georgia, the act failed passage in the senate. At any rate the interposition would have been unnecessary because the court later held in Hollingsworth v. Virginia (3 Dallas 378, (1798)) that the eleventh amendment bared prior judgments from being carried out. (SDFR, 10) However, the amendment played no role in the Penhallow case, because it did not formally take affect until John Adams announced its ratification to Congress in his Presidential message of January 8, 1798.

filed suit again in the Court of Common Pleas of Lancaster County against Judge Ross' executors and won when they failed to appear. On appeal, the Supreme Court of Pennsylvania again struck down Olmsted's appeal, by challenging the jurisdiction of the Lancaster Court to decide an admiralty case. Chief Justice M'Kean emphasized again that the ruling of the jury—that Olmsted was not in possession of the ship when the "Convention" arrived—was not revisable on appeal under common law. However, the other opinions revealed dissatisfaction with this line of argument. Shippen agreed that the Lancaster court had no jurisdiction, but defended the right of "the sovereign power of the nation, vested by the joint and common consent of the people and the states of The Union with the exclusive rights of war and peace (!)," and the right of higher courts to hear an appeal on the facts of an admiralty case. Justice Yates was also inclined to grant power to the Continental Congress commensurate with the objects of The Union. Even on the state courts, advocates of federal jurisdiction could be found.[44]

The executors of Elisha Doane also availed themselves of the federal courts in 1793 in their attempt to enforce the Congressional Court of Appeals decision in *Penhallow v. Brig Susanna.* In the New Hampshire District Court the issue hung on whether New Hampshire was a Westphalian sovereign. Justice Blair, riding on Circuit Court, ruled for Doane's executors. He placed the issue of the law of nations clearly into the case. Despite the claim of sovereignty for New Hampshire, Blair argued, the law of nations still applied, even before the Declaration of Independence. "Was it not necessary in such a war, as in any contending nations, that the law of nations should be observed, and that those who had conducting of it, should be armed with every authority for preventing injuries to neutral powers, and their subjects, and even cruelty to the

[44] Ross et. al. executors v. Rittenhouse, 2 Dallas 161 (1792).

enemy?"[45] At any rate, Blair believed Congress possessed sufficient war powers to try admiralty cases. He ruled for Doane.

The New Hampshire Legislature reacted to the ruling with alarm. In keeping with the revolutionary tradition of protest and remonstrance and the effective campaign that was being waged for the Eleventh Amendment, they petitioned to Congress. New Hampshire argued that it possessed original independence prior to 1781, and while it accepted the authority of Congress now, it claimed prior authority for itself. In particular, it was alarmed that the courts might retroactively declare that they had a sovereignty, which they did not then possess. Finally, it asserted the need for state government to prevail. "A declaration by any body whatever contrary thereto is subversive of the principles of the Revolution; unsettling all of the proceeding of the State governments prior to the existence of the Constitution." New Hampshire firmly proclaimed its loyalty to the true idea of union of strong states.[46]

In *Penhallow v. Doane* (1795), the U.S. Supreme Court considered detailed arguments from the appellants and respondent on the law of nations. Penhallow's attorneys took the line advanced by Georgia in Chisholm, which was being vindicated by ratifying state legislators, that New Hampshire, at least until 1781, was a Westphalian sovereign. They rested this argument on an argument from the law of nations. "War," the appellant argued citing Vattel, "is that state in which a nation prosecutes its rights by force." New Hampshire in 1777 had been vigorously engaged in war against Britain, and had not surrendered exclusive power to Congress. "At this period the states must have been possessed of individual sovereignty; for, the sovereign power alone can raise

[45] Penhallow v. Doane, 110.

[46] New Hampshire, "First Remonstrance of the Legislature, February 20, 1794," SDFR, 13.

troops."[47] New Hampshire, in this argument, delegated to Congress the power to grant commissions, but retained the right to hear the cases. "A court of appeal," the appellant contended, "is not a necessary incident of sovereignty."[48]

The respondent for Doane offered a counter argument, also from the authority of Vattel.

> Every nation that governs itself, under what form soever, without any dependence on a sovereign power, is a *sovereign state*. In every society there must be a sovereignty. … The powers of war form an inherent characteristic of national sovereignty; and it is not denied, that Congress possessed those powers.[49]

Both arguments failed to appreciate the nature of the Philadelphia system as it developed between 1776 and 1787. The appellant assumed that because New Hampshire exercised some war powers, it was essentially sovereign in 1781. The respondent offered a similar argument that because the nation possessed the war powers, it was the sovereign power. By attempting to claim Westphalian sovereignty for themselves alone, each argument missed the character of sovereignty as it was practiced. During the revolution, events disclosed that Congress possessed *de facto* powers over war making, foreign policy, and matters of international law. Yet the states retained control over the local courts and local military affairs. The Framers strengthened the power of the National government decisively in 1787 by founding the Constitution with the consent of the people and granting the government power over the people. However, they preserved the power of the states by strictly enumerating the power of the national government and reserving the rest to the states. Both sides in *Penhallow* forgot that under the Philadelphia system, neither held absolute sovereignty. Sovereignty was located in the

[47] Penhallow v. Doane, 68-69. Citing Vattel b.3.c.1.s.1., and b.2.c.2.s.7.

[48] Penhallow v. Doane, 70.

[49] Penhallow v. Doane, 74. Citing Vattel b.1.ch.1.s.4.

people who divided the exercise of sovereign power between the states and central government.

The Court's decision for Doane in the *Penhallow* case hinged on the question "did the Court of Appeals have jurisdiction in this case?" As Justice Patterson opined, the crisis of the revolutionary war disclosed the real national authority of Congress.

> The powers of Congress were revolutionary in their nature, arising out of events, adequate to every national emergency, and co-extensive with the object to be attained. Congress was the general, supreme and controuling council of the nation, the centre of union, the centre of force, and the sun of the political system. To determine what their powers were, we must inquire what powers they exercised. Congress raised armies, fitted out a navy, and prescribed rules for their government: Congress conducted all military operations both by land and sea: Congress emitted bills of credit, received and sent ambassadors, and made treaties: Congress commissioned privateers to cruise against the enemy, directed what vessels should be liable to capture, and prescribed rules for the distribution of prizes. These high acts of sovereignty were submitted to and acquiesced in, and approved of, by the people of *America*.[50]

Patterson's assertion that The Union possessed sovereignty before the Articles of Confederation were ratified provided an unequivocal endorsement of national sovereignty. The exercise of powers by Congress demonstrated that the people had granted them that authority. Patterson placed the authority of the Congress on the informal, unwritten constitution of its powers, exercised during times of great crisis and acquiesced in by the majority of the states. "Whether that league originated in compact, or a sort of tacit consent, resulting from their situation, the exigencies of the times, and the nature of the warfare, or from all combined, is utterly immaterial." As a member of the Congress, the state was bound by the decisions of the majority of the states in foreign policy.[51]

According to Patterson, New Hampshire stood not as a complete sovereign but as one state among other equal states in a Congress where the majority of states bound their

[50] Penhallow v. Doane, 80.

[51] Penhallow v. Doane, 81-82.

actions. Patterson explained that New Hampshire had even accepted this interpretation during the Revolution. New Hampshire's claim was decisively damaged by its refusal to recognize other states claims. It had voted with the majority to support Olmsted's appeal against Pennsylvania in the *Active* case. Patterson thus suggested that New Hampshire had supported the national authority of Congress. In fact, in matters of admiralty, the states still held many sovereign powers, including recognizing prize claims and trying admiralty cases. Patterson deftly switched the discussion of sovereignty from purely military matters, in which sovereignty was functionally divided, to matters of foreign policy, where international recognition was critical. Here The Union held primary sovereignty and the right to adjudicate the law of nations on equal footing with other nations.

Patterson's opinion argued from a selective recounting of the powers exercised by Congress. He correctly asserted that sovereignty flowed from the people, but erred when he suggested that Congress had been given authoritative admiralty jurisdiction. New Hampshire, Patterson insisted, had acquiesced in Congress' assumption of national authority. In fact, when Penhallow captured the "Susanna" in 1777, Congress operated within a system of voluntary association that left the states the power to manage admiralty decisions. The states had insisted that federal attempts to adjudicate these matters were overturning the necessary legal process of a trial by jury. The people had consented to the management of foreign policy by Congress, but they left the powers of judiciary and enforcement with the states, assuming that they would virtuously sacrifice for the good of the whole. Patterson had exaggerated the actual authority of Congress during the Revolution.

Deeply disappointed by the result of the case, the New Hampshire legislature composed an impassioned second remonstrance "against a violation of state independence and unwarrantable encroachment in the courts of the United States." They refused to accept the idea that their laws might be declared "null and void," calling it a "flagrant insult to the principles of the revolution." They took great exception to the history of sovereignty sketched out by the court. New Hampshire "cheerfully" admitted that Congress possessed legitimate authority now, but objected to the proposition that New Hampshire never possessed such authority. Like Virginia, they saw the tendency for consolidation in the influence of the courts.[52]

New Hampshire struggled to find a way to answer the Supreme Court. Surely they hoped that their petition to Congress would be effective, but the language of the remonstrance suggests they were aware of the futility of their action. Like Georgia, they turned to Congress in the hope that "the rights of state governments and the interests of their citizens will be secured against the exercise of power in a court, or any body of men under congress, of carrying into effect an unconstitutional decree of a court instituted by a former congress, and which, in its effects, would unsettle property and tear up the laws of the federal states."[53] But they stopped short of the interposition intended by the Georgia house (but denied by the senate). New Hampshire instead appealed to Congress for the redress of its grievances. Ultimately, they refused to submit their own laws to "the adjudication of any power on earth, while the freedom of the Federal Government shall afford any constitutional means of redress." The hint of extra-constitutional

[52] New Hampshire, "Second Remonstrance of the Legislature, January 16, 1795," SDFR, 13-15.

[53] Ibid.

resistance here is very faint. New Hampshire hoped that Congress would redress the problem raised by their courts.

While New Hampshire had the precedent offered by Georgia's successful challenge to the Supreme Court's opinion in *Chisholm v. Georgia*, they did not have the arguments developed by Virginia and Kentucky in 1798. New Hampshire repeated the charge of consolidation, but identified the judiciary rather than the executive as the primary threat. While New Hampshire hinted at resistance only after all constitutional measures were exhausted, the Kentucky resolution defended the right of any state to "judge for itself, …infractions [as well] as the mode and measure of redress."[54] In 1798, Virginia and Kentucky developed compact theory as the basis of The Union more explicitly than New Hampshire. They chose to appeal to the other states, rather than simply appeal to Congress. What Virginia and Kentucky shared with Georgia and New Hampshire was a confidence in their original sovereignty and the doctrine of reserved powers.

Interposition in Pennsylvania

With the increasing power of the Federal Courts demonstrated in *Penhallow*, Gideon Olmsted tried his suit again, this time in the U. S. District Court in Pennsylvania. He applied to Judge Peters for a judgment against the executors of David Rittenhouse, former state treasurer, who still held the state's share of the proceeds from the sale of the *Active* in his possession.[55] Pennsylvania unsuccessfully tried to apply the Eleventh

[54] Thomas Jefferson, "Draft of the Kentucky Resolutions of 1798,"*Works, 8:*461.

[55] In effect, Olmsted, who received one quarter of the sale, was suing the state for its quarter of the sale. The other half had been dispersed to the owners and crew of the "Convention" and the "Le Gerard." Olmsted had abandoned any hope of tracking these men down and recovering his money from them.

Amendment to the case to protect their immunity against lawsuit. Judge Peters followed the *Penhallow* case and applied the Court of Appeals decision. He ruled that the Eleventh Amendment did not apply, because Rittenhouse, and now his heirs, had held U.S. securities among their possessions.[56] His daughters Elizabeth Serjeant and Esther Waters had refused to give these up to the state after the death of their father, and now they refused to surrender them to the court.

Immediately after Peters found in favor of Olmsted in April of 1803, the Pennsylvania legislature acted to protect the interests of the state. They repeated the charge that the Court of Appeals had no jurisdiction because the Pennsylvania statute creating the admiralty court provided that there could be no appeal of facts from a jury. Because Congress had presumed to rule by the law of nations, they could legally hear no appeal. Pennsylvania quoted M'Kean's opinion in *Ross v. Rittenhouse* that the opinion of Congress was "extrajudicial, erroneous and void." They found Judge Peters' opinion "null and void," because the suit had no standing under the Eleventh Amendment.[57]

The legislature authorized two courses of action. First they commanded the Attorney General to get the certificates from Waters and Serjeant so they would clearly be in the possession of the state. Second they "authorized and required" the governor to

> protect the just rights of the State in respect of the premises by any further means and measures that he may deem necessary for the purpose, and also to protect [Waters and Serjeant] from any process whatever issued out of any federal Court in consequence of their obedience to the requisition.[58]

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[56] Treacy, 683-684. Rittenhouse, as treasurer had refused to turn over the securities to the state until the state released him from a bond he gave to Judge Ross to indemnify him from possible loss for his resistance to the Court of Appeals.

[57] United States v. Peters, 5 Cranch (1809); for Peters opinion, see 125-26; and for Pennsylvania's resolutions, see 127-131.

[58] Ibid., 133-134.

This appears on its face to be an authorization of interposition on behalf of Waters and Serjeant from any penalty they might face by the court. With this assurance, they paid the securities into the treasury, and received a bond in return.[59]

The partisan warfare between the Federalist and Republican parties that characterized national politics in the 1790s continued to color Pennsylvania politics after Jefferson's victory. Benjamin Rush commented in 1805 that the state had split into four factions: Tories, Federalists, Republicans, and Democrats. Republicans and Democrats had united in favor of Governor McKean and Thomas Jefferson in 1804, and remained united against any co-operation with the judiciary in the Olmsted crisis. [60] They had struggled against national claims over revolutionary admiralty jurisdiction for over a quarter century; now they faced a new challenge from the court.

In 1805, the Supreme Court ruled unanimously for the Holland Land Company in *Huidekoper Lessee v. Douglass*.[61] The dispute was driven by constituent protests, regional divisions between the Eastern establishment and Western settlers, and increasing tensions between the legislature and Governor M'Kean. The Democrats moved aggressively to protect the rights of improvements of small settlers against the property rights of foreign land companies in northwest Pennsylvania, while M'Kean hesitated. M'Kean had proved Pennsylvania's strongest defender of the trial by jury principle in

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[59] Treacy, 685.

[60] Rush hoped to cement an alliance between the Federalists and Republicans to prevent a further drift to the left. "The moderate republicans are few in number compared with the violent democrats, and unless most of the honest federalists join with them at the next election, Mr. Snyder will be our governor, and Dr. Franklin's [democratic] constitution will again be the constitution of Pennsylvania." Benjamin Rush to John Adams, August 14, 1805, *Letters of Benjamin Rush*, ed. Lyman H. Butterfield (Princeton: published for the American Philosophical Society by Princeton University Press, 1951), 2:900-903. For the best source on Pennsylvania's suspicion of the Judiciary during the Early Republic, see Richard E. Ellis, *The Jeffersonian Crisis: Courts and Politics* (New York: W.W. Norton, 1971), ch. 11 and 12.

[61] Huidekoper Lessee v. Douglass, 3 Cranch 1 (1805).

Ross v. Rittenhouse. But an intense factional struggle destroyed the alliance between the Republicans and Democrats. M'Kean vetoed a legislative resolution denying that the Supreme Court had jurisdiction in the *Huidekoper* case. He contended that the legislature was sitting as a court, substituting their judgment for that of the Supreme Court. If the Pennsylvania legislature could control the actions of the federal government, then "The Union can no longer exist but as a name."[62]

In 1807, Olmsted again brought suit before Judge Peters, to enforce Peters earlier judgment. Waters and Serjeant replied that the securities had been deposited in the treasury. Peters now faced a dilemma. He could not let the issue lapse, but neither could he hope to get the money from Pennsylvania.

> …[F]rom prudential, more than other motives, I deemed it best to avoid embroiling the government of the United States and that of Pennsylvania (if the latter government chose to do so) on the question which has rested on my single opinion . . . and, under the influence of this sentiment, I have withheld the process required.[63]

Recognizing that Pennsylvania would meet any attempt to obtain the money from the treasury with disdain, Peters willingly encouraged an appeal to the Supreme Court by his inaction.

Nevertheless the increasing Republican defense of the federal courts would explode in partisan rancor after the Olmsted Crisis had passed. In the 1808 elections,

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[62] Thomas M'Kean, March 31, 1807, *Papers of the Governors* [*Pennsylvania Archives,* ser. 4], (Harrisburg: State of Pennsylvania, 1900-02), 4:04. For an account of the factional dispute see Kelly, Chapter 3.

[63] U.S. v. Peters, quoted in Tracey, 685. Even though the certificates had been given to the state, the original bond of indemnity given by Rittenhouse to Ross remained outstanding and was placed on file with the court. The state never released them from legal responsibility.

M'Kean's Republican faction paid for their stand.[64] Simon Snyder's election promised a continuation of legislative resistance to the Federal Courts.[65]

Chief Justice John Marshall's opinion in U.S. v. Peters (1809) addressed the three major issues of the case: the suability of a state, the jurisdiction of the Revolutionary War Court of Claims, and Pennsylvania's claim of interposition. Marshall bypassed the Eleventh Amendment concerns by arguing that the certificates were technically in the possession of Rittenhouse, passing on to his heirs. The jurisdiction of the Court of Claims proved to be a larger issue, but Marshall took the issue to have been decisively settled by *Penhallow*. Marshall did not pretend to analyze the issue in admiralty, as did the *Penhallow* opinion. His recounting of the facts closely followed the ruling established under the law of nations by the Court of Appeals against the jury verdict. Marshall, however, did not consider the law of nations as a source of authority, resting his argument instead on the constitutional nature of judicial power. Finally, Marshall addressed the validity of Pennsylvania's constitutional claim of interposition.

> If the legislatures of the several States may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the Constitution itself becomes a solemn mockery, and the nation is deprived of the means of enforcing its laws by the instrumentality of its own tribunals.[66]

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[64] M'Kean himself was term limited so Snyder ran against Ross (of Pittsburgh, not George Ross, esq).

[65] Snyder proved an independent supporter of Jeffersonian principles. In support of Jefferson's embargo he admonished the legislature (who were also in support) "it is peculiarly and eminently the duty of all the constituted authorities to act in support of the just and honorable measures adopted by the federal government, as if animated by one heart, one spirit, and one determination." (William C. Armor, *Lives of the Governors of Pennsylvania* (Philadelphia: J. K. Simon, 1872), 317.) Snyder was also the first Pennsylvania governor to denounce slavery in an official address as a "stain" on the state. (318) "Governor Snyder's political base was in Western Pennsylvania. The settlers in the West Allegheny lands originally came from Northumberland and Lycoming counties, Snyder's home counties…" Kelly, chapter 5, quote from p. 153.

[66] U.S. v. Peters, 136

Pennsylvania, he charged, was not claiming a universal right to interpose, but only a right when the courts went beyond their proper jurisdiction. It is this right to determine the jurisdiction of the courts that Marshall defends as the linchpin of federal jurisdiction.

> If the ultimate right to determine the jurisdiction of the courts of the Union is placed by the Constitution in the several State legislatures, this act [Pennsylvania Act of April 1803] concludes the subject; but if that power necessarily resides in the supreme judicial tribunal of the nation, than … the act of Pennsylvania … cannot be permitted to prejudice the question.[67]

In keeping with Marbury v. Madison and the developing doctrine of departmental review, Marshall stressed that it was the authority of the federal judiciary to determine its jurisdiction under the constitution.

On February 24, 1809, Governor Snyder received word that the state had lost the Supreme Court appeal. The case had been "brought to a point where the interposition of the state becomes necessary."[68] The governor called out a brigade of the state militia led by Brigadier General Michael Bright. Bright posted two noncommissioned officers and twelve privates at the Philadelphia home of Waters and Serjeant.[69] As Snyder feared, federal marshal John Smith tried to serve a warrant to Walters and Serjeant on March 25.[70]

> On Saturday, at 12 o'clock, the Marshall of the district of Pennsylvania, went to the place of resistance of the representatives of David Rittenhouse, deceased, to endeavor to execute the peremptory mandamus. As he was proceeding towards the door to enter the house, his progress was arrested by the presentation of a well polished bayonet to his breast.[71]

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[67] Ibid.

[68] John Serjeant to Simon Snyder, February 24, 1809, *Papers of the Governors*, 4:691-92.

[69] Michael Bright to Snyder, March 24, 1809, *Papers of the Governors*, 4:692.

[70] Michael Bright to Snyder, March 25, 1809, *Papers of the Governors*, 4:693-94.

[71] "Treason! Treason! Treason!" *Tickler* [Philadelphia], March 29, 1809.

Smith proceeded to swear out a *posse commitas* of several thousand deputies in Philadelphia to assemble on April 15th to attempt to serve the warrant again.

Pennsylvania reacted to the pending confrontation by asserting its position even more strongly. They followed the model of the Virginia and Kentucky resolutions in sending their resolutions to "her sister states" with a call for constitutional change. The heart of the resolutions is the charge that the federal courts cannot be considered to be an impartial judge of their constitutional powers.

> Resolved, that from the construction the United States' Courts give to their powers, the harmony of the states, if they resist encroachments on their rights, will frequently be interrupted; and if to prevent this evil, they should, on all occasions yield to stretches of power, the reserved rights of the States will depend on the arbitrary power of the courts. …To suffer the United States courts to decide upon STATE RIGHTS will, from a bias *in favor of power*, necessarily destroy the FEDERAL PART of our government[72]

The revolutionary republican suspicion of consolidation prevented them from trusting the federal judiciary.

Pennsylvania had a strategy to protect its rights. First they claimed their own rights to defend their authority. They expressed, "the hope they will not be considered acting hostile to the general government, when, as *guardians of the state rights*, they cannot permit an infringement of those rights, by an unconstitutional exercise of power in the United States Courts."[73] In keeping with this strategy, Governor Snyder had called out the militia to resist the federal marshal.[74] Second, they appealed to practical solutions to handle the problem. They asked for commissioners to be appointed to negotiate a settlement, a solution that would allow them to negotiate with Congress instead of the judiciary. A negotiated settlement by commissioners would reinforce the sovereign

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[72] Pennsylvania, April 3, 1809, SDFR, 48. Italics in original.

[73] Pennsylvania, April 3, 1809, SDFR, 47. Italics in original.

[74] Simon Snyder to the Legislature, February 27, 1809, *Papers of the Governors*, 4:667-668.

rights of the state under the compact. Pennsylvania also asked the other states to pursue a constitutional amendment that would set up an independent tribunal to adjudicate difficult constitutional disputes between the states and the federal government.[75]

Faced with a potentially violent confrontation, a nervous militia general, and the weary women under virtual house arrest,[76] Governor Snyder appealed to his fellow Republican, President James Madison. He appealed to Madison's reputation as a defender of sound constitutional principles, "one who is so intimately acquainted with the principles of the federal constitution—and who will discriminate between the opposition to the constitution and laws of the United States and that resisting the degree of a judge, founded … in a usurpation of power." He eagerly hoped that the President could "adjust the unhappy collision of two governments, in such a manner as will be equally honorable to both."[77] In 1809, the Republicans controlled the Congress and the Presidency and had a history of hostility to the judiciary. Given Snyder's vigorous support for the Embargo and the national Republic cause, he expected a favorable response.

Before Snyder received his response, the crisis was averted. Federal marshal Smith quietly obtained entry into the rear of the house and served the warrant, at which point Waters and Serjeant capitulated. The Governor ordered the money to be paid for their release and the militia was withdrawn.[78] Despite direct interposition by the

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[75] Pennsylvania, April 3, 1809, SDFR, 48.

[76] Bright complained to the Governor's Secretary, that "Serjeant and Waters have become tired in their confinement, and have expressed that they will not bear it any longer what the consequence be what it may." (Bright to Bolleau, March 31, 1809, *Papers of the Governors*, 4:695-696). Earlier Bright had complained that "The marshal has noted out men with a determination to have them indicted for high treason." (Bright to Snyder, March 25, 1809, *Papers of the Governors*, 4:693-394).

[77] Simon Snyder to James Madison, April 6, 1809, Library of Congress.

[78] *Papers of the Governors*, 4:679-680.

Governor, the Federal judicial process was accomplished. State Militia leader Michael Bright and his men were tried before Federal Justice Bushrod Washington for resisting the court. Bright was ultimately sentenced for three months and fined $200. Madison used his power of pardon to grant them a reprieve and end the crisis.[79]

During the Sedition Act Crisis, Madison had insisted that interposition by the states was not judicial in character because it opposed the action of Congress and did not speak with finality in the same way that a judicial result bound the parties to a suit. Now he stood with the enforcement of judicial decree against the states. On April 15, Madison sent Snyder a formal reply to his plea for support. He duly submitted the Pennsylvania resolutions to Congress, but declined to intervene.

> The executive of the United States, is not only unauthorized to prevent the execution of a decree sanctioned by the Supreme Court of the United States, but is expressly enjoined by statute, to carry into effect any such decree, where opposition may be made to it.

Instead, he appealed to Snyder's patriotism. As governor of Pennsylvania, he could decisively end the conflict by ceasing the interposition.[80]

Pennsylvanians rejected Madison's analysis and supported that of Governor Snyder. A Democratic-Republican assembly in Montgomery County retorted:

> holding, as they do, the independence of the state governments to be the firm *rock* on which the federal government is founded; believing that the destruction of the state rights, by whatsoever means would be tantamount to a destruction of liberty, cannot see those states invaded and be silent.[81]

A procedural right which was endangered by Parliament during the Revolution, "that the finding of the jury shall establish the facts, without reexamination or appeal," was now

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[79] Treacy, 690-691.

[80] *Papers of the Governors*, 4:702.

[81] "Democratic Republican Meeting," *Kline's Carlisle Weekly Gazette* June 30, 1809, 2.

endangered again by the "usurpation and injustice" of the judiciary. [82] The meeting endorsed the governor's use of the militia to defend "by the only means in his power, the just rights of the state." The meeting also ordered its resolutions published in sympathetic papers throughout the state in hopes that other political associations throughout the states could pressure the Congress to limit the power of judges by amendment.[83]

Yet as insistent as Pennsylvanians were to defend thier rights, they did not argue that sovereignty should be consolidated in the states. Pennsylvania did not claim, as the seceding Southern states of 1861 did, that each state was an entirely sovereign member of a confederate union. The state legislature explained, "Whilst [Pennsylvania is] contending for the Rights of the state, … it will be attributed to a desire of preserving the Federal Government itself, the best feature of which must depend upon keeping up a just balance between the general and state governments, as guaranteed by the Constitution."[84] Pennsylvanians had a duty to both the states and the Union. The Democratic-Republican meeting in Montgomery County proudly proclaimed their citizenship in both Pennsylvania and the Union. It was their equal duty, "to support the constitutions of both, believing that by preserving the independence and sovereignty of each inviolate, and preventing the exercise of any powers by any branch of either, not expressly delegated, we shall insure the greatest permanency to our institutions…"[85] Loyalty was not divided, or placed solely in a sovereign state or national government. Pennsylvanians

[82] "Trial by Jury—NOTHING is the Judiciary—EVERYTHING," *Kline's Carlisle Weekly Gazette*, May 12, 1809, 3.

[83] "Democratic Republican Meeting," *Kline's Carlisle Weekly Gazette* June 30, 1809, 2.

[84] Resolution of the Pennsylvania Legislature, April 3, 1809, SDFR, 47.

[85] "Democratic Republican Meeting," *Kline's Carlisle Weekly Gazette*, June 30, 1809, 2.

stood loyal to the whole union, ready to both either state and federal government to the express boundaries of the Constitution.

After the crisis had passed, the problem of collective state action once again confronted Pennsylvania, as it had confronted several state legislatures before it. Although eleven states sent responses, none of them was positive. They universally asserted that Pennsylvania's course of action was a greater threat to the Union than the exercise of authority by the independent federal judiciary. Virginia, which a decade before had been agitating against consolidation, now opposed the idea of an impartial tribunal outside of the federal judiciary. It would "invite, rather than prevent" a collision between the federal and state courts. Instead, they suggested that the independence and experience needed for an impartial tribunal could be found in the Supreme Court![86] Kentucky called the resolutions, "inexpedient."[87]

The debate of 1809 presented a fundamental issue over constitutional interpretation. Pennsylvania and the Supreme Court offered contending claims as to how the constitution applies to the judicial branch. Marshall's claim that the High Court could determine the limits of the judicial power conflicted with Pennsylvania's assertions of reserved sovereign power. Pennsylvania could make a strong case for a separate constitutional mechanism (either in the states or an independent tribunal) that could apply the Ninth, Tenth, and Eleventh Amendments against the federal government. Given the republican fear of corruption and consolidation, such an institution might be seen as a necessity. Until the development of a full-fledged theory of nationalism in the "Era of Good Feelings," American political theory stressed divided authority, not

[86] "Reply of the General Assembly of Virginia to Pennsylvania," January 26, 1810, SDFR, 49-50.

[87] *Papers of the Governors*, 4:721.

incontrovertibly delegated authority to a Westphalian state (either state or federal governments). It should not be surprising then, that states *and* central governments would both try to interpret the Constitution in disputed cases.[88] When Pennsylvania acted, they did not do so as pure sovereigns, but as "guardians" of state rights. Within the American constitutional framework, its action relied as much upon right reason applied to the structure of the Constitution as did Marshall's defense of the judiciary. Pennsylvania took as its starting point the revolutionary suspicion of power. It took from Lockean contract theory the idea that no man was a fit judge of his own cause. It is fully consistent with this theory that they would try to create a tribunal that could manage the dispute between the states and the courts.

In fact, the theory and institutional design of the Constitution did not consider that the judiciary might be in conflict with the states. Just as Congress was presumed not to need additional checks and balances against the "least dangerous" branch of government (i.e. the judiciary),[89] so the states, because they possessed an independent power base in the people, were not given a veto on federal power. The Constitution was framed in a moment of strength for the states and profound weakness for the Union. Nationalists had feared that granting states power to directly choose senators and not giving Congress a veto over state action would be fatal to The Union. The fear that a counter-weight might be needed against an expansive and aggressive national authority certainly did not prevail at Philadelphia. Madison and Marshall could justify judicial review as theoretically

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[88] Keith E. Whittington, *Constitutional Construction: Divided Powers and Constitutional Meaning*, (Cambridge, Mass.: Harvard, 1999).

[89] Hamilton, Federalist 78, in Alexander Hamilton et al., *The Federalist: a Commentary on the Constitution of the United States* (New York: Modern Library, 2000). In Hamilton's exact phrasing, "The judiciary, from the exact nature of its functions, will always be the least dangerous to the political rights of the constitution; because it will be least in a capacity to annoy or injure them." (496).

necessary because of the supremacy clause and the long line of precedent stretching back through *Kemper v. Hawkins* to Bracton's Dicta.

Unfortunately for Pennsylvania, the state replies were correct when they argued that the existing judiciary was the best equipped to handle these cases. No truly disinterested tribunal could be found. The best practical alternative was professional and (relatively) independent federal judges. The Republican administration of Madison wisely accepted the authority of the judiciary and rejected Snyder's plea to join him in opposing the judiciary. The position of the federal judiciary gained acceptance within constitutional theory.

Resistance to Federal Power in New England

At the same time that Pennsylvania was developing theories of resistance to federal power, New England was acquiring a reputation as a hotbed of secessionism. In contrast to Pennsylvania's well-developed theory of state rights and state constitutional deliberation, New England's approach was driven by political factionalism and separatist conspiracies. Prominent statesmen expressed the fear of secession frequently in the correspondence of the period. Benjamin Waterhouse opined, "The British Party, or Tories, have long contemplated a separation of the states and a formation of a northern confederacy, the end of which was to be opposition to France and to the Southern states and a sort of alliance with England."[90] Pennsylvanian Richard Peters expressed his suspicion that Timothy Dwight's century sermon on the text "Come out from them and

[90] Benjamin Waterhouse to John Adams, July 8, 1811, *Microfilms of the Adams Papers,* part 4 (Boston: Massachusetts Historical Society, 1959) #412.

be ye separate" was code for secession.[91] Many Federalist leaders admitted, with Roger Griswold, "There can be no safety to the Northern States without a separation from the confederacy."[92]

Federalist leaders in New England reacted out of a sense that the national political tide was turning against them. They had closely lost the election of 1800 to Jefferson (73-65), and some complained that the margin of victory was provided by electoral votes provided by the 3/5 clause in the constitution. Federalists believed that the Louisiana Purchase had been unconstitutional and unwise. Westward expansion would gradually erode the electoral strength of New England.[93] In Congress, Josiah Quincy (F-MA) denounced the admission of Louisiana to the Union in Congress with a defense of the rights of the existing state over potential states. The essential question considered the problem of sovereignty. As the states were the original parties of The Union, the existing members should not be made subject to ethnically French residents of the Louisiana Territory. "Have the three branches of this government a right, at will, to weaken and outweigh the influence respectively secured to each state in this compact, by introducing, at pleasure, new partners, situated beyond the old limits of the United States?" Such was

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[91] II Corinthians 6:17. Peters coyly suggested that Dwight was agitating secretly for disunion. "There are some of his observations on this scripture that are not without ambiguity." Peters to Timothy Pickering February 3, 1809. *Documents Concerning New England Federalism, 1800-1815*, Henry Adams, ed. (Boston: Little, Brown, 1905), 331.

[92] Roger Griswold to Oliver Wolcott, March 11, 1804, *Documents Concerning New England…*, 356.

[93] Plumber to John Quincy Adams, December 20, 1828, *Documents Concerning New England…*, 144-146. Timothy Pickering referred to the problem as "Negro Representation." Pickering to Theodore Lyman, February 11, 1804, *Documents Concerning New England…*, 343-46. For more on New England attitudes on representation and the South, see Matthew Mason's "'Nothing is Better Calculated to Excite Divisions': Federalist Agitation against Slave Representation during the War of 1812," *The New England Quarterly* 75 (2002): 531-561.

the injustice that they faced that Quincy charged it would be the duty of the Northeast to "prepare for a separation, amicably if they can, violently if they must." [94]

In 1804, leading Federalists, including Timothy Pickering conspired to separate the northeastern states from the Union.[95] The hope of the conspiracy was that a favorable political climate might be created where the Federalist states might seize back control of New York, either directly, or through sympathetic Republicans like Aaron Burr. Burr's known hostility to Jefferson, it was hoped, would make him amenable, "and if a separation should be deemed proper, the five New England states, New York, and New Jersey would naturally be united."[96]

Timothy Pickering's primary grievance was political, not constitutional. The focus of his rhetoric was on the diabolical "Mr. Jefferson's plan of destruction."[97] He stressed that the North was being oppressed by "Negro representation" in Congress.[98] But his solution was found in the principles of revolution, not in interposition against the judiciary.[99] In the midst of the partisan wars of the Jeffersonian Era between the republican-controlled Congress and the Federalist-stocked judiciary, Pickering despaired at the persistent efforts of a Republican congress to reduce the legitimate influence of

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[94] Josiah Quincy, U.S. *House Journal*. 1811. 11th Cong., 3rd sess., 14 January.

[95] Kevin M. Gannon, "Escaping, 'Mr. Jefferson's Plan of Destruction': New England Federalists and the Idea of a Northern Confederacy, 1803-1804," *Journal of the Early Republic* 21 (2001): 413-443.

[96] Pickering to Rufus King, March 4, 1804, *Documents Concerning New England…*, 332.

[97] Pickering to George Cabot, January 29, 1804, *Documents Concerning New England…*, 339.

[98] Pickering to Lyman, February 11, 2004, *Documents Concerning New England…*, 343-346.

[99] Pickering to George Cabot, January 29, 1804, *Documents Concerning New England…*. "The principles of our Revolution point to the remedy, - a separation. That this can be accomplished, and without spilling one drop of blood, I have little doubt."

New England to naught."[100] Fortunately for the Union, Hamilton moved decisively against Burr, preventing many influential New York Federalists from participating in the conspiracy.[101]

For much of the early nineteenth century, New England bore the stigma of disloyalty and secessionist politics. Even today, many scholars associate New England with radical state rights.[102] Yet Pickering's political theory does not represent the main current of state rights thinking in the North. Although this conspiracy was real, and Pickering would have genially destroyed The Union if could he attain the necessary influence, New England did not share his sympathies. Northerners were willing to use interposition and conspiratorial politics to limit the power of the central government, but they understood that The Union was too important to be risked. Despite the efforts of the old guard in the Federalist Party, the majority of Federalists were not interested in secession. Instead of despairing at the rise of democracy, they decided to tame it and channel it into party activism.[103] Nationally minded leadership like that of John Quincy Adams disapproved of the addition of Louisiana, but hoped that a stronger national government might compensate for a weaker New England section. He believed, "a severance from the union … [would be] a remedy more desperate than any possible

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[100] Pickering to Rufus King, March 4, 1804, *Documents Concerning New England…*, 332. Jeffersonian politicians frequently brought up the charge of disloyalty and suspect politics in New England, but no details were widely available until the Nullification Crisis brought the issue back into the public eye. John Quincy Adams' letters to the *National Intelligencer* revealed some of the details for the first time.

[101] For more on the bitter personal rivalry between Hamilton and Burr in 1804 that resulted in the infamous duel, see Joseph J. Ellis, *Founding Brothers: The Revolutionary Generation* (New York: Alfred A. Knopf, 2000), 40-45.

[102] See, for instance, Gannon's article, cited above.

[103] David Hackett Fisher, *Revolution in American Conservatism,* (New York, Harper and Row, 1965).

disease."[104] It was an assessment shared by the people. After the battle between the *Chesapeake* and the *Leopard* in 1807, the Federalist dominated Boston Town Meeting denounced the British attack as "a direct violation of our national honor, and an infringement on our national rights and sovereignty," to the dismay of party leadership.[105]

New England separatism is well illustrated by the crisis over the Embargo. While widely supported by the nation as a whole (Snyder vigorously supported it), New England was outraged by it. Over one third of the total tonnage of the Union was berthed in Massachusetts alone. The Northeastern economy was overwhelmingly commercial. Yet despite fierce political opposition to the Embargo, a visible secessionist movement never emerged.

The Federalist response to the Embargo represented a more developed constitutional theory than the conspiracy of 1804. The leadership were aware that rumors had hurt them badly and that they needed to move far more cautiously.[106] Even the fiery Pickering admitted that while he would rather destroy the Union than change it, a constitutional critique would be more effective with the people, as they did not want to leave The Union.

> Pray look into the constitution, and particularly to the tenth article of the amendments. How are the powers reserved to the states respectively, or to the people, to be maintained,

[104] According to Henry Adams, Rufus King, whom Pickering depended upon to help bring New York into the conspiracy, shared this sentiment. (*Documents Concerning New England…*,148.

[105] Henry Adams, *Documents Concerning New England…*, 189.

[106] Cabot complained to Pickering about rumors "that a disunion of the states is mediated by the Federalists. Some Federalists have been made to believe there was foundation for these insinuations, and the Democrats at the Southward are using this story to deter men from acting with the Federalists. I think, therefore, it will be well to pass some very decided resolution on the importance of maintaining the union inviolate under every trial, &c." October 5, 1808, *Documents Concerning New England…*, 373.

but by the respective states judging for themselves and putting their negative on the usurpations of general government.[107]

In 1809 the state legislatures took up the task of addressing the constitutionality of the Embargo and the Force Act. Massachusetts, at the urging of its leadership, purged its resolution of any hint of disunion. They stressed their loyalty to a union as a "confederation of equal and independent states with limited powers."[108] The resolution did not make an issue of the states acceding to The Union as states, speaking more frequently about the rights reserved to the people. Their reliance upon the people as the ultimate sovereigns helped to rein in their rhetoric. Nevertheless, they denounced the Enforcement act of 1809 as "unjust, oppressive, and unconstitutional, and not legally binding on the citizens of this state." They asserted that it was the duty of the legislature to defend the rights of the people, "by peaceable and legal remedies. While this state maintains its sovereignty and independence, all the citizens can find protection against outrage and injustice in the strong arm of the state government."[109] Massachusetts, then, set about the course of remonstrating Congress and seeking constitutional amendments with the other states.

Several other states participated in the resistance to the Force Act. The governor of Connecticut urged the legislature that it was "their duty, to interpose their protecting shield between the right and liberty of the people, and the assumed power of the general government."[110] The legislature then refused to aid in the "execution of measures, which

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[107] Pickering to Christopher Gore, January 8, 1809, *Documents Concerning New England…*, 378. Emphasis in original.

[108] Massachusetts, "Resolves" (1809), SDFR, 29-33.

[109] Massachusetts, "Resolutions of the Enforcement Act" February 15, 1809, SDFR, 34-36.

[110] Jonathan Trumbull, February 23, 1809, SDFR, 40.

are unconstitutional and despotic."[111] Most New England states took this course of passive resistance, actively enforced. Rhode Island declared that the act undermined the rights of the people, and declared it unconstitutional, but stressed that they supported constitutional measures that would "remove the political evils under which we are now suffering."[112] Delaware was even more explicit:

> We have the fullest confidence, that the patriotism of the good people of the United States will induce them to submit to unwise and arbitrary laws, rather than resort to violence; and that they will use the remedy pointed out by the constitution for the evils they suffer, rather than jeopardize the union of the states and the independence of their country, by an open opposition to the laws.[113]

Despite the genuine threat of civil war that loomed during the Embargo, the Federalist dominated states carefully moderated their constitutional strategy. They avoided threats of armed resistance, stressing that they preferred to work through the political process for change.

The unified opposition of these states to the Embargo was partly successful in securing its replacement by a non-intercourse policy, which allowed trade with neutrals. Virginia's resolutions in response blamed the Federalists for the failure of the embargo. "It is not failed because our enemies have not felt its force, but because they believe we have felt it too sensibly; because the unfortunate opposition which the measure has met in some other parts of The Union has inspired them with a fallacious hope, that we ourselves, either would not bear its privations."[114] If constitutional argument of the

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[111] Connecticut, General Assembly, SDFR, 41.

[112] Ibid., 44.

[113] Delaware, House of Representatives, SDFR, 37-38.

[114] *Acts of the General Assembly of Virginia,* quoted in Ames, ed., SDFR, 43.

Federalist legislatures' resolutions was not successful, their political strategy met its aim.[115]

Conclusion:

In contrast with the Federalists, Pennsylvania Republicans struggled to understand the theoretical significance of its confrontation with the judiciary. In 1810 the Pennsylvania legislature assembled again to choose a final course of action. Having been decisively defeated in their attempt to interpose against the enforcement of *U.S. v. Peters*, they struggled for a remedy that would allow them to vindicate their cause. The state was now deeply divided between moderate Republicans and radical Democrats over the best course of action against the federal government. Pennsylvania Republicans appeared slightly chastened by the crisis. In the legislative debate on proposed resolutions, several Republicans were especially vociferous in their criticism of the actions of the state and Democratic constitutional doctrine. "What is meant by state rights and sovereignty?" asked the fiercely Republican William Duane. "I have been accustomed to believe that there is no sovereign in this country but the people."[116] He charged that Pennsylvania was the real source of danger to liberty. Massachusetts' reputation for disunion was far exceeded by Pennsylvania.

> [T]he disorderly proceedings of some private men, or the impotent resolutions of the legislature of that state vanish into insignificance when compared with the regularly organized and governmental opposition of Pennsylvania: there you saw a war of words, but here you saw the bayonet thrust into the constitution of the union.[117]

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[115] Concurrent action by the states on constitutional issues became a frequent tactic of lobbying Congress. In 1811 Pennsylvania and Virginia offered constitutional arguments against the re-charter of the bank. They contended that because the states were sovereign parties to the union, they felt it their duty to advise Congress that the bank was unconstitutional. (SDFR, 52-54).

[116] William Hamilton and Hugh Hamilton, *Debates of the Legislature on the Case of Olmsted*, (Lancaster, Penn.: William Hamilton, 1810), 36.

[117] Ibid, 71.

The Democratic faction, who persuaded a majority to support their position, continued to defend, in principle, the right of the state to guard the liberties of the people against usurpation. Mr. Tarr drew an analogy from criminal law. "Would it not be just, if a constable without proper authority, would break open and search the trunks of gentlemen--would not gentlemen be justified in knocking him down?"[118] The principle for Pennsylvania was much the same. The state had never given the right to the federal government to have admiralty cases heard upon appeal. The majority understood the crisis in light of the "constitution of suspicion." History was replete with examples of republics that lost their liberty to consolidation, and Tarr believed consolidation was the present threat. The Philadelphia system existed to guard against such a danger.

Both moderates and radicals agreed that they were for state sovereignty within prescribed constitutional limits. Each accepted that separation from The Union would be ruinous. The majority of the legislature expressed its obedience to the federal courts within their proper jurisdiction. Yet its resolutions condemned the action of the federal courts as illegal and unconstitutional. They sought a constitutional amendment to create an "impartial" constitutional tribunal. Pennsylvania recognized that the rights the state sought to defend against federal incursion depended upon the ability to declare that a violation had taken place.

> It may be asked, who is to decide the question? If it be alleged that the state has not the right, it may be justly replied, the power invading it had not. It is a case unprovided for in the constitution, and there is no common umpire.[119]

[118] Ibid, 85.

[119] The Pennsylvania Senate never acted upon these resolutions. Ames, ed., SDFR, 51-52.

Chapter 4: "The Euthanasia of our Constitution": Monopoly, Commerce, and Concurrent State Power in the Steamboat Cases

> The same want of general power over Commerce led to an exercise of this power separately by the States, [which] not only proved abortive, but engendered rival, conflicting and angry relations…. In sundry instances of as N.Y. N.J. Pa & Maryd. the navigation laws treated the Citizens of the other States as aliens.
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> -James Madison, 1787.[1]

Northern Republicans' denial of an authoritative "common umpire" for constitutional disputes meant that state legislatures held considerable authority in the actual construction of the Constitution within their own boundaries. Without a "common umpire," the several states came to divergent understandings as to how to define the boundary between the reserved and delegated powers. If the Supreme Court could not be trusted to interpret the Constitution without a bias toward its own power, the states soon discovered that they were just as likely to interpret the Constitution to benefit their own interests. The lack of a "common umpire" was directly tied into the rise and fall of state sovereignty in New York during the Early Republic. New York, like many other states, believed it possessed sovereign legislative power over internal domestic matters despite the growing assertions of Congressional and federal judicial authority in constitutional construction. This chapter examines the debate over the locus of sovereignty, state legislative authority, and the concurrent regulation of property that surrounded the steamboat cases—a debate that had its root in the political grammar of American constitutionalism.

[1] Max Farrand, ed., *Records of the Federal Convention of 1787* (New Haven: Yale University Press, 1911), 3:547-48.

The steamboat cases illustrate this rise and fall of legislative sovereignty particularly well. They reveal the actual power that state governments claimed and exercised over commerce, the domestic economy, and technological development. The development of steamboat technology created a new area of economic enterprise governed by the states that challenged the regulation of economic development under the common law. The North River Steamboat Company (NRSC), with an exclusive state monopoly on the Hudson River, quickly engendered a complex legal dispute concerning the balance between individual, state, and federal rights over property and commerce within the rapidly developing economy. New York, New Jersey, Connecticut, the federal government, and entrepreneurs struggled to formulate a legal doctrine that would govern this largely private development. As the steamboat cases wound their way through the state legislatures, state courts, and finally the Supreme Court, the public recognized the need for a "common umpire" to provide a common legal framework for economic development. New York's claim to regulate steamboat at first entirely with its sovereign legislative power, and then concurrently, collapsed under the weight of public complaints, the resistance of New Jersey and its citizens, and the interposition of the Supreme Court. When the Court finally affirmed the power of Congress over interstate commerce in *Gibbons* v. *Ogden* (1824), the state powers reacted with acquiescence, rather than interposition. In the process, national power over national commercial development was established, and the role of the Supreme Court as the "common umpire" of the powers delegated to the national government was decisively asserted.[2]

[2] Scholars have perhaps made too much of the Supreme Court's assertion of its authority over constitutional interpretation. Charles Warren emphasized that *Gibbons* represented a trajectory of increased political power for the court. According to Warren, "The political effect of Marshall's opinion was …potent; for it marked another step in the broad construction of the Constitution, and became a mighty

The steamboat cases did not simply establish the commerce clause as the vehicle through which the Supreme Court or Congress asserted its power over this national economic regulation. Examining the cases solely in terms of the commerce power does help to explain the origins of the modern commerce clause, which was exercised to powerful effect by the post Civil War Supreme Court. But the cases involved much more than a dispute over the nature of commerce. Taken as a whole, the cases express the disparate economic and legal doctrines used to govern the constitutional law of economic development. They reveal the difficult role that states and entrepreneurs played in balancing the common law, individual liberty, the desire for economic growth, and state constitutional rights.

Because the commerce clause doctrine emerged gradually, three additional legal doctrines played a key role in deciding these conflicts and provide security for both individual rights and technological innovation: intellectual property and patent rights, the sovereignty of state legislatures, and a critique of special monopoly privileges.

First, the Framers of the U.S. Constitution hoped to define and protect intellectual property rights through a federal patent power. However, patents proved difficult to

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weapon in the hands of those statesmen who favored projects requiring the extension of federal authority." (Charles Warren, *The Supreme Court in United States History* (Boston: Little, Brown, and Company, 1935), I:610-611). Conversely, William Crosskey argued that Congress's power over commerce had always been plenary and broad. (Crosskey, *Politics and the Constitution in the History of the United States* (Chicago, University of Chicago Press, 1953), esp. chapter 9). Melvin I. Urofsky and Paul Finkelman describe the philosophy of the Marshall Court during the first quarter as "unrestrained judicial nationalism and pro-business attitudes." (*A March of Liberty* (New York, Oxford University Press, 2002), 246). More recent scholars have seen Marshall's jurisprudence as something less than a striking endorsement of modern judicial supremacy. Robert Lowry Clinton, in "Judicial Review, Nationalism, and the Commerce Clause: Contrasting Antebellum and Postbellum Supreme Court Decision Making," 47 *Political Research Quarterly* (December 1994): 857-876, argues that Marshall's jurisprudence should be understood as establishing "a fundamental modern maxim of judicial restraint: that constitutional issues should be resolved on the narrowest possible grounds." (868). Christopher Wolfe's *The Rise of Modern Judicial Review: From Constitutional Interpretation to Judge-Made Law*, (New York: Basic Books, 1986) is also helpful in establishing that the Marshall Court was not, as progressive constitutional scholars like Warren suggest, primarily about cementing national power through a broad construction of the Constitution.

enforce and only offered weak protection. Inventors frequently sought stronger protections for their intellectual property in an exclusive state grant of usage through a monopoly. This exclusive right operated to protect original inventions where federal patents were easily copied and stolen. In the case of the steamboat, New York asserted its power on behalf of Robert Fulton and his financial backers to induce them to risk their invention and capital in the marketplace.[3] It claimed sovereign legislative authority under the powers reserved to the states to regulate all inventions in its territory, patented or otherwise, and to grant exclusive use to whomever it desired. This second legal doctrine—the sovereign legislative power—proved a double-edged sword. Entrepreneurs in New Jersey likewise turned to the sovereign power of their legislature to protect and defend their own rights on the Hudson River. Conflict between the sovereignty of New York and the sovereignty of New Jersey proved intractable. Finally, the business and legal community sought to protect the rights of business and innovation through critiques of state's grant of exclusive monopoly rights or special privileges. They stressed that the state laws violated both the principles of natural justice, common law protections of the rights of public navigation, and the constitutional rights secured to citizens under the national Bill of Rights.

Each of these three doctrines—protection of intellectual property through patent law, the sovereign power of state legislatures, and the critique of special privileges as a contradiction to fundamental rights—offered persuasive arguments for inventors and businessmen who sought to secure their individual rights. Each of these doctrines

[3] As J. Willard Hurst suggests in *Law and the Conditions of Freedom in the Nineteenth Century United States* (Madison: University of Wisconsin Press, 1967), the antebellum states played a vital role in encouraging the release of economic energy through their support of development and their protection of scarce venture capital.

suggests that the constitutional history of economic development should not be presented as a exercise in state building organized by Congress and enforced by the Supreme Courts, or even as driven by state versus federal conflict over internal improvements. The conflict was more complex. Individual entrepreneurs sought ways to secure their investment against state sponsored competitors. They turned to the common law, patent protection, the sovereign power of the other states, individual property rights arguments, interstate comity, and only finally to the commerce clause. By the 1820s, the persistence of businessmen like Thomas Gibbons and state politicians like William Duer forced the issue to the Supreme Court and disclosed the "common umpire" provided by the federal Constitution. Any analysis of how federalism affected economic development should place the state legislatures and individual entrepreneurs who developed these doctrines at the heart of the narrative.

National Internal Improvement

During the early Republic, the contentious national debates that surrounded economic development concerned not the commerce clause, but the character of internal improvements. After the War of 1812, Americans hoped to promote a flourishing society through a national program of legislation. The failure of the Hartford Convention and the defeat of the British themselves led to a temporary rise in national identity and patriotic feeling. Hezekiah Niles celebrated the return to the Revolutionary sentiment that "these United States are, of God and by our right, free, sovereign, and independent."[4] For Republicans, the victory offered a "golden opportunity" to crush Federalist faction and secure a prosperous and firm union. Joseph Story hoped to extend the power of the

[4] Hezekiah Niles, *Niles' Weekly Register* [Baltimore], September 2, 1815.

national government as far as the Constitution would allow. Military schools, a larger army and permanent navy, uniform bankruptcy and navigation acts, national wardens and justices of the peace, and "judicial courts which shall embrace the whole constitutional powers" would create a chain of national interest to bind the people together. Petty factions in the "great states" would give way to popular national government.[5]

Initially, it seemed as if the wave of nationalist fervor would lead to a permanently enlarged government. Madison's annual message to Congress in December 1815 echoed Story's call for "enlarged and liberal institutions." He proposed re-incorporating the national bank, expanding the military, protecting fledgling industry with a tariff on manufactures, establishing a national university in D.C., and developing an national system of roads and canals through the authority of the federal government. The latter idea, in particular, would be a boon to the national economy and help to bind "our national confederacy" together. He suggested that the Constitution should be amended to that end, if necessary.[6] In answer to his call, Congress enacted many of the reforms Madison suggested. Despite fierce opposition from both the traditionally minded Republicans, and the mercantile faction of the Northeast (including Webster), Congress passed a mildly protective tariff in April 1816 under the influence of John C. Calhoun.[7]

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[5] Joseph Story to Nathaniel Williams, February 22, 1815, William Story, ed., *Life and Letters of Joseph Story* (Boston: Little and Brown, 1851), 1:253-254.

[6] James Madison, "Annual Message to Congress," *U.S. House Journal*, 1815, 14th Cong., 1st sess., 5 December.

[7] The charter of the first Bank of the United States had been allowed to lapse in 1812 under heavy opposition from the Republican states. Opponents of the bank had stressed the argument originally raised in the First Congress: that the power to charter a bank had not been among the powers delegated to congress. Pennsylvania, in particular, had deployed the doctrine of state legislative review, so forcefully articulated during the Olmsted crisis. It reasoned from the nature of the general government, rather than the text itself. The people, it argued, created a central government for national purposes, and reserved to themselves the "right and authorities" not delegated. Each party acceded as a state to a treaty of union. As a result, "the general government was not considered the exclusive or final judge of the power it was to

The re-charter of the bank, in March 1816, was a testimony to the conversion of many republicans to the nationalist point of view. Even Madison, a Democratic-Republican, signed the bill.[8]

The issue of internal improvement in roads and canals proved more difficult for the President. Under the leadership of Calhoun, Congress proposed to use the $1.5 million bonus from the National Bank's new charter as a fund for internal improvement. Calhoun justified this, as Hamilton had as Treasury Secretary with the general power granted to Congress to spend money for the general welfare. According to Calhoun, a "plain, good sense" reading of the Constitution was more plausible than a reading that limited spending to the enumerated powers.[9] Madison disagreed. On his last day in office, he vetoed the Bonus Bill as an unconstitutional exercise of power. His reliance on the Constitutional balance between state and federal governments echoed the "Partly National and Party Federal" description of the Union articulated by Publius in Federalist Thirty Nine, an expression that should be taken as the essence of moderate Republican thought. Returning to the doctrine of enumerated powers, Madison stressed that no "just interpretation" could include it among those powers necessary and proper for

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exercise; for if it were so to judge then its judgment and not the constitution would be the measure of its authority." Virginia, also a bastion of republicanism, stressed that the power to charter the bank was vested in the states, not Congress. A congressional re-charter, would be a usurpation of its sovereignty. (Pennsylvania, January 11, 1811, *Senate Journal of Pennsylvania*, quoted in *State Documents on Federal Relations: The States and the United States*, ed. Herman V. Ames (New York, Da Capo, 1970), 53-54. See also the Virginia's resolutions against the bank, SDFR, 54).

[8] During the war, the Treasury Department faced a severe shortage of credit and consumers faced a run on specie in the states outside New England. Under the leadership of Calhoun and Henry Clay, and with the assent of Madison, the constitutional defense of reserved powers, which was so fiercely asserted in 1811, was nearly absent. Calhoun argued cogently that given the vast amounts of paper money issued by the states, a national bank was the only practical means by which Congress could regain control over its constitutional power to issue the currency. It was necessary under the circumstances faced by the nation (Bray Hammond, *Banks and Politics in America, from the Revolution to the Civil War* (Princeton, Princeton University Press, 1957), 227-237). See also James Madison to C. J. Ingersoll, February 2, 1831, *Letters and Other Writings of James Madison* (Philadelphia: Lippincott, 1865), 4:160-161.

[9] John C. Calhoun, *U.S. House Journal*, 1817, 14th Cong., 2nd sess., 4 February.

government, because it could not be tied to a specific purpose of government. To the suggestion that the commerce clause might be available to justify the bill, Madison flatly replied that such a construction would distort the "ordinary import of the terms" as originally understood by the Founders caught in the grip of a crisis of trade in 1787. Madison probably meant that commerce did not constitute the ability build roads, but to regulate trade "among the several states." In his later years, Madison explained that the commerce clause had been intended as a restraint on state power and a guarantee of private liberty, not as a grant of expansive power to the national government:

> It is very certain that it [the commerce clause] grew out of the abuse of the power by the importing states in taxing the non-importing, and was intended as a negative and preventive provision against injustice among the states themselves, rather than as a power to be used for positive purposes of the government, in which alone, however, the remedial power could be lodged.[10]

Madison found Congress' use of the general welfare clause was even more problematic. Such a broad reading would completely negate the limits on power that the Framers had established by carefully enumerating the powers that were granted. The policy authority of Congress would expand to the detriment of the U.S. Constitution and state municipal law. Not even the Supreme Court would be able to answer this new claim of power. The courts must defer to Congress on questions of the general welfare, because issues of public policy do not lend themselves to judicial involvement. Instead, Madison argued the safer policy was the approach suggested by the enumerated character of the Constitution. By limiting Congress to spending money in pursuit of the enumerated powers, the Constitution still left to Congress the "great and important measures of Government." If the construction of roads and canals is essential, then this purpose should be added to the list of enumerated powers by the amendment process suggested by

[10] James Madison to Joseph C. Cabell, February 13, 1829, James Madison Papers, Library of Congress. Docketed to Martin Van Buren.

the Constitution itself.[11] Madison's cautionary veto message suggests that even during the heyday of nationalist legislation, the doctrine of enumerated and reserved powers was too important to be surrendered.

Despite the attempts of Congressional leaders to design a broad theory of constitutional construction, the majority of Congress accepted the rationale of Madison that constitutional amendment was required. Subsequent vetoes by Monroe (1822) and Jackson (1830) of major transportation projects reinforced the traditional Republican belief that the Constitution did not permit such expenditure. Consequently, internal improvements remained the subject of state legislative and private action. The doctrine of reserved powers remained the basis for state constitutional theorizing. The necessary and proper and commerce clauses remained unavailable for the kind of state building that the National Republicans favored.

The states had not been idle while Congress debated the constitutionality of transportation spending. While national east-west roads lay far beyond their financial capability, the states for the decade before the War had heavily invested in turnpikes and canals. In New York alone, over four thousand miles of turnpikes were constructed between 1815 and 1821.[12] The Erie Canal—the largest transportation project of the era—came at the behest of the New York legislature of 1817 and spawned an entire generation of canal building. The canal demonstrated to the nation that state projects could be both

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[11] James Madison, "Veto of Internal Improvement Bill," *Annals of Congress*, House of Representatives, 14th Congress, 2nd Session, 1060-1061. Jefferson concurred with Madison's exercise of executive review (i.e. the veto power). He considered it the Republican party's distinction from the Federalists that they considered the general welfare clause to be limited to those powers "specifically enumerated; and that, as it was never meant that they should provide for the welfare but by the exercise of the enumerated power, so it could not have meant that they should raise money for purposes when the enumeration did not place under their action" (Jefferson to Albert Gallatin, June 16, 1817, Thomas Jefferson Papers, (Ser. 1, General Correspondence, 1651-1827), Library of Congress.

[12] George Rogers Taylor, *Transportation Revolution, 1815-1860* (New York: Rinehart, 1951), 22-24.

open the interior of the nation to commerce and prove tremendously profitable.[13] These projects did not generate much political theorizing about the Constitution, because they fell within the well-established sphere of state municipal law and the reserved powers.

The Steamboat Revolution (1785-1809)

So much attention has been focused on the federal debate on internal improvement, that Constitutional scholars have neglected the importance of technological and legal developments at the state and local level. The steamboat cases demonstrate the strong and vital role that the states played in the constitutional definition of the extent of the reserved powers. Although the government was heavily involved in the legal regulation of steamboats, steam technology proved unique among transportation projects during the early Republic in its lack of direct government investment. In this area of private development, new enterprises challenged the old common-law guarantees of public navigation, traditional doctrines of legislative sovereignty, the rights of property and contract, and the rights of private inventors against the public, while reshaping the concurrent authority of the states over commerce and patents and the regional course of economic development.[14]

Before the development of canals, steamboats, and improved roads, the vast majority of the American countryside lay beyond the reach of affordable transport for the commercial farmer. The cost of shipping goods to market over land was prohibitive to the extent that water transport was universally favored from the colonial period until the development of rail transport. Even on major rivers like the Hudson, Delaware, Potomac,

[13] Taylor, 32-36.

[14] Taylor, 67.

and especially the Mississippi, upriver transport proved slow and difficult. For instance, the journey down the Mississippi from Pittsburgh to New Orleans (1,950 miles) could take a month floating downstream by barge. Returning by land might take four months. Steamboats revolutionized passenger transport almost immediately and promised to open the West to cheaper consumer goods by allowing easy transport upstream.[15] Many Republicans hoped that the better communications that accompanied improved transportation would bind the fractious Union together. Fulton hoped, "The union must be kept from dismemberment by bonds of strong communication, education, and art."[16] Into this unique opportunity for technological growth and business investment, men of political genius, wealth, oratory, and scientific ability brought their considerable energies to bear to accomplish… both bind the nation together and secure their personal fortunes.

Successful steamboat development demanded more support than the technical genius of a Robert Fulton. It required a wealth of legal and financial support to make the technology profitable. Equally important, would-be entrepreneurs required weighty political patronage to succeed. Three men were integral to bridging the cultural divide between the eighteenth-century world of kinship ties, aristocratic privilege, and entrenched wealth with the new world of democratic politics, commercial enterprise, and business partnership. Robert R. Livingston had been Chancellor of New York and, while in political decline by 1807, still maintained deep financial pockets and networks of kinship with many of the influential landowners in the state. Aaron Ogden had been a senator and the last Federalist Governor of New Jersey. Thomas Gibbons was a wealthy planter from Georgia with a keen business sense and a reputation as an intractable lawyer

[15] Taylor, ch. 4.

[16] Cynthia Owen Phillip, *Robert Fulton: a Biography* (New York: F. Watts, 1985), 244.

and political strategist. For Livingston, Ogden, and Gibbons, success depended upon multiple sources: their financial resources (needed to sustain long and successful legal battles and to constantly improve their boats), forensic skill, political connections, and personal business acumen.

For many inventors, the hopes of profiting from their invention failed because they lacked these resources. As early as 1787, two American inventors, James Ramsey and John Fitch, had produced working steamboats capable of traveling at four miles per hour. Ramsey's model employed an innovative water jet propulsion system that secured the active support of George Washington and the Philadelphia scientific community. But even after obtaining patents from both Virginia and Maryland, Ramsey could not secure a profitable base for his business. In the same way, John Fitch made surprising technical breakthroughs with his stern paddle steamboat. Despite the support of private investors and monopolies from Delaware, Pennsylvania, New Jersey, and New York, Fitch could not sustain enough interest on the Delaware River for a passenger line.[17]

The research and construction of functioning steamboats required a heavy investment of capital. Ramsey and Fitch had both turned to the federal Patent Office to grant them the exclusive use of the steam engine and a profitable domestic monopoly. This patent would help persuade investors to support their enterprise. Their hope that a U.S. patent would secure an exclusive market proved false. In 1791, the Patent Office accepted the claims of *both* Fitch and Ramsey on the same day. By accepting both claims, the patent office offered little security to future inventors. Had a third patent closely modeled on the first two with minor modifications been presented, it is likely that

[17] Jack L. Shaenga, *Who Really Invented the Steamboat? Fulton's Clermont Coup* (Humanity Books: New York, 2004), Ch 6 and 7; and Maurice G. Baxter, *Steamboat Monopoly: Gibbons v. Ogden, 1824* (New York, Knopf, 1972), 6.

the patent office would have accepted it as well. No attempt was made to determine which inventor had an original design. Without an exclusive national privilege and with poor financial return, Fitch and Ramsey left for Europe in pursuit of richer markets.[18]

Given the failure of the U.S. patent to offer security to steamboat inventors, new inventors turned to state government to protect their inventions. New York held near total autonomy over transportation development on the Hudson River, precisely because patents were so weak. The constitutional reluctance of the federal government to fund internal improvements also created a lack of legislative authority that New York readily assumed. Private entrepreneurs understood that state regulation was necessary to provide security for their business investments and intellectual property. In the case of the steamboat, when Robert Livingston began to investigate steamboat technology, he ignored the U.S. Patent Office and appealed directly to the New York Legislature for support. By 1798, Livingston had already served as Chancellor and was actively campaigning for governor. He persuaded the legislature to repudiate Fitch's monopoly, because Fitch had never operated a boat in the state.[19] He justified his request for an exclusive privilege because the "uncertainty and hazard of a very expensive experiment" would make it unwise to proceed without assurances from the legislature. The legislature promised him a fourteen-year privilege, but only if he could prove his boat could travel four miles per hour up the Hudson River within a year.[20]

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[18] Shagena, ch. 8; and Baxter, 6-7. A cogent argument could be made that because Fitch and Ramsey's inventions rested on such different methods of propulsion, they both deserved patent protection.

[19] Baxter, 8-9.

[20] New York Assembly, 27th March 1798, in "A Review of the Letter Addressed by William Alexander Duer, Esquire, to Cadwallader Colden, Esquire, in Answer to Strictures Contained in his 'Life of Robert Fulton' Relative to Steam Navigation, With an Appendix Containing the Acts of the Legislature," (New York, 1818), 24. Livingston's initial grant came at the expense of previous inventors The New York

Livingston in failed his initial efforts to build a steamboat. Despite the aid of inventors John Stevens and Nicholas Roosevelt, Livingston could not perfect the technology. The boats he laid down were broken up and sold at a loss. Fortuitously, Jefferson appointed him a minister to France. While in Europe, Livingston had occasion to meet Robert Fulton who was working on developing underwater torpedoes and convinced Fulton to partner with him in the venture. The legislature recognized the potential of the partnership with repeated offers of an exclusive grant in 1803 and then in 1807. With Livingston's backing, Fulton successfully ran the *Steamboat* up the Hudson to Albany in 1807. Fulton's boat was deemed to meet the conditions required by the 1807 statute. Using his considerable political influence, Chancellor Livingston was able to secure an extension of the monopoly to thirty years and a provision that anyone navigating "by fire or steam" without a license, would forfeit their boat to Livingston and Fulton and pay penalties.[21]

Despite these extreme penalties, the *Steamboat* was quickly challenged by a rival. In 1808, Livingston's brother-in-law and former partner, John Stevens launched a ferry service from New Brunswick, NJ to New York City based on research he and Roosevelt

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Council of Revision objected to the proposed law as a violation of Fitch's property rights. The rights vested by the legislature, argued Judge Genson, were not revocable by the legislature once vested (Council of Revision, 23 March 1798., in "A Review of the Letter Addressed …", 24-25). The Legislature moved to repeal the grant to Fitch in 1799 to support its grant to Livingston. Given Livingston's later assertion that his contract with the state could not be repudiated, his deprivation of Fitch's rights was particularly ironic. The potential conflict was averted by tragedy, however. While the New York Legislature was repudiating his grant, John Fitch died of a drug overdose in Kentucky in 1798, so the point about his vested rights never became an issue (Shanega, 203-204). Ramsey had already died in 1792 while pursuing a patent in Europe. His patents had also expired and posed little threat to a new inventor.

[21] "An Act Relative to a Steamboat," April 5 1803; "An Act to Revive an Act, entitled, 'An Act Relative to a Steam Boat,'" April 6, 1807; and "An Act for the Further Encouragement of Steam Boats, on the Waters of this State, and for Other Purposes," April 11, 1808, in "A Review of the Letter Addressed…", Baxter 11-13.

had continued while Livingston was in Paris.[22] The new boat's (*Phoenix*) top speed of six miles per hour posed a significant threat to Livingston and Fulton as did the Federal coasting license for which Stevens planned to apply.[23] Initially, it seemed Livingston and Stevens might combine their interests, but negotiations quickly broke down over money. Because they were related by marriage through Stevens' sister Mary, Livingston and Stevens confined the dispute to their personal correspondence to avoid dragging their family into the courts.[24]

The correspondence between the brothers-in-law raised most of the arguments that were later deployed in the steamboat cases. The acute legal mind of Livingston stressed the positive law authority of the legislature to grant monopolies, while the entrepreneurial drive of Stevens preferred the protections offered to intellectual property by patent right. In a private letter to Stevens, Livingston stressed that the state possessed a sovereign power to promote science by rewarding innovation. Hence, Livingston's own great public service and the genius of Fulton justly deserved a reward from the state. This reward took the form of a "contract" explicitly acknowledged in the 1808 law. Fulton and Livingston had provided the state with a steamboat service of three ships in

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[22] Baxter, 19-20.

[23] Phillip, 216-220.

[24] Shagena, ch. 12; George Dangerfield, *Chancellor Robert R. Livingston of New York, 1746-1813* (New York, Harcourt, Brace, 1960); and Phillip are the best sources on the debate. See also Thomas Hughes Cox's dissertation, "Courting Commerce: Gibbons v. Ogden and the Transformation of Commerce Regulation in the Early Republic," (Ph.D. diss., State University of New York at Buffalo, 2004). Cox's dissertation offers a far more detailed treatment of the case in his dissertation than I could hope to accomplish in one chapter. Cox's account builds upon the social and cultural legal history of the last fifty years, including the work of J. Willard Hurst and Morton Horwitz. It stresses how "legal elites used *Gibbons* to encourage economic development and social change" (viii). My approach, emphasizing sovereignty, state legislative authority, and rights of property, necessarily offers a different perspective, focused less on the social history of ideas and more on the internal grammar and language of Early American Constitutionalism.

exchange for a thirty-year exclusive grant.[25] Livingston believed that a contractual state grant would provide a firmer ground for investment than a patent. Even if another inventor secured a patent, the state's municipal laws could control the use of the patent within the state. He wrote to Stevens, "Were a man to patent a new musical instrument, would that give him the right to play in your garden and set your children to dancing when you wished them to study?"[26] For Livingston, the sovereign power of the state to regulate the details of life trumped any patent that the federal government might grant.

Because the NRSC believed the sovereign power of New York was sufficient, Fulton had chosen to not file for a federal patent. In contrast, Stevens relied heavily upon his federal patent and coasting license as justifications for his right to ply the Hudson with his ferry. Stevens challenged Livingston that Fulton had not even really invented anything, but merely combined existing inventions into a working model. Furthermore, the state of New York should not be able to interfere with the paramount power of the national government to patent. The New York State monopoly was also an unconstitutional violation of national authority over commerce "among the states." Finally, he disagreed with Livingston that the monopoly's services to New York justified the grant: "Monopolies are very justly held, in every free country, as odious." Nothing could justify such a grant of special privilege.[27]

In his 1808 reply, Livingston adopted a more moderate tone in the hopes of a financial partnership yet threatened a lawsuit if they could not reach an agreement. On the one hand, Livingston argued that the entire nation, with the exception of New York,

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[25] Dangerfield, 411-414.

[26] Robert R. Livingston to John Stevens, April 1808, quoted in Phillip, 210.

[27] Baxter, 20, and Phillip, 222.

was open as a market to steamboats, and Stevens could thus use Fulton's technique profitably in other states without fear of legal repercussions and with their blessing.[28] On the other hand, New York state law clearly vested in Livingston and Fulton a right of property that is "full and clear" unless in blatant contradiction of the U.S. Constitution.

Livingston began from the assumption that sovereignty had been divided between the states and the general government. Reasoning from the general structure of The Union, Livingston stressed that the state power to regulate property was concurrent with federal power; while the U.S. Constitution clearly did contain powers over patents, those powers existed to confirm pre-existing natural rights, which the states were already regulating. By arguing that "All property must be held subject to the conv[entions] of the community," Livingston concluded that the power of the general government to support the natural right of property in patents was concurrent with the right of the community to regulate property subject to its own conventions:

> …the states and Congress have concurrent jurisdictions in matters that are vested but not exclusively vested by the constitution in Congress. The right to grant patents, is not among those which the states are prohibited from exercising. The Congress also enjoy it, & will most exclusively possess it because of the great extent of their jurisdiction.[29]

The argument for concurrent regulation of commerce would become a prominent part of New York's defense of its sovereignty.

Concurrent jurisdiction over technological development offered a new perspective on the federal principle. Instead of dividing sovereignty according to function (whereby the national government might be said to have full authority over the war power and the

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[28] Stevens later admitted that while he himself had made unique strides in perfecting steamboats, Fulton had been the first to employ paddle wheels mounted on the side of the boat and he had a considerable advantage in miniaturization (John Stevens, "Letter relative to Steam Boats, addressed to the Editors by John Stevens, Esq. Of Hoboken, (NJ), *The American Medical and Philosophical Register*… Apr. 1812; [American Periodicals Series online, pg. 413]).

[29] Robert R. Livingston to John Stevens, January 18, 1808, New Jersey Historical Society.

state hold full power over education), sovereign power over some functions could be shared. Concurrent sovereignty had more in common with the multi-leveled associations of Revolutionary political grammar. It emphasized the de facto division of the usufruct of sovereignty by the Revolutionary people, more than the careful enumeration of powers in the Founder's Constitution. According to Livingston, the enumerated powers in Article I section 8 in Congress were also to be exercised by the states unless they were explicitly prohibited from exercising them. While the Union was paramount in the case of a conflict, those conflicts would be rare. States were accustomed to the limited exercise of legislative sovereignty during the Confederation Era over economic development and patents. They had only surrendered the powers when specifically demanded by Congress and the federal courts. Livingston and the state of New York consistently averred that they would submit to federal authority when the central government made a valid constitutional claim.

The dispute between Livingston and Stevens over concurrent sovereignty continued to fester throughout the winter of 1808. While they maintained a polite correspondence, each invested heavily in improving their steamboats for the spring thaw. Both understood that the conflict would ultimately be settled outside the courts because neither man wanted to subject his family to a lawsuit. Instead, they focused their energies on securing an advantage. Livingston received an informal written opinion from the Secretary of State, James Madison that New York could ban a patented item within its jurisdiction, while Fulton improved the speed and profitability of the *Steamboat*. By July, it carried 140 up to Albany in one trip and was making over $1,000 per week in profit. Stevens continued to run his ferry route from Amboy and Hoboken to Albany

without a legal challenge, but as the *Steamboat* proved difficult to compete with, he grew more amenable to compromise.[30]

In the end, the dispute was settled more by the monopoly's legal advantages than by the niceties of the constitutional theory. In 1809, facing rumors of competition from a new company in Albany and the hint of a steamboat operating on Lake Champlain from Canada,[31] Livingston and Fulton proposed a legal compromise to Stevens. First, they offered to split the national market with Stevens granting him the Delaware, Chesapeake, Santee, Connecticut, and Savannah Rivers for seven years. To pressure Stephens to take the offer, they licensed John R. Livingston, Robert R. Livingston's brother to employ their newly built boat, the *Raritan,* between New York and New Jersey (between Sandy Hook and Powles Point) in direct competition with Stevens. John Livingston threatened to cut his rates to one-third of Stevens and secure an injunction against him for violating the 1808 law. In addition, Fulton secured a federal patent for his invention. Faced with these threats, Stevens took the proposed franchise from Livingston and Fulton and left to run a passenger line on the Chesapeake and Delaware.[32] Livingston also recognized that a lawsuit could potentially cost them their lucrative monopoly. It proved safer to compromise than to risk the forfeiture of his monopoly before the courts. Livingston and Fulton would still enjoy the strong protection of the monopoly in New York and the protection of Fulton's patent.

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[30] Dangerfield, 414; Baxter, 21; Phillip, 222-234; Shagena, 367-369.

[31] Phillip 228-234.

[32] Stevens, "Letter Relative to Steamboats," 425; Phillip, 229; Baxter, 21.
Fulton, Livingston, and John Livingston subsequently subscribed to his steamboat company (Dangerfield, 414). Stevens successfully brought steam service to the Delaware and continued to improve his boats. He later became the only steamboat pioneer to begin the transition to railroads (See Shagena, ch. 12).

The Livingston Monopoly (1809-1815)

The Failure of Patent Protection

Today, inventors might expect a U.S. patent to provide security for intellectual property rights. In 1811 however, Fulton was deeply frustrated by his attempts to defend his patent and the difficulties of complying with the requirements of a patent application. Opponents of the monopoly gleefully pointed out that Fulton had copied tables from other technical manuals and had failed to patent original items. Technically, the items presented for patent—a combination of parts on a ship, including sails!—were not patentable at all.[33] Concomitantly, U.S. Patent Commissioner William Thornton was privately speculating in steamboat technology himself and thus had little personal interest in ensuring that other inventors properly applied for their patents.[34] Because many of the steamboat components patented by Fitch and Thornton in the eighteenth century were now in the public domain, it is surprising that Fulton eventually succeeded in obtaining a U.S. patent.

Even if Fulton had possessed an impeccable patent, the power of the federal government to enforce patents was weak at best. Eli Whitney (cotton gin inventor) complained to Fulton in 1811, "A patent is but a species of right which but a *few* can acquire & will always be liable to be trembled under foot by the many." A suit for infringement inevitably had the facts tried by a local jury that was more sympathetic toward the local infringer than the distant inventor.[35] Fulton's patent ultimately collapsed when challenged by steam towboat inventor John Sullivan of Massachusetts. U.S. Patent

[33] Phillip, 211-214; (from NJ and NY legislative hearings) Shaenga, 379.

[34] Shagena, 371

[35] Eli Whitney to Robert Fulton., March 30, 1811, quoted in Phillip, 265.

Commissioner William Thornton had advised Sullivan to challenge Fulton, not on the originality of his invention, but on a fault of the application process. Even with the sympathetic Eli Whitney on the arbitration committee, the committee ruled unanimously for Sullivan.[36] Fulton's faulty patent surely made him more vulnerable to future lawsuits. Understanding the weakness of the patent process, Livingston was wise to seek a firmer ground for the steamboat line in New York statutory law.

Opponents of the monopoly soon turned to the U. S. government to balance the economic dominance that New York had granted to the NRSC on the Hudson River. Like Stevens and Sullivan, other opponents of the Livingston-Fulton monopoly tried to develop the federal power over patents into a counterweight to the state monopoly. They argued that Congress had been given exclusive and not concurrent authority over patents. The argument over patents quickly devolved into a contest between the supremacy of the federal government, and the authority of municipal law or the state police power to regulate federal patents. Because Fulton's patent itself proved clumsily executed, it could not sustain his patent rights against other inventors who more carefully secured their patents. In addition, Thornton believed that the states could not restrict river navigation against a patented ship and was quick to tell anyone who asked that New York's monopoly was a violation of U.S. rights to grant patents. The security of Fulton's grant, then, depended on the power of the state of New York to grant exclusive use to his patent and regulate other patents on grounds of public health, safety, or (in the end) simple

[36] "Petition of John L. Sullivan," March 5, 1817, and "Report of the Committee on the Sullivan Petition," in William Alexander Duer, *A Letter Addressed to Cadwallader D. Colden …* (Albany, E. and E. Hosford, 1817), appendix T, 120-124; and Phillip, 305. The committee consisted of former senator James Hillhouse for the Government, Eli Whitney for Fulton's heirs, and Theodore Dwight for Sullivan.

expediency. In the aggressively competitive business climate of the Early Republic, opponents of the monopoly power turned to the courts to challenge it directly.

Livingston v. Van Ingen (1811-1812)

The lull in competition secured by the departure of John Sullivan for the Delaware River was brief. In the summer of 1811, a company comprised of approximately two dozen Albany businessmen including James Van Ingen, (henceforth referred to as the Albany Company), built and ran the *Hope* from Albany to New York City in direct competition with the *Steamboat.* Because the *Hope* was very nearly a direct copy of Fulton invention and the businessmen's superb local advertising was winning the upstate market, Robert R. Livingston and Robert Fulton felt it worth the risk to test their monopoly in court.[37] Rather than risk a jury trial for patent violation, they first filed a bill for an injunction in U.S. Circuit Court for the District of New York, headed by their kinsman Justice Henry Brockholst Livingston.[38] Justice Livingston denied that the circuit court had any jurisdiction over patents as a court of equity, and ruled that it would be improper for the court to engage in "interposition" against the state. He pointed to the state Chancery court as the proper tribunal to grant them an injunction.[39]

Fulton and Livingston took Justice Livingston's advice. Their bill in Chancery relied heavily upon the arguments for state sovereignty that Livingston had developed against John Stevens. New York had justly rewarded Livingston and Fulton's North

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[37] Anonymous, "Steam Boat Controversy," *Archives of Useful Knowledge, a Work Devoted to Commerce, Manufactures, Rural…* 3 (July 1812): 1; [American Periodicals Series Online, 98]; Phillip, 266-268.

[38] Fulton had married Robert R. Livingston's second cousin Harriet in January of 1808, so he too was related to the justice by marriage (Phillip, 216).

[39] Livingston et al. v. Van Ingen et. al. (Circuit Court, D. New York 15 F. Cas. (1811); U.S. App. 264).

River Steamboat Company (NRSC) for the hard work, financial investment, and time with an "exclusive privilege" for thirty years. Livingston and Fulton's contract with the state entitled them to an injunction to restrain the Albany Company from operating. They believed state statutory law was sufficient to decide the case. In answer, the Albany Company mirrored Stevens' arguments that the monopoly contradicted the patent and commerce clauses of the U.S. Constitution. [40]

While Chancellor and Republican leader John Lansing refused the injunction, his opinion did not repudiate state legislative power as completely as most scholars have suggested.[41] Lansing acknowledged that the states had possessed sovereignty when the original grant was made to Fitch in 1787, although some of that sovereignty had devolved on the Confederation by acts of the states. However, the Constitution had changed the character of the government, granting to it real power over patents and commerce. Because Lansing's opinion was confined to refuting the NRSC's reliance on statutory law, he disregarded the issue of patents and scientific progress. The matter in question was the power of the state to grant exclusive privileges or monopolies. Here, Lansing alluded to the distinction between a grant from executive prerogative, which under common law had been called monopoly, and the just power of a legislature. A legislative right to regulate navigable waters for a public purpose was "unquestioned" in his belief, but the case did not make it necessary to determine how much this right was limited. His

[40] Robert R. Livingston and Robert Fulton v. James Van Ingen, H. Boyd, and Twenty Others, Respondents, Court for the Correction of Errors of New York, 9 Johns. 507 (NY Ch. 1811).

[41] Phillip explains that Lansing argued from the Common Law and stressed the "perplexity" of the case (268). Baxter also emphasizes the ancient precedent that Lansing deployed against the monopoly and a "preference for exclusive national power" (23). Cox has the most thorough analysis of Lansing's opinion, but he misses the deference of Lansing to State legislative power and precedent. Interestingly, Cox suggests that Lansing had deep financial ties to the Albany Company and correspondence with U.S. Patent Commissioner Thornton that could have biased his opinion (112-115).

nod to existing doctrine on legislative power shows Lansing's careful efforts not to challenge state authority too directly.[42]

The strongest challenge to the state-granted monopoly came from the common law. Lansing downplayed the constitutional conflict suggested by the Albany Company. Lansing cited the privileges and immunities clause, the patent power, and the commerce clause to acknowledge tension between the U.S. Constitution and N.Y. Statues. Yet the acts were not fundamentally in violation of the rights of citizens, of federal patents, or of interstate commerce because Livingston and Fulton had scrupulously avoided potential conflicts. The NRSC had justified the monopoly as a municipal law regulation of the other patents. Municipal law or police powers jurisdiction allowed the states to regulate federal patents regarding their effects on public health, safety, or nuisance. Lansing found the ground to overturn this argument in traditional common law liberty. He stressed that the acts respecting steam navigation were not a grant to operate a specific type of machinery, but of the right to navigate in general. Under the common law, however, New York's grant of navigation was in fundamental conflict with traditional liberty. Lansing explained: "Sound maxims of justice and jurisprudence … from able and learned jurists" stretching from Justinian through Magna Charta to Blackstone emphasize the *jus publicum* to free usage on the seas and navigable rivers, which even the king could not bar.[43] Parliament and the New York state legislature had both, on

[42] Lansing's opinion is contained in Livingston v. Van Ingen, 9 Johns. 507 (1811); (N.Y. LEXIS 212) 17-41.

[43] Blackstone himself emphasizes that "the element of air and flowing water, are incapable of any other than a usufructary property." (Lansing citing, but not quoting Blackstone (2 Bl. Comm., 14).) The Justinian Code, the basis of much European civil law, in several places emphasized that the rivers and seas are public property. Holt (6 Mod., 73) ruled that a royal grant could not impair the public right of passage (Ibid, 20-27). The *jus publicum* are the collective public rights to the use and enjoyment of lands and water for the

occasion, regulated navigation by creating wharves, but neither had ever gone so far as the monopoly granted to Livingston and Fulton. "It would certainly seem," opined Lansing, "that it was considered contrary to the *jus publicum*" that an exclusive grant of navigation right could be made.[44]

Building the common law into a federal legal principle, Lansing implied that the *jus publicum* might restrict all legislative sovereignty. A right to public navigation could operate as a rule of law over the legislature, both in its own right, and through its incorporation into the "privileges and immunities clause" of Article IV, section 2. Suggesting that the Constitution "intended to secure equal rights to all" through the common law, Lansing challenged the very possibility that a contractual right of property made in statutory law could be "legally carved out of the *jus publicum* of the citizens of the United States."[45] Yet at the very moment, when Lansing boldly suggested the incorporation of the common law into constitutional rights, the Chancellor retreated. Out of deference to the state legislature, he refused to undertake such a significant review of legislative authority. He stressed instead that the complexity and "novelty" of the

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purposes of commerce, recreation, fishing, or other public purposes. Traditionally, the state cannot transfer these properties into private ownership.

[44] Ibid. 27.

[45] Ibid. 30-31. Barron v. Baltimore, (32 U.S. 243 (1833)), decisively ended the thought that a broad rights of national citizenship might be incorporated into the privileges and immunities and applied against the states . For more on the debate surrounding the incorporation of rights of national citizenship into the Constitution see Charles Fairman, "Does the 14th Amendment Incorporate the Bill of Rights, The Original Understanding." 2 *Stanford Law Review*, 5 (1949); William Crosskey, "Charles Fairman, Legislative History and the Constitutional Limitations on State Authority," *University of Chicago Law Review* 22 (1954): 1; E. M. Maltz, "Fourteenth Amendment Concepts in the Antebellum Era." 32 *The American Journal of Legal History*, 305, 335. (1988); and Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* (Cambridge: Harvard University Press, 1977; Indianapolis, Liberty Fund, 1997).

questions raised sufficient doubts to prevent an injunction from issuing against the Albany Company. [46]

Livingston and Fulton immediately appealed to the Court for the Correction of Errors for reversal.[47] Livingston and Fulton employed Cadwallader David Colden, Fulton's personal lawyer, and Thomas A. Emmet, an Irish-American with a reputation for brilliant oratory. Their core argument emphasized that the supreme, sovereign state power was bound to protect their property rights by its contract in the 1808 law. The appellants challenged Chancellor Lansing's opinion that a monopoly power was inconsistent with the *jus publicum* of navigation. Such a radical doctrine would dangerously limit the sovereignty of the states. The power to grant exclusive privileges is a power "inherent in every sovereign and in every regular government … exercised for the promotion of industry, enterprise, commerce, science, and the arts."[48] The appellants argued that the legislature possessed intrinsic sovereign power to vest them with an exclusive grant of navigation; it did not need a municipal health or safety justification. Lansing's opinion unduly emphasized the limits of royal prerogative; the legislature itself was not so limited. Citing Lord Hale, counsel for Livingston stressed that "the parliament may control the *jus publicum*, as to navigable waters, though the king

[46] Lansing's exact words are a masterpiece of evasion: "These are questions which, at the first blush, must appear of much moment; certainly too much so to admit of being determined without the fullest investigation. Without meaning to decide upon any, the mere propounding of them must carry conviction to every mind that the subject is involved of much doubt and difficulty, and that, from novelty, its importance and perplexity, it constitutes a case incapable of being considered so clear and plain as not to admit of doubt, which is the only ground upon which an injunction could have been granted on the bill of complaints" (Livingston v. Van Ingen, 31).

[47] The court consisted of the New York Supreme Court, sitting together with the Senate and acting as a court of review for judicial opinions (Baxter, 23).

[48] Oral Argument, Livingston v. Van Ingen, 41-42.

cannot."[49] Against a common law conception of sovereignty, limited by natural law, they posited a theory of absolute legislative sovereignty to make positive law, limited only by the higher positive law of the Constitution. In so doing, however, Colden and Emmet abandoned the Revolutionary Whig principle that the legislature was bound by a constitution of customary right. New York, they claimed, possessed the power to do everything that not been specifically enjoined by the U.S. Constitution.

Counsel then returned to the agent that the monopoly, was in fact a municipal regulated "air and water … to prevent public injury." [50] This power, they asserted, clearly could be held concurrently by the states and Congress. Congress might prohibit the importation of slavery, but so can the states. Congress might patent an item, but the state under municipal law still reserves the right to prohibit "an immoral or blasphemous book or a noxious medicine."[51]

Because Congress already possessed power over commence and patents, it became necessary for New York to develop the doctrine of concurrent powers, so that the states could also exercise their authority in this sphere. Livingston had developed this argument in his correspondence with Stephens in 1808. Now, the counsel for the NRSC found the doctrine in the text of the U.S. Constitution. As they explained, "All power not, in its nature, exclusively vested in Congress, not expressly prohibited to the states, remains concurrent in the states." Following their reasoning, Article I sec. 8 enumerates

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[49] Ibid., 42.

[50] Ibid., 44-48.

[51] By stressing that states had the power to regulate property on the grounds of nuisance, health, or morals, the monopolists unwittingly opened themselves to future criticism. Opponents would argue that the monopoly was not really a regulation of property grounded in municipal law, but the kind of grant to navigation rights asserted by Lansing. When the question over inter-state commerce arose, as New Jersey businessmen challenged the monopoly, the courts recognized that the monopoly was actually a regulation of commerce, and not a municipal law.

what Congress is permitted to do; however, the states also exercise these powers concurrently unless explicitly prohibited by the Constitution (Art. I sec. 10). They argued that if Congress had exclusive authority, as in the power of making war, then that power has been alienated from the states. But the power to promote science, Emmet argued, was necessary for both states and Congress. To be sure, if a specific Congressional statute conflicted with state law, than the state must yield to the supremacy of the national government in their exercise of a concurrent power. But "the rights of the states are not to be explained away by metaphors and figures of speech." [52] To drive out the state jurisdiction, counsel for NRSC explained that there must be a "complete, entire, and exclusive" legislation by Congress. In consequence, however, the NRSC opened itself to the possibility that the court might reject the idea of concurrent sovereignty, and that the state would lose all practical authority over steam navigation.

The counsel for Van Ingen faced a daunting challenge. They were bound to defend Lansing's ruling by the need to sustain the ruling of the lower court and prevent an injunction. Yet they were forced to argue against sovereign legislative authority before the Court of Errors, which was seated in the New York Senate. Competitors had easily undermined Fulton's patent; it proved much harder to persuade the senate to sustain Lansing's bold use of the common law against their own grant of monopoly. Where possible, counsel for Van Ingen focused their critique on Constitutional issues. They cogently argued that the patent power of Congress is supreme over the state legislature. Congress's 1793 patent law provided the legislation necessary to overrule state patents, because the Constitution made federal law supreme over state law. Such

[52] Ibid., 48-54, 87-99.

laws must be uniform across the nation to be effective, and so New York's patent power needed to be subservient to the federal power to for patent protection to be effective. Because the NRSC's monopoly did not rely on patent law, however, this argument was insufficient.[53]

Consequently, The Albany Company's main assault followed Lansing's common law critique of the monopoly. The NRSC had challenged that because the legislature had a sovereign power to limit the *jus publicum* through positive law, they did not need a municipal law justification. To undermine this claim, counsel for Van Ingen argued that the power to make municipal law qualified, but did not destroy the public right of navigation. They argued, "Every man must use his property in such a manner as not to injure another. Because a man has no right to ride over a neighbor's field without his consent, it does not follow that his horse is not his own and that he may not ride on a public highway."[54] Inventors, they implied had some right to protection of their property rights. However, in depriving other businessmen of their property rights (by seizing the *Hope* through injunction), the monopoly grantees violated both universal justice and the power of Congress to patent inventions.

The Court of Errors unanimously overturned the Chancery court ruling and ordered that the *Hope* be forfeited to the North River Steamboat Company. The conflict in *Livingston v. Van Ingen* was between the ancient common law on the one hand, and

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[53] Ibid., 69-84. Counsel also made the argument that the monopoly could also potentially defeat the power of Congress to regulate commerce. Because it could potentially defeat Congress, then the power was unconstitutional. This argument seems unpersuasive to me. A regulation that did in fact eradicate Congress' power to regulate commerce would surely be void, but no one had denied this power to Congress. No one would propose removing the state taxing power, merely because it had the possibility of destroying the state government. When Marshall challenged the Maryland tax on the Bank in McColloch v. Maryland, 4 Wheaton 316 (1819) he focused on the specific tax, not the general power of taxation. Clearly, New York had the power to regulate commerce generally in this case.

[54] Ibid., 74.

the sovereign power of the legislature on the other. The argument thus dealt significantly with the commerce clause because the conflict took place entirely within state lines. As expressed in *Livingston v. Van Ingen* (1812), New York chose its positive law contract with Fulton and Livingston over the traditional common law restraints on sovereign power. Because the court was composed of the state senate, sitting with the state supreme court, it is not entirely surprising that they vindicated legislative sovereignty. Yet the Court of Error vindicated the monopoly in such clear and striking terms that *Livingston v. Van Ingen* became the byword for legislative authority in New York. The judges largely agreed with the NRSC's contention that the state retained the power, first to grant monopolies to promote progress and second, to regulate navigation and patents concurrently. Judge Joseph C. Yates insisted that to prevent the state law from touching on commerce might "lead to the total prostration of internal improvements."[55] Neither the state nor the central government would have the power to build local roads. Judge Smith Thompson explained that the surrender of a state power to promote science was "repugnant to state sovereignty, and unnecessary relinquishing a power not contemplated by the Constitution."[56] The Court overturned Lansing's integration of the *jus publicum* into the rights of national citizens. New York refused to countenance the federal supremacy over patents and commerce suggested by Lansing's opinion, because it would lead to the evisceration of state sovereignty itself.

Chief Justice James Kent, one of the most capable legal minds of the Early Republic, gave the only opinion to advance beyond the doctrine suggested by Thomas A. Emmet and Cadwallader Colden—that state legislative sovereignty could control the *jus*

[55] Ibid., 118.

[56] Ibid., 131.

publicum. Kent opined that the central question at stake was the sovereign authority of the legislature. Rejecting any conflict between vested rights ("the fundamental principles of all government") and the grant to Livingston and Fulton, Kent stressed that the only possible conflict to the grant lay in the U.S. Constitution. If the people had given "the whole original power of the subject matter of the grant" to the United States, then the monopoly would be invalid. Accepting the idea of concurrent powers, then, it was necessary that some specific collision be found to challenge the grant:

> It strikes me as an … inadmissible proposition, that the State is divested of a capacity to grant an exclusive privilege of navigating a steamboat, within its own waters, merely because we can imagine that Congress, in the plenary exercise of its power to regulate commerce, may make some regulation inconsistent with the exercise of its privilege. When such a case arises, it will provide for itself; and there is, fortunately, a paramount power in the Supreme Court of the United States to guard against the mischiefs of collision. [57]

Kent agreed with Emmet that a state provision must only be overruled on an express violation. To overrule the state grant because it *might* interfere would be a "monstrous heresy." However, Kent recognized that should the federal courts rule against them, it would be the duty of the state to respect the courts. He did not contemplate the interposition practiced by Pennsylvania in 1809, or by Kentucky and Virginia in 1798. Kent recognized that the stability of the law required a "common umpire" to prevent a collision between state and federal jurisdiction. However, Kent thought the possibility of such a federal court undermining state law quite remote.[58]

Kent did not anticipate that existing federal law conflicted with the monopoly. Chancellor Lansing had suggested that the traditional rights of *jus publicum* might be incorporated into the privileges and immunities clause to invalidate the state grant. In

[57] Ibid., 141-158. Block quote from 157.

[58] Ibid., 155.

contrast, Kent insisted that the power of the state over the "internal commerce of the state by land and water remains entirely, and I may say exclusively, within the scope of its original sovereignty."[59] The Court of Errors decision settled the question of state legislative power, and grounded it on a Blackstonian conception of legislative sovereignty. The state was still duty bound to protect property, promote science, and permit commerce, but it was markedly free from the restraints of the common law in this pursuit. The sole restraint on the power of the legislature was the grant that the people made in the U.S. Constitution to the general government. Should an explicit conflict arise, New York suggested it would defer to the legitimate authority of the national government. Until then, "the faith of this State" required that it keep the grant it made, and punishes the disregard of the Albany Company for the law.[60] Thus in 1811, the NRSC's argument for concurrent regulation and state sovereignty was incorporated into state constitutional law.

"The War of Legislation" between New York and New Jersey

While New York had promoted the initial development of the steamboat in 1807, it now sought to stifle future innovation and competition, while reserving the benefits of the steamboat to itself and the grantees. Paradoxically, Kent's assertion of New York's sovereignty created the perfect opportunity for opponents of the monopoly to undermine it. In the wake of Kent's opinion, inventors and entrepreneurs in the several states turned to the sovereign, positive law-making authority of their own states to challenge the power

[59] Ibid., 153-154.

[60] Ibid., 179.

of New York State. New Jersey twice passed retaliatory confiscation statutes against any New York steamboat operator who might seek an injunction against a New Jersey boat (1811 & 1820). A contest quickly developed which pitted the "state rights" of New Jersey, not against the federal government, but against her "sister state" of New York. New York found that the several states would not accept New York as the "common umpire" for constitutional meaning, any more than Pennsylvania had accepted the Supreme Court in 1809.

If New York tried to protect its state legislative power from too broad a reading of the U.S. Constitution, New Jersey identified the primary threat to its state rights as New York itself. In addition to threat of confiscation by injunction in New York court, New Jersey steamboat operators like John Stevens encountered a bitter dispute about the state boundary line that further endangered their business. New York claimed that under its colonial charter all of the waters of the Hudson, up to the New Jersey shoreline. Thus, New York insisted that its grant to Livingston and Fulton included the waters outside the towns of Elizabeth, New Brunswick, Hoboken, and the Amboys. New Jersey, in response, claimed up to the center of the Hudson. The dispute became quite rancorous. New York state officials took their claim so far that they would occasionally serve warrants upon those standing on docks in New Jersey! Little wonder, then, that Stevens had eventually moved his business to the friendlier waters of the Delaware.[61]

Encouraged by the prospect of a successful challenge to the monopolists early in 1811, competitors to John R. Livingston's ferry service began to emerge on the New Jersey shore. John Stevens returned to run the *Juliana* as a ferry from Hoboken to New

[61] John D. Ward, "An Account of the Steamboat Controversy between Citizens of New York and New Jersey, From 1811 to 1824, Originating in the Claim of New York to the Exclusive Jurisdiction over All Waters between the Two States," *New Jersey History* 1, no. 9 (1862): 117-134.

York City, carrying up to 1,600 passengers per day.[62] New Jersey Governor Aaron Ogden recognized that the new steam ferries made his "ancient ferry" from Elizabeth Town to New York City obsolete. He contracted with Daniel Dod to secure an engine and mount it in the *Sea Horse*. In addition, he purchased a stake in the *Perseverance* from the Albany Company and secured Fitch's old patent rights and an U.S. coasting license.[63] For once, the monopolists faced an opponent who possessed political connections as good as their own. Ogden also enjoyed the benefit of a January 1811 New Jersey law that allowed anyone who had his steamboat seized by New York to have their competitor's boat seized in the waters of New Jersey.[64] In retaliation, New York passed a statute strengthening the monopoly further by requiring the court to enjoin unlicensed boats as they were used, and requiring that they be prohibited from any use of the boats before trial.[65] Simply by filing a lawsuit, the monopoly could shut down an opposing boat for weeks or months. Facing this obstacle, Ogden proved reluctant to try his monopoly and instead tried to buy a license from Fulton. (Livingston had died; control of his share passed to his heir, Robert L. Livingston.)[66] When Fulton demanded too much money, an exasperated Ogden petitioned both the New York and New Jersey legislatures for relief.

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[62] Phillip, 277-278

[63] Duer, *A Letter Addressed to Cadwallader D. Colden,* 19.

[64] Baxter, 26.

[65] New York, "An Act for the More Effectual Provisions Contained in an Act Entitled 'An Act for the Further Encouragement of Steam Boats, on the Waters of this State, and for Other Purposes.'" April 9, 1811, in Duer, *A Letter Addressed to Cadwallader D. Colden,* Appendix H, 93-94. The act did not affect the boats already running by the Albany Company to avoid being challenged as an ex post facto law, but definitely affected any boats constructed in New Jersey after that date.

[66] Shagena, 375-76.

In 1813, New Jersey granted Ogden sole right to navigate by steam in the waters of New Jersey. This measure placed John R. Livingston as much in violation of New Jersey law, as Ogden would be in violation of New York law.[67] Yet Ogden asked the New Jersey legislature for a still more stringent retaliatory provision against the New York monopolists. Simultaneously, he petitioned New York to repeal the 1811 law and allow him to fight an injunction through the judicial process, suggesting they might exempt the New Jersey ferries from the law.[68]

The New York legislative committee that heard Ogden's petition in February 1814 received the favorable attention of William A. Duer, a Duchess County Federalist assemblyman. Duer organized the committee meeting and neglected to invite Fulton's lawyers until a few hours before the hearing. Fulton himself was in New York City and not able to attend. Ogden gave an impressive speech, supported by "some very pretty little tin machines and models." He defended the technical merits of Fitch and Dod's innovations and disparaged the originality of Fulton's. Because Fulton did not invent the steamboat, Ogden charged that the legislative grants were defective. Colden and Emmet lacked the knowledge to answer the technical arguments but fiercely defended the monopoly with a defense of the legislative power to grant.[69]

Ogden's most powerful argument was the injustice of the 1811 law's requirement of an injunction before trial. To test the law, he would have to sail his vessel in violation of the law, and subject it to injunction before trial. This, he contended, violated the

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[67] Aaron Ogden to the New Jersey Legislature, October 29, 1813, Gibbons Family Papers, Drew University Archives, Madison, New Jersey, 22:1 (hereafter referred to as DUA); and Phillip, 284, 305.

[68] Duer, *A Letter Addressed to Cadwallader D. Colden,* 19-20.

[69] Duer, *A Letter Addressed to Cadwallader D. Colden,* 20-30; and Cadwallader Colden, *A Vindication by Cadwallader D. Colden of the Steam Boat Right Granted by the State of New York …* (Albany: Webster's and Skinners, 1818),60-68.

requirements of procedural justice in the federal Bill of Rights. By stressing his own moderation, and his preference for the judicial process, Ogden was able to gain the committee's support for his request. Over the objections of Fulton's lawyers, they reported a bill to repeal the confiscatory act, which passed the House (49-42). Allies of the Livingstons, however, mobilized to defeat the bill in the Senate, where it died.[70] Despite this defeat, Ogden could argue that the interests of the people and legal justice were served by the destruction of the monopoly

The following year, John R. Livingston used Ogden's strategy and appealed to the New Jersey Legislature to overturn Ogden's monopoly so that an NRSC boat could run into New Brunswick according to his license. In the January 1815 hearing, Emmet reversed his earlier arguments in favor of monopolies and labeled the New Jersey grant "odious in law and justice." Fulton, he asserted, deserved rewards and protection of his intellectual property, but all Ogden sought was profit. Ogden's counsel stressed the duty of New Jersey to defend her citizens against the statues of New York. According to Vattel's doctrine of the law of nations, New Jersey was required to protect its own citizens against foreign invasion. This duty was the basis of the Embargo and non-importation acts lately passed by congress. New Jersey, as a state "equally free, sovereign, and independent with the state of New York, and her privileges as such guaranteed by the federal compact" was bound by the "dictates of common reason and common justice" to defend its own citizens. If New York agreed to follow "reason and justice," and renounce its discriminatory laws, then New Jersey would also agree. The

[70] Baxter, 27-28; and Duer, *A Letter Addressed to Cadwallader D. Colden*, Appendix, "Journal from the Committee of the Whole, March 30, 1814," 98-105.

law of nations required New Jersey to act as a sovereign to protect her natural rights against New York:

> The State of New Jersey is equally free, sovereign, and independent with the State of New York, and her privileges as such, guaranteed by the federal compact, and susceptible of enforcement by the power of the union, and founded on the immutable principles of truth, justice, and equality of rights, are not to be sacrificed to the ruin and injury of her citizens on the demands of any[one].[71]

Despite the animosity of New Jersey against her traditional rival, Ogden, a Federalist, could not overcome the political obstacles in the legislature. The Federalists were out of power and in decline after the embarrassments suffered during the War of 1812. He lost the monopoly by a margin of one vote, with the legislature divided along party lines. Ogden, facing bitter denunciations from his former business partners, needed a new base of support, and the monopolists, as always, proved willing to include vanquished foes rather than continue costly political and legal battles. John R. Livingston agreed to grant Ogden a license for $600 per annum.[72]

Fulton never got another opportunity to defend his monopoly. On the return trip from Trenton in February 1815, Emmet fell through the ice on the Hudson. Fulton managed to rescue Emmet from the freezing water, but died from the exposure himself. His widow, Harriet, sold her share of the monopoly for $100,000 to a group of investors

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[71] For Southard's argument of behalf of Ogden see Lucius Horatio Stockton and Aaron Ogden, *A History of the Steamboat Case Lately Discussed by Counsel before the Legislature of New Jersey Comprised in a Letter to a Gentlemen at Washington* (Trenton, 1815), 11-18. Block quote from p. 18.

[72] Baxter, 30; Jonathan Dayton to Thomas Gibbons, [1815], DUA, 1:12; and Duer, *A Letter Addressed to Cadwallader D. Colden,* 83. Despite the victory, the hearing further damaged Fulton's claim to originality. When he appeared to testify to the originality of his claim, he produced a letter he claimed to have written in England in 1793 detailing his plans for the steamboat. Upon close examination, it was revealed to have a 1796 American watermark. This letter, which had been so helpful to his case before the N.Y. legislature the previous year, was cast into suspicion. When Fulton suggested the letter was just a more recent copy, Hopkinson replied that if Fulton could get the original from England, it would be worth the trip. (In "A Review of the Letter Addressed …," 14-18).

headed by Fulton's personal lawyer, Cadwallader Colden.[73] Thus the monopoly persevered, despite the loss of Fulton's genius. The struggle between New York and New Jersey proved a largely political contest, waged by lawyers in state legislative committee, rather than by appellant and respondent in the state supreme courts. Through the demise of the New Jersey Federalists and the strength of the Livinstons in the New York Senate, the NRSC was able to triumph in this arena. Nevertheless, the struggle demonstrated the need for a "common umpire" to adjudicate constitutional disputes while demonstrating New York's unsuitability to fit that role.

The Pamphlet War

As the clamor against the monopoly grew from New Jersey, Cadwallader Colden, as a leader of the North River Steamboat Company (NRSC), sought to defend the legislative sovereignty of the state, while beginning to recognize the limits on that sovereignty. The tide began to turn against his position. Statesmen in New York recognized that the security of its liberty, both personal and economic, ultimately depended on the security of the Union and its government. Chancellor Kent had proclaimed that, if necessary, New York would submit to duly enacted Congressional regulation of commerce. Now opposition arose from within New York against the injustice of the monopoly itself.

Despite the death of Fulton and the capitulation of Ogden, Assemblyman William Duer personally continued the struggle against the monopoly. As the Federalist Party fell out of favor after the War of 1812, Duer increasingly moved into the democratic camp of Martin Van Buren's Bucktail faction as they made common cause against De Witt

[73] Phillip, 345-349.

Clinton and his supporters, which included Cadwallader Colden.[74] Duer's critique of special privilege increasingly gained the support of the public and business community. In New Jersey, town meetings took up the cause of reform. In New York, businessmen were anxious to share in the potential profits of free navigation and repeatedly petitioned both New Jersey and New York legislatures for an end to the monopoly. This public coalition challenged the legitimacy of the monopoly and the state laws as a violation of new inventors' property rights, the due process rights of steamboat owners, and the public's right to progress in science.[75] In 1817, Cadwallader Colden published a biography of Fulton that severely criticized Duer's handling of the legislative hearing of 1814. *The Life of Robert Fulton* served dual purposes: first, as an extended eulogy for a close friend of Colden who had offered a great service to science; second, to justify the exclusive grant he had just purchased as the fitting reward for a departed genius. Duer responded with a long and detailed defense of the committee's actions in *A Letter Addressed to Cadwallader Colden* (1817), which he had distributed, to the state legislature.[76] Duer deployed his former arguments against the monopoly: first, because Fulton did not invent the steamboat, he did not deserve the monopoly; second, it concerned matters belonging to Congress under the Constitution. These arguments were familiar themes in the steamboat cases and did not significantly alter the debate. Duer's contribution consisted in his critique of monopoly laws, and his insistence that legislative sovereignty be subject to higher norms of justice.

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[74] Craig Hanyan, "William Alexander Duer," *American National Biography*, vol. 7, (New York, Oxford University Press, 1999), 16-17.

[75] Duer, *A Letter Addressed to Cadwallader D. Colden*, 29.

[76] Cadwallader Colden, *The Life of Robert Fulton, by his Friend Cadwallader D. Colden* … (New York: Kirk & Mercein, 1817); Duer, *A Letter Addressed to Cadwallader D. Colden*; and Cadwallader Colden, *Vindication*, 5.

Whereas Ogden had challenged the automatic imposition of an injunction against any violator of the monopoly as a violation the *federal* Bill of Rights, Duer now insisted that the people held a *natural* right of due process that the legislature ought not to take from the people. In *A Letter Addressed to Cadwallader D. Colden,* Duer retorted, "The legislature had no power to barter the natural rights of their constituents, in exchange for any public benefit whatsoever, or to reward even Genius—at the expense of the constitution."[77] While this argument did not constrain the theoretical sovereignty of the state, it challenged what the state, acting prudently in pursuit of justice, *ought* to do. He convincingly argued that this monopoly was not so much designed to preserve property as to promote the accumulation of further wealth. Even if the state had the power to ban a patented item or form a monopoly, the ban should proceed from "motives of general policy and the public good." [78] Government should balance the need to promote invention with special grants with the danger of creating too great a cost to future generations.

Duer's *Letter* explained that it was the legislature's responsibility to limit its own power to prevent infringements of justice. If the New York legislature had mistakenly granted rights in conflict with those vested by the U.S. Constitution, then it ought to declare that *that* law was not meant to deprive people's rights. This admission would not change an existing contract with the North River Steamboat Company, but recognize through *legislative* review the limits of its jurisdiction. If the statutory laws passed in 1808 and 1811 are "repugnant to the conditions of the constitutional compact, it becomes

[77] Duer, *A Letter Addressed to Cadwallader D. Colden,* 76.

[78] Duer, *A Letter Addressed to Cadwallader D. Colden,* 25-31. 45-50; and Colden, *Vindication*, 19-20.

the duty of the legislature to repeal them."[79] In other words, the legislature itself was the proper body to review whether its actions were consistent with the U.S. Constitution. Duer believed they were inconsistent and urged the monopoly's repeal. Duer diligently pursued this course of action, and as a state assemblyman, Duer repeatedly held new hearings of petitions for repeal of the monopoly. In 1817, he secured another bill to open the courts to a suit by John Sullivan so that he might challenge the law. Only the Livingstons' continued influence in the Senate blocked this legislation.

Colden quickly responded to the threat to his grant with the pamphlet publication of *Vindication* (1818) to answer his critics' allegations in detail. First, he answered Ogden's claim that Fitch was the true inventor. Although Colden's counter charges against Fitch's genius are unconvincing, Colden persuasively demonstrated that Fulton's invention possessed technical merit, and that the legislature duly rewarded him. Second, Colden challenged that Duer and the assembly committee held a radical egalitarian tendency against vested property rights. The grant of special privilege, moreover, was legitimate simply because it had been enacted by the legislature. While Duer believed the legislature's actions were in need of comparison to principles of justice and higher law, Colden insisted that the legislature, acting as a sovereign voice of the people, was essentially unconstrained.[80]

In answer to Duer's constitutional argument, Colden mustered the carefully reasoned arguments for legislative sovereignty he had used against Van Ingen. He insisted that the right of property found in a federal patent could be distinguished from the right of a state to regulate the use of that property. While an inventor could hold a

[79] Duer, *A Letter Addressed to Cadwallader D. Colden*, 10.

[80] Colden, *Vindication*, 17-23.

valid patent, within the jurisdiction of a state, the power of its state legislature was supreme. The legislature did not even need a nuisance or public health reason to exclude a patent.[81] Colden's insistence that the state could regulate patents in all cases, answered his critics. And while Duer had argued that the state monopoly was a grant against the common law right of navigation, not a municipal regulation of health or safety, Colden now countered that the nature of legislative power gave the states power over the federal government even in granting exclusive rights of navigation.

Nevertheless, Colden's strongest argument rested on precedent and history. Based on successful transit of the *Steamboat* in 1807, the legislature had offered Fulton a contract to give the NRSC an exclusive privilege for up to thirty years, if they would risk their fortune in a passenger line. Five state legislatures, councils of revision, and the unanimous Court of Errors had supported the grant. Now Fulton had aroused the jealousy of out-of-state competitors like Sullivan and Ogden who believed they were entitled to challenge him in the courts. Without legal protection, Fulton would have been condemned to "certain ruin…by endless and expensive lawsuits." Why should New York show generosity to "strangers" at the expense of her own citizens?[82]

By shrewdly appealing to the revolutionary and anti-federalist critique of concentrated power, Duer's *A Reply to Mr. Colden's Vindication of the Steamboat Monopoly* (1819) offered a strong republican response to Colden's defense of vested property and exclusive grants of privilege. Duer stressed that legislatures, as well as

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[81] Colden, *Vindication*, 15-16, 99-139. Colden did concede limits on the monopoly power of the legislature. If the legislature wanted to repeal the monopoly grant, it would possess the power. It could not arbitrarily take property and give it to another, but that seems to be the only limit on state power.

[82] Colden, *Vindication*, 140-159. Colden referred to the five state legislatures that passed the monopoly laws of 1798, 1799, 1803, 1807, and 1811.

kings, could commit injustice through their actions. Specifically, he argued that all monopolies are "grants against common right, and equally at variance with the principles of political economy, and the liberal spirit of the common law." They should only be created when the public good supports them or a great evil is to be avoided. He implied that the grant to Livingston was, in fact, a special privilege: "Whether conceded to court favorites, or obtained by the management of intriguing demagogues; whether their object be the private emolument of an iron crowned tyrant, or the gratification of a brawling tribune of the people: public utility is equally violated."[83] In this case, the rights of navigation and scientific property that New York granted belonged to the people of the whole Union. New York had selfishly claimed these privileges for its own citizens and barred other citizens from further innovations. The people, Duer argued, possessed a higher right than the state, grounded in "the solemn agreement of every State of The Union—they are supported by a consideration of their mutual forbearance in the exercise of the power of legislation among co-ordinate sovereignties,'[84] New York had neglected its duty to consider the needs of the whole Union.

The basic constitutional issue, Duer asserted, was not one of precedent, nor what former chancellors have argued, but one of property. Intellectual property was acknowledged to be a form of property to which the author was entitled to exclusive enjoyment. Duer acknowledged that Fulton had a just claim to this property right, so long as it did not eradicate the rights of others. To protect the rights of the public, Duer challenged Colden's absolute framework for property rights. Unlike Colden, Duer

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[83] William Duer, *A Reply to Mr. Colden's Vindication of the Steam Boat Monopoly* (Albany: E. and E. Hosford, 1819), 14-15.

[84] Duer, *A Reply to Mr. Colden's Vindication*, 118.

repudiated compact theory as the legal foundation of property rights. This Lockean liberal held that property was a natural right, which people had formed societies to protect. The defense of property rights was therefore a primary end of society. During the early Republic, the natural rights of property derived from the state of nature remained a fundamental political axiom. Colden followed this line when he argued that the sovereign power of the legislature existed to protect vested rights.[85] Duer openly "renounced all faith in that ancient speculation; and regard[ed] the 'state of nature' as one in which the genius and talents of mankind would be forever useless and unprofitable." Thus, according to Duer, property and natural rights were derived from natural, organic communities:

> The right of exclusive enjoyment in things, both real and personal, corporeal and incorporeal, is the very foundation of *property*. It is the creature of civil society, and one of the strongest ligaments by which the body politic is bound together.[86]

Conceptualizing how property rights do not arise from occupying a territory or improving it (Locke), but from the needs of society for stability and growth, Duer fully supported a liberal policy of patents for inventors as basis for "natural justice," which does not arise out of a social compact or legislative sovereignty, but out of the needs of natural, organic communities. For instance, both inventors and the public benefited when the granting of patent rights encouraged innovation. Yet if an inventor had a perpetual right to his intellectual property, then the further progress of science would be heavily impaired, and the public would never enjoy the full potential of the new idea. A limited

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[85] As Blackstone explained, "…so great … is the regard of the law for private property, that it will not authorize the least violation of it; no not even for the general good of the whole community" (1 *Blackstone's Commentary*, 139). I am indebted to Wallace Mendelson's "New Light of Fletcher v. Peck and Gibbons v. Ogden," *Yale Law Review* 58 (1949): 567 for this citation.

[86] Duer, *A Reply to Mr. Colden's Vindication*, 107-109.

natural right of intellectual property served the community, while an absolute legislative right served the few at the expense of the community.[87]

In Duer's estimation, Colden's distinction between a national property right held through a patent and the right of a state to regulate property was meaningless. Duer believed that both national property rights and state regulation were necessary, but that in the case of the NRSC, the latter had obliterated the former. Because the grant of exclusive privilege was really a grant of navigation itself, and not a regulation of it, state legislation had unjustly impaired the property rights of those holding other patents. Duer argued that a state grant of exclusive navigation effectively voided the right that other businessmen like Sullivan and Ogden had to the exclusive use of patents they held. The extreme length of the state grant would deprive the public of innovations for until the thirty years expired. Duer maintained the need for a balance between federal patent and state municipal law and, at the same time, held that the existing monopoly was considerably biased toward the grant held by Colden under the municipal law and against the rights of the public protected by federal patents.

Duer seems to have won the public to his opinion. Evidence of increasing skepticism toward the monopoly is demonstrated in the dozens of petitions sent to the New York and New Jersey legislatures for an end of the monopolies. In many cases, public appeals were driven by self-interest rather than a consistent theory of political economy. Inventor John Sullivan's petitions for an end of the monopoly, as an example, should not be read as a charge against monopolies in general because he held exclusive

[87] Ibid., 107-111.

grants from Massachusetts on the Connecticut River.[88] The various petitions from merchants, traders, and town meetings from New Brunswick (NJ) to New York to Albany, however, can be taken as a more representative sample of the increasing pressure on state legislatures to open their waters up for free trade and navigation by steam. The people of New Brunswick petitioned the New Jersey Legislature in April of 1820 that they were denied those privileges of navigation that the citizens of New York enjoyed in the waters of New Jersey. They asked that the "right of free and unrestrained intercourse between the several states," which the Constitution was supposed to secure, be made available to them. Naturally, they turned to their own legislature, and not the federal courts to secure these rights to them.[89] But the failure of the states to equitably and authoritatively mete out justice to which all parties would submit, began to bring about the decline of state sovereignty, and even more so as New Jersey and New York began to dispute the validity of the others claims.

The Intractable Thomas Gibbons (1815-1824)

In the wake of the 1811 decision against Van Ingen and Kent's reaffirmation of intrastate commerce, the monopolists' privilege seemed secure. Yet competition continued to grow on the ferry routes into New York City, against the licensees of the monopoly. In particular, a feud arose between Aaron Ogden, who held a license, and Thomas Gibbons, who did not. Initially they argued over their ferry business, but the argument spilled over into intensely personal matters. This dispute was so bitterly

[88] "Petition of John Sullivan," March 5, 1817, *A Letter Addressed to Cadwallader D. Colden*, Appendix S, 120-123.

[89] "Petition of the Subscribers, Merchants and Traders of Albany" January 18, 1817. *A Letter Addressed to Cadwallader D. Colden*, Appendix P, 112-114. See DUA, 22:1 for the flavor of the petitions.

contested that Gibbons was determined to destroy his adversary regardless of the cost. After more than a decade of successful legal defense, in 1824, the NRSC and Cadwallader Colden finally faced a competitor willing to sustain the costly legal battle necessary to destroy the monopoly.

For over a decade, an appeal to the Supreme Court on the grounds that Congress was supreme over commerce was left untried. Commerce was largely considered a "maritime, coastal, external, and mercantile" function comprised entirely of trade goods and not applicable to inter-state passenger service. If the industrialization and the explosion of internal canal and road projects were gradually transforming this understanding, the newer idea of commerce as intercourse did not immediately supersede the old one.[90] Appeals to the Supreme Court were slow to materialize because the NRSC preferred to allow competitors into the franchise before risking their lucrative grant before the High Court. Additionally, most competitors were eager to join a profitable monopoly when given the opportunity. Cooperation offered security from the risks of a volatile market economy. When an appeal to the Supreme Court finally came, it arose from the pugnacious ire of Thomas Gibbons more in his personal determination to destroy his business rival Aaron Ogden rather than from shrewd business calculation. As Gibbons explained:

> I want to gallop my case thru the courts of chancery & errors, and I don't much care what their decisions are. –My stand must be made in the Supreme Court of the United States and I must get there as soon as I can under these circumstances.[91]

Gibbons intransigence, and not the consolidating will of the nation-state, carried the case through to the Supreme Court, and provided the arena for the contest between state

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[90] G. Edward White, *The Marshall Court and Cultural Change, 1815-1835*, abridged ed. (New York, Oxford University Press, 1991), 23.

[91] Letter from Thomas Gibbons to Price, March 1, 1819, DUA, 2:4. Gibbons hereafter referred to as TG.

legislative sovereignty and federal commerce power to be fully explored. Marshall's defense of commerce as intercourse placed it under Congressional regulatory authority, sealed the fate of the monopoly, and for a time led to the decline of state sovereignty in New York.

In 1803, Georgia planter Thomas Gibbons had purchased a share of a salt meadow in Elizabeth Town that was suitable for a ferry landing.[92] Gibbons gradually increased his business and financial investments in New Jersey, largely in real estate, and he became a partner with Ogden in the "ancient ferry" to New York City. By 1813, Gibbons resided in Elizabeth Town during the summer to manage his investments there and soon thereafter granted the salt meadow as a trust to his daughter Ann Trumbull, which he managed together with his family and political allies. When Ogden petitioned the New Jersey Legislature for protection from the Livingston monopoly, Ogden presented the ferry as something he owned in his own right.[93] Gibbons quickly took offense, and the trust began to squabble with Ogden over its share of the property's rent and profits. Consequently, when Ogden lost his monopoly before the partisan state New Jersey legislature in 1815, the trust tried both to re-negotiate their agreement and then to buy the ferry outright.[94] As Gibbons and Ogden proved unable to agree on terms, in July 1815, the trust offered to either buy Ogden's share of the ferry or sell its own share if Ogden would name a price. Before an agreement could be reached, Ogden discovered that Gibbons had opposed his 1814 petition to the New Jersey legislature and sent

[92] Letter, September 19, 1803, DUA, 19:18.

[93] Petition of Daniel Coit and William Gibbons, September 27, 1814, DUA, 22:1. The other trustees were Joseph Trumbull (Ann's father-in-law), Daniel M. Coit, and William Gibbons (Thomas's son).

[94] Jonathan Dayton to TG, [spring?] 1815. DUA, 1:12.

Gibbons an extensive list of his complaints against Gibbon's interference with his personal property. As the dispute escalated, Gibbons petitioned the New Jersey State Legislature to destroy Ogden's property rights in the ferry landing, while Ogden helped pressure Gibbons' wife into filing for divorce.[95]

This ended any hope for peaceful cooperation on the ferry between Gibbons and Ogden. On July 26, 1816, Gibbons stalked the half-mile to Ogden's house to challenge him to a duel. Because Ogden was not at home (some suggest he fled out the back door), Gibbons posted a steamboat handbill to his door, challenging his "wanton interference in a case so delicate" and asking him to arrange the time and place of their duel with his

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[95] When a deal fell through, Gibbons combined with Ogden's political opponent, Jonathan Dayton, to gain control of the bank that held Ogden's loans (Dayton to T. Gibbons April 27, 1815, and May 25, 1815). Ogden had borrowed $24,000 from the bank that Dayton sat on the board of. DUA, 1:12. TG to Dayton, 27 July, 1815. DUA, 1:12. Ogden had caught wind of the Bank scheme and was outraged. The substance of Ogden's complaint was that Gibbons was meddling in his private business affairs. His list of grievances complained against Gibbons' ingratitude for Ogden's long support to Gibbons as an absentee landlord, against Gibbons' fickle offers to buy or sell the ferry, for lying in the petition Gibbons presented to the legislature, and against Gibbons' purchase of forty shares in the Elizabeth Town bank that held Ogden's loans. In reply, Gibbon attributed the petition to his allies, and fiercely counterattacked that Ogden's complaint was a "violation of my natural rights" to manage his property as he saw fit. Ogden continued to argue Gibbons' claim to the ferry, but he dropped the issue of the bank entirely. He admitted he had been wrong to challenge Gibbon's rights to do what he pleased with his property. (Aaron Ogden to TG, August 4, 1815; TG to Ogden, August 4, 1815; Ogden to TG, August 7, 1815. DUA, 1:13).

The dispute continued. Gibbons had been able to collect rent on the meadow in November, but could not buy it in full. In January, he adopted the tactic of petitioning the legislature to have all the area declared a public landing, which would have destroyed everyone's property rights. This plan, however, opened a bitter breach within his own family. His daughter Anne challenged him to buy the property back from the trust if he wanted to speculate with it. Gibbons stressed that his management of the property was in her best interest. The schemes of Ogden, he explained, would "make a highwayman blush." (Receipt, November 9, 1815; J.M. Trumbull to TG, January 24, 1816; TG to Ann Trumbull, January 24, 1816, DUA, 1:13).

Gibbons' family gradually began to side with Ogden against him. His son-in-law, John Trumbull wrote that Ogden believed "you have even contrived to hunt him, apparently with a desire to crush him. He said your current views, were, without a doubt, to destroy the ferry & break up the monopoly which constituted value of the estate." William was the exception, remaining steadfastly loyal. Upon his father's death, he received the bulk of the estate. (J. M. Trumbull to TG, January 26, 1816, DUA, 1:14). Ogden threatened to bring Gibbon's wife up from Georgia to apply pressure to him as well. When Gibbons got word in May that Trumbull had carried out his threat, his response was virulent. He virtually disowned Anne and John, and when his wife arrived, they had such a terrific argument that, with the aid of John Trumbull and Aaron Ogden, she planned to file for divorce. (J. M. Trumbull to TG, February 1, 1816; TG to Ann H. Gibbons (wife), May 13, 1816, DUA, 1:14; and John Trumbull v. Thomas Gibbons, New York City Hall Recorder 3, no. 7 (July 1818)).

second Col. Jonathan Dayton.[96] Fortunately, the social climate had turned against duels so that Ogden did not feel obligated to appear. Gibbons was able to intimidate his family into submission by threatening to distribute a libelous pamphlet against them. Horrified, his wife gave up the idea of divorce.[97]

As soon as he could affect a temporary reconciliation with his family, Gibbons turned his energy toward damaging Ogden financially by destroying NRSC's monopoly. When the monopolists applied for a Congressional extension of Fulton's patent in the name of his widow (she still held an interest in the monopoly), Gibbons wrote to John Randolph of Virginia to expose their greed. The petition for extension, Gibbons explained to Randolph, had not been requested for any public purpose, but was "a tax on the citizens of the state" for the personal enrichment of Livingston and Ogden. Like Duer, he stressed the monopoly was for private enrichment and not the public good.[98]

Gibbons took great care to cultivate good relations with other stage and steamboat operators as he planned his operation. A fragmentary record of a meeting with John R. Livingston in October 1816, indicated they believed they could co-operate against Ogden. Gibbons would run his own ferry from Halsted's Point (NJ) to New York to avoid conflict with Livingston's line to New Brunswick (NJ). Livingston, in turn, agreed not to "disturb" Gibbons with litigation.[99] In the following season (1817), Gibbons attempted to extend business alliances to former New York Governor D.D. Tompkins and

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[96] Steamboat handbill with postscript, July 26, 1816, DUA, 23:15; Baxter 31-32.

[97] Ogden later successfully sued him for trespass, and Trumbull secured a $15,000 judgment for libel. Gibbons was also brought to judgment for trespass by Trumbull. Despite the efforts of William Gibbons to broker a truce, Thomas and his daughter were never completely reconciled. When he made out his will he insisted that the Trumbull family not be invited to the funeral. (Jan 20, 1819, DUA, 2:4).

[98] TG to John Randolph, [1816], DUA, Copybook.

[99] Fragment, October 16, 1816, DUA, 1:14.

began using Tompkin's base in Staten Island. Later, Gibbons conveniently argued that he was operating on the strength of Tompkin's license from John R. Livingston. But Tompkins clearly did not believe that Gibbons had the necessary authority and grew alarmed when Gibbons began operating from Halstead's Point (NJ—near Elizabeth Town and consequently outside Livingston's grant). In an attempt to open negotiations for a license from the steamboat company, Tompkin's gave William Gibbons a letter of introduction to Edward P. Livingston (one of Robert's heirs) and proceeded to warn Livingston that Gibbons intended to run his boat in "opposition to the New York grant with a view of bringing the question of the validity of the New York Law before the Supreme Court of the United States." Tompkins himself (running from Staten Island to New York City) would not be immediately threatened, but believed it was better for all concerned under the grant if the issue never reached federal courts, where legal costs would mount quickly and the monopoly could be overturned. He urged Livingston to work out a deal privately.[100]

By mid 1818, Gibbons was running the *Bellona* across the Hudson under the charge of a young captain, Cornelius Vanderbilt. Vanderbilt succeeded marvelously, displaying the competitive edge and business sense that would later make his fortune as a railroad tycoon. By October, Ogden's profits were suffering heavily. He filed a bill of complaint for an injunction in Chancery Court under Chancellor Kent.[101] Gibbons immediately shifted his boat to a new line from New Brunswick to Elizabeth Town,

[100] D.D. Tompkins, letter of introduction to Edward P Livingston., October 5, 1818. Although William Gibbons seems to have taken Tompkins advice to heart, his father Thomas seems to have completely disregarded it, in his design to destroy the monopoly. There is no evidence the letter of introduction was ever used. DUA, 2:3.

[101] Baxter, 33; and Ogden v. Gibbons, 4 Johnson 150 (1819).

though additional injunctions against Gibbons suggest that Vanderbilt was running into New York harbor when he could. Gibbons even arranged a deal with Tompkins to carry Gibbons' passengers on to New York City.[102]

Gibbons left Vanderbilt to manage the details of the steamboat operation and focused on preparing the case. Gibbons' letters to his lawyers stress fine distinctions in the route between New York and New Jersey that his counsel warned him would not be sustained. Gibbons also railed against the "subtlety" and villainy of his adversary. By this point, Gibbons was quite ill (probably dying slowly of diabetes) and had to be satisfied with micro-managing his New York City lawyer from the other side of the Hudson.[103]

By 1819, Gibbons sole aim was to bring his case before the Supreme Court; he had lost interest in financial compromise. His determination is evident in his reply to an offer from John R. Livingston for an agreement between them, presumably on sharing New Brunswick. Gibbons replied bluntly (and deceitfully) that his boat now ran solely in New Jersey waters under an U.S. coasting license. "I shall not, in any case violate your

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[102] Livingston v. Ogden and Gibbons, 4 Johnson 48 (1819); and In the Matter of Vanderbilt (4 Johnson Ch. 57 [1819].

[103] His correspondence with his lawyers indicates that he was relying heavily on the argument that the *Bellona* was not in violation of the monopoly. At the same time, he expressed a desire to test the constitutionality of the New York laws. His principal counsel, Peter Jay Monro, suggested that because of the difference in the common law of Georgia and the practices of the New York Chancery court, the case would best be left to Gibbon's lawyers. Monro was, in fact, politely telling his client that Gibbon's belief that he possessed a license through Tompkins was too weak to be sustained. His letters also stress that Gibbons had not paid his supporting lawyers enough money. Gibbons' letters in reply stress fine distinctions in the route between New York and New Jersey that Monro knew would not be sustained. Munro's letters also stress that Gibbons had not paid his supporting lawyers enough money. Out of frustration with Monro's management of the case, Gibbons sought to hire William Price and Martin Van Buren, but both declined. He even offered William Duer whatever money was necessary to secure a legislative repeal of the monopoly, but Duer reacted with offended honor. (TG to Peter Mono, December 27, 1818; Monro to TG, January 5, 1819; TG to Monro, January 16, 1819; Monro to TG, January 18, 1819; TG to Monro, January 21, 1819; Monro to TG, January 22, 1819; TG to Monro, January 28, 1819; Monro to TG, January 29, 1819; William Duer to TG, February 7, 1819; TG to William Price, March 1, 1819; Price to TG, March 15, 1819; and Patterson to TG, April 2, 1819, DUA, 2:3 and 2:4).

rights," he wrote, "I will defend my own."[104] Faced with debilitating illness, mounting legal bills, economic panic, and offers of conciliation from the monopolists, Gibbons maintained his course when so many of his competitors had joined with the monopolists.[105]

Gibbons was sustained, in part, by public support, particularly in coastal New Jersey, but also among New York City businessmen and fellow steamboat operators. John Sullivan, operating steam tugboats on the Connecticut, also planned to break into the New York market through a litigation strategy. Working in concert with William Duer, he had repeatedly tried to break the monopoly in the legislature but was frustrated by the Livingstons' power in the state senate. Sullivan now needed financial support to form a company, so that he would have the resources to "assert my rights in New York."[106] When legal setbacks came, Gibbons received letters of advice hoping that he would expand his services in New Jersey. One correspondent encouraged him that the "friends of state rights" in Trenton hoped he would use the occasion of a legal setback to shift his route to South Amboy, New Jersey. These letters must have encouraged Gibbons that his supporters were also working to sustain their rights against the monopoly. Powerful business and political enemies of the Livingston faction were gathering in support of Gibbons, preparing to enjoy the spoils.[107]

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[104] Dayton to TG, April 2, 1819; J. R. Livingston to TG, April 21, 1819; TG to J. R. Livingston, April 22, 1819, DUA, 2:4.

[105] For the impact of the panic see Henry Reiuseau to TG, May 13, 1819, DUA, 2:4.

[106] Sullivan to TG, January 17, 1819. Sullivan wrote Gibbons again in August seeking money in support of a broad suit brought by the Connecticut comptroller against the New York law in Chancery court. Sullivan initially would focus on the constitutional argument, but hoped to bring the issue back to patent rights. (Sullivan to TG, August 17, 1819, DUA, 2:4).

[107] James Cook to TG. June 3, 1820; and Stockton Houre to TG, March 3, 1820, DUA, 2:8 and 2:9.

Gibbon's bill in August 1819 to the Chancery Court displays the confidence of his supporters. Because he did not have any rights of patent, patent law never entered the case. He relied instead upon two separate arguments: first, that he held a federal coasting license entitling him to an interstate route, and second, an extensive argument that his route and landing (Halstead's Point) did not interfere with the grant held by Ogden. As Gibbon's lawyer had predicted, Kent pointed out that Gibbons only used the latter argument to avoid an injunction against the *Bellona;* Kent quickly ruled that Gibbons had no right under New York law. Ironically, Kent used an expanded definition of commerce to justify his argument. The monopoly granted to the NRSC "was intended to comprehend the entire benefit of all the travelers and passengers going to and from *Elizabethtown* and *New York.* It meant to embrace the whole stream of intercourse between those two places." Thus, Gibbons could not claim that the law did not apply to him because his route was not identical to Ogden's. Each was in the "stream of intercourse" between an area over which New York claimed regulatory control. Generously, the Chancellor did not order the seizure and forfeiture of the *Bellona.* And while Kent did not accept Gibbons' claim to operate under the monopoly, he accepted Gibbons good faith pledge that he had scrupulously obeyed the law as he understood it.[108]

On the question of commerce and the federal coasting license, Kent cited the precedent of *Livingston v. Van Ingen* to argue that New York could subject property to laws governing its "use and employment" while the only United States government could regulate the national character of transportation:

> There is no collision between the act of Congress and the acts of this state, creating the steam boat monopoly. The one requires all vessels to be licensed, to entitle them to the

[108] Chancellor Kent's opinion, available in Gibbons v. Ogden, Court for the Correction of Errors of New York, 17 Johns. 488; 1820 N.Y. Lexis 29, 11-26, quote on page 19.

> privileges of *American* vessels, and the others confer on particular individuals, the exclusive right to navigate steam boast, without, however, interfering with, or questioning the requisitions of the license. The license is admitted to be as essential to those boats as to any others. … The suggestion that the laws of the two Governments are repugnant to each other upon this point, appears to be new and without foundation.[109]

On the issue of the coasting license, Kent ruled, it gave the *Bellona* an American character before the customs collector, but that a federal license did not give the Gibbons a right of property superior to the monopoly holders.

As in his 1811 opinion, Kent supported the state again in 1819. He asserted that only when Congress made the laws more specific would federal supremacy would inevitably defeat the state law. If Congress were to pass a law granting vessels with a coasting license a liberty to navigate anywhere, then that law would be valid (if constitutional). "But," Kent opined, "at present, we have no such case, and there is no ground to infer such supremacy or intention, from the act regulating the coasting trade."[110] Until there was a direct collision, the concurrent power of the state stands.

Gibbons had no illusions about the outcome of the case in the 1820 session of the Court of Errors. He wrote to secure the services of Daniel Webster and William Wirt before the Supreme Court. "This section of the Union," he entreated, "is extremely agitated, from the imposition … of that proud state, New York."[111] Probably at Gibbons' influence, a wave of petitions issued from Elizabeth town and New Brunswick, complaining that their constitutional right of "free and unrestrained intercourse between the several states" had been impaired. New Brunswick wanted their state to prohibit all steamboats, until New York should repeal its monopoly. Although this measure was

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[109] Ogden v. Gibbons, 4 Johnson 158.

[110] Ibid.

[111] TG to Daniel Webster, December 13, 1819 and January 14, 1824, DUA, 3:9 and Copybook.

regarded as too extreme, New Jersey moved to secure Gibbon's legal position. Entitled, "A Law for maintaining the rightful jurisdiction of this State," the legislation allowed persons who had their boats seized to obtain retaliatory injunctions against the monopoly and seize the monopolists boats. The law apparently succeeded, for in 1821, the ferriage rates dropped one quarter and the New Jersey boats again had free access.[112]

Meanwhile, Gibbons suffered his expected defeat in the Court of Errors. Having averted the forfeiture of the *Bellona*, Gibbons abandoned his claim that he had been operating in good faith. Instead, he focused on the absolute destruction of that monopoly. Gibbon's 1820 appeal to the Court of Errors had stressed that the coasting license was a "direct collision" between the federal commerce power and the state monopoly. (The commerce argument had been previously employed in the steamboat cases by John Stevens against Livingston and by the Albany Company in *Livingston v. Van Ingen*, but had yet to be tried in federal court). In his reply, counsel for Ogden argued that Gibbons was not engaged in the coasting trade, and that this issue was a distraction. The real issue, argued counsel for Ogden, was the power of the state to promote science and invention through the special privilege of grant or monopoly. The state could also regulate property through municipal law. Counsel for Gibbons replied that most municipal regulation was legitimate; however, the interdiction of another state's steamboat exceeded New York's authority. As expected, the state affirmed Kent's Chancery court decision. The Court of Errors supported the theoretical power of

[112] The New Jersey law was immediately challenged in both the legislature and the courts. Elizabeth organized a petition drive in 1821 to prevent its repeal, and Gibbon's New Jersey Lawyer reported that "our Retaliatory Law" would be challenged in the Supreme Court. See Petition and Memorials in DUA, 22:1 and 22:2; particularly the New Brunswick Petition of April 1820 and the Elizabeth Petition of October 1821. See also George Wood to TG, September 22, 1820, DUA, 2:10.

Congress, but failed to find an actual conflict between the 1793 Coasting Act and steamboat law in New York.[113]

Gibbons immediately appealed the case to the Supreme Court, but was surprised to have the case dismissed for want of jurisdiction in March of 1821. An error in paperwork meant that his appeal did not comply with the Judiciary Act of 1789, so he began the process of re-filing. Desperate to halt the threat to their privileges, the monopolists tried to quash the threat on all fronts. James Allaire, a New York City manufacturer of steam engines, reported that the monopoly had threatened him with an injunction if he constructed boats for the New Jersey trade. Aaron Ogden tried to mediate the territorial dispute over the Hudson in the New York legislature to diffuse tension over the injunctions.[114] None was more anxious to prevent financial loss than John R. Livingston. First, he petitioned the Legislature to sustain his contract with the state in the face of a wave of hostile petitions:

> From the time the boat called the Bellona was built to the present, little or no peace has taken place, petition after petition, lawsuits and bills in chancery have followed rapidly upon each other and the Honorable Legislature of New Jersey have been induced to pass almost every session new laws said to be in retaliation of those of New York.[115]

Now, Livingston claimed, he was forced to run at a loss against two or three other boats out of New Jersey. If the legislature should overturn the monopoly, or if the Supreme Court should overturn it, use of the steamboat would immediately "be claimed as a right" by Vermont, Connecticut, and Canada, and his vast investment would be in

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[113] Gibbons v. Ogden, Court for the Correction of Errors of New York, (7 Johns. 488 (1820); N.Y. Lexis 29), 26-37.

[114] "Petition of James P. Allaire to the New York State Legis.," [1822]; "Petition of the of the Shipbuilders of the City of New York," February 7, 1822; "Of New Brunswick, New Jersey on steam boat laws to New York," January 30, 1822; and Aaron Ogden to New York Legislature, February 11, 1821, (DUA 22:2). The Judiciary act required that Supreme Court cases be based upon a final decree, and Chancellor Kent had never issued one in Ogden v. Gibbons. (Cox, 228-229).

[115] Memorial of John R. Livingston to New York State Legislature, February 8, 1822, (DUA 22:2).

jeopardy. In any event, Livingston expressed himself perfectly willing to sell out to the legislature, if they would pay his losses and buy his boats. Livingston sensed that the public tide was turning against the monopoly and hoped to cash out while his investment was still valuable.[116] The monopolists tried to convince Gibbons to back down from his injunctions against them. Ogden approached Gibbons in 1822. Walter Livingston approached him on behalf of the monopoly as late as February 1824, but their efforts were to no avail.[117] National events were moving against the monopolists. By 1824, the Supreme Court had already sustained federal power against the states in *McColloch v. Maryland* (1819) and *Cohens v. Virginia* (1819). Astute observers knew that the Marshall Court might well destroy the entire monopoly.

When the Supreme Court finally heard the case in February 1824, each of the arguments paid careful attention to the question of state sovereignty, and how far it covered the rights of property and commerce. Even Daniel Webster allowed that the state opinions of Chancellor Kent were "justly entitled to respect and deference," but these lofty sentiments only softened the blow of his forensic oratory.[118] Webster focused his attention exclusively on the question of the commerce clause. In his view, the "extreme belligerent" legislation of the state[119] was in clear violation of the complete and entire power that Congress held over commerce. To remedy this violation, Webster

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[116] Ibid.

[117] William Gibbons note. On Meeting with Walter Livingston [1824]. (DUA 3:9) Aaron Ogden to TG March 22, 1822; TG to Aaron Ogden, March 30, 1822. Ogden hoped that Gibbons would desist from pressing New Jersey injunctions against him as a monopolist. Gibbons replied, "It is my intention to continue in force the injunction you refer to [from New Jersey] and to enjoin as many of the steamboats belonging to the monopolists as are required to navigate the waters between the states of New Jersey and New York." (DUA, copybook).

[118] Webster's phrase, Gibbons v. Ogden (22 US1 (1824)), 3. See also pp. 187-188 for Marshall's view.

[119] Ibid., 5.

asked the Court to repudiate the doctrine of concurrent powers. If a power was granted to Congress, then Congress had complete sovereignty toward the exercise of those ends. Consequently, the state would have complete sovereignty over its municipal law although the lines must be strictly drawn to retain the federal structure of the Union. Webster explained that the doctrine of concurrent powers would grant the Federal government power over "a vast scope of internal legislation, which no one has heretofore supposed to be within its powers."[120] This power was not unlimited. To prevent the complete loss of state legislative power to the supremacy of the federal government, Webster argued, the Constitution established strict boundaries between state and federal jurisdiction. Yet New York had clearly exceeded its authority, not through municipal regulation of navigation, which properly belonged to states, but through its claim to hold a sovereign and unlimited power to grant monopolies. Webster recognized that a sovereign power to grant exclusive privileges was theoretically unlimited if the Constitution did not control it. But the Constitution had, in fact, limited New York. To protect the rights of the people, New York had acceded to the Constitution, and consequently, the national government should protect rights of New Yorkers by exercising its complete power over commerce.[121]

William Wirt, also arguing for Gibbons, stressed the exclusive power of Congress over commerce and patents. He was willing to concede that states might have a concurrent power, but even if they did, the collision between the federal patent power and the grant by the state obviously subverted the authority of the federal government. U.S. patent law reserved the right of exclusive use to an inventor for fourteen years, and then

[120] Ibid., 19.

[121] Webster's whole argument at Gibbons v. Ogden, 22 US 4-42.

surrendered the right to the American people as a whole. The state, in contrast, granted a right of exclusive use for thirty years, and claimed that it could extend the grant indefinitely under its sovereign power: "If this be not repugnance, direct and palpable, we must have a new vocabulary for the definition of the word."[122] In terms of the commerce power, the collision was between the coasting license and the monopoly. Congress's power to regulate commerce was "entire, regular, and uniform."[123] Before 1787, commerce was protected imperfectly by international law as the *jus commune* of nations. The turbulence of the Confederation period illustrated just how imperfect that protection was. Congress's power to regulate commerce, then, includes passengers conveyed by steam. In answer to the contention of the respondents that commerce was traffic, Writ insisted that commerce "always implies intercommunication and intercourse."[124]

Deploying both natural and statutory law, as well as arguments from the general structure of government, Wirt and Webster appealed to the court to exercise its jurisdiction and proclaim that a collision between state and federal law was manifest. Wirt appealed directly to the duty of the court:

> Here are three states [New Jersey, Connecticut, and New York] almost on the eve of war. It is the high province of the Court to interpose its benign and mediatorial influence…. If you do not interpose your friendly hand, and extirpate the seeds of anarchy which New York has sown, you will have civil war. The war of legislation which has already commenced, will, according to its usual course, become a war of blows. Your country will be shaken with civil strife. Your constitution will fail. The last hope of nations will be gone.[125]

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[122] Ibid., 171.

[123] Ibid., 220.

[124] Ibid., 182-183. Wirt, like Webster, also distinguished between the municipal power of the state from the sovereign right to make an exclusive grant, but denied that the state was exercising the former power. "Can they prohibit the use of an invention on the grounds of its noxiousness, and then authorize the exclusive use of the same invention by their law. …there is no pretext of noxiousness here" (176).

[125] Ibid., 184-185.

The situation in the waters around New York had grown progressively worse, and despite Wirt's hyperbole, seriously threatened the peace and prosperity of the region.

The counsel for Ogden, Thomas J. Oakley and Thomas Emmet, did not believe the Union was in crisis. In fact, they insisted that the legal issues be settled by established convention. Their arguments on the patent and commerce powers mirror those offered in the state courts, particularly in *Livingston v. Van Ingen*. In summary, existing precedent emphasized that the states held concurrent power over commerce and power to promote the progress of science in so far as a specific federal law did not overrule state laws. States exercised this power by virtue of their original, residual sovereignty. However, the introduction of the case into federal court, impelled their argument toward new directions.[126] Because their argument ultimately rested on the states' sovereign power to grant the monopoly and strengthen it, the lawyers took greater care to develop the argument for sovereignty. Oakely argued that the state possessed 'supreme legislative power' by virtue of the Declaration of Independence. In contrast, the grant of power to Congress was limited to the enumerated powers, which, he insisted, must be construed strictly. The state must exercise powers like taxation concurrently with the federal government as an essential portion of its sovereignty.[127] Through the original sovereign power that the states possessed over the public domain, New York

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[126] Federal case law, which had played such a small role in Chancery Court, now factored heavily in their arguments. *Miller v. Taylor,* 4 Burr. 2303 (KB 1769) had frequently been cited before to establish that authors had intellectual property in their work, but that government had rights to control property. But Emmet cited both *Sturges v. Crowninshield,* 4 Wheaton122 (1819) and *Houston v. Moore,* 5 Wheaton 1 (1820) to support his point that a state law could only be overruled on a specific contraction, not on a hypothetical collision with Federal power. Webster and Wirt did not dispute this point, focusing their efforts instead on proving that an actual collision had taken place.

[127] Oakley's argument sharply mirrors the argument made in 1808 about which powers are limited to Congress. If Congress is granted a power in "express terms" as exclusive, if it is granted to Congress and prohibited to the states, or if the nature of the power requires its exclusivity, then Congress has exclusive power. Otherwise, the power was concurrent. Ibid., 35-36.

acted to grant a special privilege to Livingston and Fulton in 1807, which Emmet stressed had been a wise decision.[128] The state contracted for a valuable improvement in exchange for grant of the public domain that it had the sovereign power to make.

To undermine the appellant's argument that the coasting license constituted a collision with the monopoly, Oakely offered a definition of commerce as the "transportation and sale of commodities"; consequently, Gibbons use of the coasting license, because it was employed for a passenger ferry, was a "fraud upon the state law."[129] Emmet also contended that travel of passengers on a private holiday was certainly a local matter, not subject to the laws of Congress.[130]

As Oakely stressed the sovereignty of the state, Emmet waxed eloquently on the wisdom of the federal principle as "only safe and practicable rule of conduct, and the true constitutional rule" in the United States:

> …the peculiar nature and principles of our free and federative society make the existence of such subordinate [commercial] legislation … prudent and politic. There must be, even in respect to foreign commerce, local interests and details, which cannot be well presented to the view of Congress, and can be, at least, better provided by the state legislatures, emanating from the very people to whom they relate.

Prudently, the Framers did not try to limit state authority, but only marked out the clearest cases in which the states should not act. To guard against a potential abuse, they granted Congress "the paramount and controlling power over the whole matter."[131] But

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[128] Ibid., 102-106.

[129] Ibid., 76-77.

[130] For instance, Emmet asserted, "It could not, I think, be seriously contended, that Congress can regulate the carrying of passengers from any part of the Union who are traveling to Ballston, Saratoga, or any other place, for health or pleasure; and even if the object of their passing were to trade, that would not legalize the interference of Congress in their mode of conveyance from place to place. That naturally falls within the sphere of State legislation" (Ibid., 95).

[131] Ibid., 100-102. Looking to the future, Emmet worried about the future of the principle. During the revolution, the thirteen states were a "band of brothers" and could trust their particular interests to the general will, because of their common sacrifice and victory. Emmet continued, "If ever the day should

no one really believed that Congress's power was intended to control all the details. Otherwise the Erie Canal would be a matter for the federal government to fund and profit from, not New York. Citing examples of slave importation, quarantine, local piloting, or lighthouse legislation, Emmet stressed that federalism wisely preserved the authority of states over domestic commerce.[132] Despite their confidence in federalism and limited view of commerce, Oakley's and Emmet's arguments revealed their apprehension that they might not only lose the case, but the whole of the monopoly as well. Both stressed that, even if a part of the monopoly should be overturned, most of the laws *could* stand. Oakley, in particular, tried to preserve the right of the state to regulate internal navigation, even if they should lose the power over ferry to New Jersey.[133]

Chief Justice John Marshall's opinion first addressed the respondent's claim that the states still possessed original sovereignty. If this claim was true, than the right of monopoly flowed logically from it. Marshall, furthermore, conceded that the states had been sovereign and independent under the Articles of Confederation. Yet their status, Marshall countered, must be understood in light of the Constitution: "But, when these allied sovereigns converted their league into a government … the whole character in which the States appear, underwent a change." This change must not be determined by

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come, when representatives from beyond the Rocky Mountains shall sit in this capitol; if ever a numerous and inland delegation shall wield the exclusive power of making regulations for our foreign commerce, without community of interest or knowledge of our local circumstances, our Union will not stand; it cannot stand" (Ibid., 127-128).

[132] Ibid., 107-177.

[133] Ibid., 44-50, 83-84.

the nature of government before the change, but rather by a study of the instrument that changed them or, as Marshall expressed it, "the words in their natural sense."[134]

Taking up the text of the Constitution, Marshall then addressed the meaning of "commerce" on which the case would hang. He ruled in favor of Wirt's definition over Oakley's stating that "Commerce, undoubtedly, is traffic, but is something more: it is intercourse."[135] Marshall argued that it included navigation as well. Yet Congress' power over commerce did not extend as far as Webster suggested. Marshall accepted Oakley's careful distinction between internal and external commerce, although he insisted that commerce "cannot stop at the external boundary line of each state, but may be introduced into the interior."[136] Only purely internal commerce could not be touched by Congress.

Regarding the doctrine of concurrent power asserted by the monopolists, Marshall addressed Webster's argument that the sovereignty of Congress was unlimited when in pursuit of the enumerated powers. [137] Marshall's opinion vindicating federal power over interstate commerce is usually compared with Webster's sweeping argument to federal

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[134] Ibid., 187-189. At the end of the opinion, Marshall again asserted the importance of textual interpretation to carefully reason out the proper axioms to resolve the issue. By reasoning from general principles, he feared that the proponents of state rights would leave the constitution "unfit for use" (221-222). For the best treatment on the role of textual interpretation in Marshall's jurisprudence, see Sylvia Snowiss, *Judicial Review and the Law of the Constitution*, (New Haven: Yale University Press, 1990).

[135] Gibbons v. Ogden, 189.

[136] Ibid., 194.

[137] Marshall proclaimed, "If, as it has always been understood, the sovereignty of Congress, though limited to specified object, is plenary as to those objects, the power over commerce with foreign nations, and among the several states, is vested in Congress as absolutely as it would be in a single government…. The wisdom and discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this … the sole restraints on which they have relied to secure them from abuse" (Ibid., 196-197).

authority over all commerce.[138] In fact, Marshall responded carefully to each of the oral arguments and, while drawing upon Webster's ideas, took care to address the concerns of Emmet and Oakely about concurrent authority. For instance, the state power to tax, strictly speaking, was not even concurrent with the federal taxing power because the taxing power of the states and of Congress are not identical. Congress had the power to tax for national purposes, while the states tax for local purposes. Regarding commerce, Marshall stressed that all the power over commerce among the states lies in Congress.[139] And regarding those powers left to the states, Marshall pointed to

> that immense mass of legislation, which embraces everything not surrendered to the general government: all of which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every general description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, &c. are component parts of this mass.[140]

Finally, Marshall turned to the federal coasting license and affirmed Webster and Emmet's contention that the state law was in direct collision with it. Because commerce includes the navigation of passengers, and the coasting license confers the power to carry on the coasting trade, Gibbons was engaged in commerce between two states. Marshall agreed that the state grant of monopoly was in violation of the Constitution.

Marshall's opinion eviscerated New York's claims of sovereign legislative authority over commerce. Federal power over interstate commerce required that New York submit to the federal regulation of steamboats, and any other vessel in transit between the states. However, Marshall did not destroy state power altogether. New York still held state rights to regulate municipal health and nuisance concerns, but it

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[138] Later in life Webster would claim that "The opinion of the Court, as rendered by the Chief Justice, was little else than a recital of my argument." Warren, I:610-611.

[139] Gibbons v. Ogden, 22 US 199-200.

[140] Ibid., 203.

could not claim to hold sovereignty concurrently with national sovereignty in an arena where the people had clearly granted that authority to Congress in the text of the Constitution.[141]

The Marshall Court's subsequent decisions on state sovereignty and the commerce clause emphasize that the power and authority it found in the federal commerce power were balanced by the reserved power of the states. *Wilson v. Blackbird Creek Marsh Co.* (1829) established that in the absence of congressional legislation the states could regulate their waterways. At the end of his career, Marshall's opinion in *Baron v. Baltimore* (1833) affirmed the cities right to divert local streams and lower the water around Baron's wharf. Furthermore, the court explicitly renounced the idea (advocated by Chancellor Lansing in *Van Ingen*) that federal rights could be applied to the states through the privileges and immunities clause. The impact of *Gibbons v. Ogden* on New York's claim of sovereignty is impressive, but it should not be extended so far as to claim that the federal commerce power destroyed the state police power. Not until the

[141] Justice Johnson filed a concurrence in the case that suggests differences between a broad Republican nationalism and Marshall's textualism. Johnson agreed with Marshall on the basic issue that commerce was navigation and that the coasting license was designed to secure an American freedom to engage in the coasting trade. However, he arrived at this construction by a very different path. "The great and paramount purpose" of the Constitution, according to Johnson, "was to unite this mass of wealth and power, for the protection of the humblest individual; his rights, civil and political, his interests and prosperity, are the sole end; the rest are nothing but the means. But the principal of those means, one so essential as to approach an end, was the independence and harmony of the states, that they may the better subserve the purposes of cherishing and protecting the respective families of this great republic." (Ibid., 223). Johnson held the states in great respect and believed them to be essential to good government, but during the Confederation, they had so mismanaged domestic commerce that the Constitutional Convention was called to resolve this very issue. From the intent of the Framers, Johnson reasoned the power over commerce to be the same power that the states had possessed as independent bodies. The object of this transfer was to secure to individuals their rights of free navigation under the law of nations. This sweeping opinion, in many ways outdistanced Marshall in the power it granted to the government to secure individual rights. But like the opinions of Duer and Lansing, the opinion also limited government. Because a liberal vision of individual rights was the end of government, states like New York could be restrained when they violated them.

Lochner Era did the commerce clause become the favored judicial weapon in striking down state legislative authority. [142]

Gibbons' victory at law brought him little personal benefit, however. He died shortly thereafter, and his son William pursued the more genteel interests of real estate and horse breeding. Ogden was completely ruined by the decision. Imprisoned for debt in New York City, he was eventually released under a law that released Revolutionary War veterans from debtors' prison. He survived on the munificence of his state as the customs collector of Jersey City.[143] John Stevens continued as a successful steamboat manager, and eventually became an early promoter of the railroad.[144] The remains of the Livingston-Fulton monopoly perished in 1825. John R. Livingston, emboldened by the decision began to run his ferries to Albany after stopping in New Jersey to establish an inter-state route. Livingston's franchise had only granted him rights to a ferry from New York to New Jersey, to the lucrative Albany route. When the steamboat company sought an injunction against Livingston, a new pro-property chancellor refused them. Then the state government turned against the remnants of the monopoly. Attorney General Talcott reported to the Assembly that steamboats operating under a coasting license were entirely under federal protection: "The state legislature have no power directly to interfere with it

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[142] Wilson v. Blackbird Creek Marsh Co., 2 Peters 245; and Baron v. Mayor and City Council of Baltimore, 32 U.S. 243. For the best treatments of the Lochner Court, property, and commerce, see, James W. Ely, *The Guardian of Every Other Right: a Constitutional History of Property Rights* (New York: Oxford University Press, 1998); and Howard Gillman's *The Constitution Besieged: The Rise and Demise of the Lochner Era Police Powers Jurisprudence* (Durham: Duke University Press, 1993).

[143] Cox, 328-329.

[144] Shagena, 380-383.

… and thus render the right useless, or prevent its excuse."[145] Before the Chancery court, Emmet offered the contradictory opinion:

> If some of the principles of *Gibbons v. Ogden* are not overruled within twenty years, the Constitution will before then have verged towards a form of government which many good men dread….
>
> It is upon state rights that we stand and state rights are state liberty. They are more; they are in this land the bulwarks of individual and personal liberty; they are the outposts of the Constitution. While they are preserved entire, our federative Union will stand the shocks of time and the approaches of despotism. … Consolidation will be the *euthanasia of our constitution.*[146]

But the Court of Errors, sitting together with the Senate, supported the authority of Congress over inter-state commerce. Upon appeal, the Chief Justice and twenty-one senators gave a very broad reading to Marshall's opinion and struck down the monopoly as a violation of federal power. The minority (two Judges and seven senators) did not contest the Supreme Court decision, but merely asserted that Livingston's stop in New Jersey was a ploy and did not create inter-state commerce.[147]

Marshall's decision fundamentally altered over two decades of New York's exercise of sovereign power over commerce. New York willingly submitted to the court's opinion once federal power had been decisively asserted. As the minority opinion in *NRSC v. Livingston* suggests, the state could have justified the monopoly north of New York City as an exercise of intra-state commerce. By 1825, the political climate had turned decisively against the monopoly and the deluge of petitions submitted to Albany in the 1820s certainly testifies to this position. Moreover, the defenders of the monopoly, from Colden to Robert R. Livingston had always stressed that under the concurrent powers doctrine, federal power duly exercised was paramount. Kent's original opinion in

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[145] *The Watchtower* [Cooperstown, New York], April 19, 1824.

[146] North River Steamboat Company v. John R. Livingston [May 3, 1824], 1 Hopk. Ch. 149 (1824): 189, 197. (Emphasis mine).

[147] Baxter 62-68; and North River Steamboat Company v. John L. Livingston, 3 Cowen, 713; (1825).

Livingston v. Van Ingen had promised that if the Court or Congress had presented clear direction, then the state would comply. The state's legal and political elite understood that, ultimately, a strong Union would benefit all of the states, including New York.

New York acquiesced in the repudiation of its state sovereignty, in part, because it recognized the state monopoly power had long stifled economic development. Having worked for a generation to establish the dominance of legislative sovereignty over the common law rights of *jus publicum*, New York recognized that special privilege had benefited the NRSC at the expense of the public good. Federal courts increasingly assumed the legal task of preventing undue interference with the commercial and intellectual property rights of U.S. citizens, which to some extent, had been the original purpose of the commerce clause. As Madison explained, it "was intended as a negative and preventive provision against injustice among the states themselves, rather than as a power to be used for the positive purposes of government…."[148] State sovereignty was defeated and repudiated because of the protection of certain economic rights was understood to be so important that they had been delegated by the people to the national government under the Constitution.

The states' acquiescence in the legitimate judicial role of the U.S. Supreme Court over the state legislatures did not mean that they had completely subjugated state legislative rights to the federal judiciary. In the case of transportation, New York accepted that Congress had power to regulate interstate commerce, and the Supreme Court likewise had the power to adjudicate those cases. New York continued to actively assert its over authority over the reserved power through municipal law. It accepted that disputes would continue to arise over the division of the powers of government under the

[148] Madison, as quoted above. See footnote 10.

Constitution. Now the North accepted that the Supreme Court would be the "common umpire" over the disputes. As one newspaper editor explained,

> …it was wisely provided by the Constitution of the United States that questions of this nature should be finally settled by a tribunal removed from the influence of those state and private interests which gave rise to them. Thus every year unfolds new relations growing out of our Federative and republican government. It will take many years to settle the boundary line between State and Federative rights.[149]

The deference their leaders had shown to the Supreme Court, as well as the increasing patriotism of the "Era of Good Feelings," produced a different brand of state rights that respected the legitimate judicial authority of the Supreme Court while continuing to insist on their own legislative rights. Over the next decade, under the leadership of Martin Van Buren, New York would again become the most vociferous defender of state rights in the North. State legislative resistance, association, and constitutional theorizing continued to play a central role in antebellum politics as state legislatures insisted that they had a right to declare what the Constitution meant.

[149] *Connecticut Courant*, March 9, 1824.

Chapter 5: "The Sacred Cause of State Rights"

> Even at this critical emergency in our public affairs, when so much discredit is apprehended to the sacred cause of State rights from the excesses of South Carolina, the confidence of the Committee in the correctness of that cause is strengthened by the exemplary conduct of her sister States.
>
> -Martin Van Buren. "Report." New York Legislature. 1833.[1]

No event reveals the fractured character of American political thought on federalism better than the nullification debate during the winter of 1832-33. Each of the constitutional deliberators—Congress, the individual state legislatures, Andrew Jackson, John C. Calhoun, and the South Carolina government—asserted its own vision of the federal Union. Fierce disputes raged over the meaning of the reserved powers, the nature of sovereignty, federal rights of coercion, state rights of constitutional construction, and the locus of final political authority. The crisis proved again the fundamental loyalty of Americans to a national Union of strictly limited powers. Yet the debate further undermined Americans' consensus on the extent of national power. Strong positions staked out in the national political culture by John C. Calhoun, Andrew Jackson, and Daniel Webster eroded the Madisonian middle ground that the Union was a "partly national and partly federal" association for preserving liberty under law. Although the state legislatures acted as deliberators on constitutional meaning during the crisis, their voice was decisively overshadowed by Jackson's policy of confrontation, and by the Congressional compromise.

[1] New York, "Report," in Massachusetts, General Court, Committee on the Library, *State Papers on Nullification*, (New York: Da Capo Press, 1970), 137.

Thus far, the analysis of this dissertation has stressed the legislative authority of the states, especially Northern states, to construe how the Constitution ought to apply to them. Between 1789 and 1830, the pattern of state review was evident across the country; Massachusetts, Connecticut, Rhode Island, New Hampshire, New York, Pennsylvania, Vermont, Maryland, Ohio, Virginia, Kentucky, and Georgia individually claimed that their authority over constitutional meaning was superior to that of the federal government. They sought to secure their construction as the proper understanding of the Constitution before the courts, public opinion, and the tribunal of the collective state legislatures. State legislatures were not so much defending their sovereignty as they were asserting their rights to apply the Constitution to their own laws and citizens. They accepted that sovereignty had been divided, and endeavored to exercise only the sovereignty that had been reserved to the states. For instance, Pennsylvania, in 1809, claimed it was simply defending its citizens from the excesses of judicial power. While New York acquiesced in the power of the Supreme Court in 1824, they continued to assert the right of their legislature to speak where the High Court was silent. Northern states still insisted on the importance and necessity of state rights, particularly their rights to determine constitutional meaning. Yet, by 1832, Northern states were increasingly accepting the idea that the constitutional authority of the national government over all of the people was paramount.[2]

[2] Virginia and Kentucky advanced state rights positions between 1798 and 1800 in response to the Alien and Sedition Acts of 1798. Georgia took a strong stand even earlier against the Supreme Court's course of action in Chisholm v. Georgia, 2 Dallas 419 (1793). Similarly, New Hampshire challenged the Supreme Court's opinion in Penhallow v. Doane, 3 Dall. 54 (1795), although they were more amenable to the final jurisdiction of the High Court. Massachusetts, Rhode Island, and Delaware took strong action against the Embargo of 1807, while Connecticut opposed the enforcement act of 1809. Pennsylvania's actions against the government during the Olmsted crisis have already been treated in detail by this dissertation. During the War of 1812, Massachusetts, Connecticut, Rhode Island, and Vermont resisted federal control over the militia and, in varying degrees, supported the work of the Hartford Convention. Both Maryland and Ohio

How did the Northern states come to embrace a union of one national people? The answer lies less in the North than in new ideas arising from the South. In pursuit of an expansive vision of state sovereignty, John C. Calhoun and South Carolina triggered a national debate on the nature of the Union that gradually polarized the broad spectrum of political thought on the nature of the Union along sectional lines and into nationalist and state sovereignty positions. Many Northern states were already accepting federal authority in national matters like admiralty jurisdiction, the regulation of commerce, use of the tariff for revenue, and the Bank. Yet they still jealously guarded the powers reserved to the states. However, the Nullification Crisis would weaken the tactic of state review as a legitimate exercise of constitutional deliberation because South Carolina's claims linked state constitutional deliberation with treason and disloyalty. Martin Van Buren was wise to fear that the "sacred cause of state rights" was being discredited by the radical theories of Calhoun. The Madisonian middle ground, which allowed that the essential constitutional actors in the American system were both the several states and the national government, was eroded as Jacksonian nationalists and Southern particularists staked out increasingly polarized positions.

This chapter focuses on the rights claimed by state legislatures to construct constitutional meaning and the challenge posed to this idea by nationalist voices during

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took an active role in opposing the National Bank of the United States. (McCulloch v. Maryland, 4 Wheaton 316 (1819), and Osborne v. Bank U.S., 9 Wheat. 738 (1824). Kentucky again took a strident position against the power of the federal judiciary between 1821-1825 in the controversy surrounding Green v. Biddle, 8 Wheat. 1 (1823). Finally, Georgia again resisted national policy on the Cherokee Indians, and Jackson feared that Alabama would take a similar course against the Creek.

The best treatment of antebellum federal-state conflicts can be found in Forrest McDonald's *State Rights and the Union: Imperium in Imperio, 1776-1876*, (Lawrence: Kansas University Press, 2000). Unfortunately, McDonald's first-rate scholarship focuses on the events in the Capitol to the neglect of the actions of the state legislatures. Because so few scholars have examined the conflict from the perspective of the states, a rich collection of primary sources provides the best starting point. An old but excellent edition is Allen Johnson's *Readings in American Constitutional History, 1776-1876* (New York: Houghton Mifflin, 1912).

the crisis. First, it examines John C. Cahoun's perspective on the nature of the Union and the way that South Carolina implemented his theory of nullification. South Carolina believed that the "sacred distribution" of powers in the Union reserved to them sufficient sovereignty to nullify federal law. Nullification proved a departure from the Framers' design for a constitutional republic and from the ideas of nullification and interposition as developed in Virginia and Kentucky and exercised by Northern Republicans. Nevertheless, South Carolina's doctrines associated disunion with the idea of state constitutional theorizing in the minds of the Northern public. Nullification began to discredit the defense of the federal principle. Second, the chapter treats the several states' repudiation of nullification through the constitutional voice of their state legislatures. Third, it examines Andrew Jackson's response to the Nullification Crisis. Andrew Jackson reinforced the power and influence of the national idea through his own speculative theory of the Union and his militant posturing. The chapter also analyzes Martin Van Buren's attempts to preserve the Madisonian middle ground—what he called "the sacred cause of state rights"—in response to both Calhoun and Jackson. Finally, it considers the fate of state rights in 1833 as the crisis was mediated through the Congressional compromise.

John C. Calhoun's "Sacred Distribution"

Because South Carolina had a long history of nationalism, its sudden adoption of state sovereignty in the 1820s requires explanation.[3] The historiography of the

[3] South Carolina, ironically, was one of the few states that had not actively pursued a policy of interposition before 1830. A Federalist hotbed during the early Republic, South Carolina shifted its loyalty to the pro-war National Republican party between 1800 and 1828. Prominent Congressmen John C. Calhoun and George McDuffie were vociferous in their support of war with England in 1812. South Carolina further supported an expansive vision of federal power in support of a growing commercial and agrarian republic.

Nullification Crisis, as well as the rhetoric of South Carolina's politicians, offer an explanation for nullification centered on the tariff. The gradually increasing rates, from twenty percent in 1816 to sixty percent in 1832, devastated South Carolina's ability to import foreign manufactures at a time when the price of cotton had fallen by half and the cultivation of cotton was rapidly expanding throughout the Southwest. Increasing industrialization and immigration in the North altered the balance of sectional power after two generations of relative economic prosperity in the South. William Freehling also emphasizes developing concerns over slavery, slave revolt, and abolition as the critical factor in the Palmetto State's turn toward state sovereignty. Other explanations emphasize the role of a disaffected planter class which dominated state politics in the small homogenous republic. Ambitious planters found themselves financially trapped by plans they had financed on credit during the boom years of 1816-1819, before the panic tightened international credit. When that elite group turned against the national government, the whole state quickly followed in support. [4]

South Carolina had supported the tariff bill of 1816 as a just measure designed to repay the national debt and to promote infrastructure development. Calhoun himself dismissed the constitutional objections of the strict constructionists: "Let it not be said that internal improvement may be wholly left to the enterprise of states and individuals." (John C. Calhoun, *Annals of Congress*, 14th Cong., 2nd sess., 851-858, (February 4, 1817)). Politically, South Carolina stood in the nationalist wing of the National Republican Party against particularists among New England Federalists and Southern state rights supporters like William Crawford (GA). See McDuffie's 1821 speech denouncing William Crawford for his advocacy of a state veto power. (Quoted in *The Nullification Era: A Documentary Record*, William W. Freehling, ed. (New York: Harper & Row, 1967) 5-7). In December 1824, the South Carolina House asserted that "the people have conferred power upon their state legislatures to impugn the acts of the federal government or the decision of the Supreme Court of the United States." Their resolution adopted a very limited role for state constitutional review; the states even lacked the power to propose amendments to the Constitution; the sole constitutional power of the states was the right to petition Congress for a "convention of the people." (South Carolina, House of Representatives, December, 1824, *State Documents on Federal Relations: The States and the United States*, ed. Herman V. Ames (New York, Da Capo, 1970), 138-139).

[4] The best literature on the Nullification Crisis can be found in Keith Whittington, *Constitutional Construction: Divided Powers and Constitutional Meaning* (Cambridge, Mass.: Harvard University Press, 1999), ch. 3; Richard Ellis, *The Union at Risk: Jacksonian Democracy, States' Rights and the Nullification Crisis* (New York: Oxford University Press, 1987); William W. Freehling, *Prelude to Civil War: The Nullification Controversy in South Carolina, 1816-1836* (New York: Harper and Row, Publishers, 1966);

The crisis engendered a sectional debate about the constitutional rights and responsibilities of the Southern states within a constitutional union. South Carolinians' themselves often used the language of class conflict. As the sentiment of South Carolinians turned against the tariff, the anger of local politicians quickly moved beyond their national leaders. These agitators painted the conflict in starkly sectional terms. Thomas Cooper identified a new national tendency to "sacrifice the South to the North," to by draining the South of revenue to subsidize Northeastern manufactures.[5] "Brutus" compared their own lack of free trade to the oppressive bondage of slavery and demanded protections for their liberty. "The Government, therefore, which places on that commerce any restraint … RIVITED THE CHAINS around the neck and the feet of Southern industry."[6] However, while tariff rates and anxieties about slavery proved to be catalysts for dispute, they were not the final cause of the crisis.

Historians have so focused their analysis on the racial and economic conflict that they have neglected the importance that constitutional theory played in the debate. South Carolina's principal grievances were constitutional. Other South Carolinians complained

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David F. Ericson, *The Shaping of American Liberalism: The Debates over Nullification and Slavery* (Chicago: The University of Chicago Press, 1993); and Chauncey Samuel Boucher, *The Nullification Controversy in South Carolina* (Chicago: The University of Chicago Press, 1916). The weakness of Whittington's analysis of the Nullification Crisis lies in its extensive focus on the tariff. Whittington does not sufficiently explain that the fundamental disagreement was over the right to construe the constitution itself, not over what the Constitution said about the tariff. It if were otherwise, than South Carolina would have readily accepted the 1833 modification of the tariff with no further ado. But instead they called another convention and re-asserted their rights by repealing the nullification of the Tariff of 1828 and nullifying the Force Bill.

[5] "James Hamilton Jr.'s Speech at Walterborogh, October 21, 1828," and "Thomas Cooper's 'Value of the Union' Speech, July 2, 1827," *The Nullification Era*, 10-29, 48-61.

[6] "Brutus," "The Crisis" [Trumbull] (1827), *The Nullification Era*, 37. Brutus understood that political recourse had been closed to them because demographic trends had reduced South Carolina to permanent minority status. "The more national, and the less federal, the government becomes, the more certainly will the interest of the great majority of the states be promoted, but with the same certainty, will the interests of the South be depressed and destroyed" (27). South Carolina believed that they were already under an unconstitutional projectionist tariffs.

that the Revolutionary guarantees of liberty that should have protected minority rights were ceasing to function. James Hamilton explained that the Constitution was almost beyond recovery.

> 'The very blessings of liberty to ourselves and our posterity' [are placed] in such awful peril by the unmeasured strides of a government which has already passed the very banner of the Constitution to which it owes its existence, and which now lies at the mercy of a majority who seem to acknowledge no other canons for its interpretation than their own selfish …interests.[7]

Two feasible options lay open to South Carolina. First, they could pursue the course laid out by the Virginia and Kentucky Resolutions. In Madison's words, the states could and were "in duty bound to interpose," or as Jefferson explained it, "A nullification by those sovereignties is the rightful remedy."[8] When Hamilton began to appeal to an idea of a state veto, he presented it as a measure to preserve the Union. Hamilton demonstrated his faith in a constitutional solution with the toast: "The *Constitution of the United States*-'Whilst there is life there is hope.' Let us not abandon this work of our fathers until the only alternative is to abandon it or liberty itself."[9] Second, South Carolina could pursue secession. Cooper posed the choice as one of "submission or separation." "We shall 'ere long be compelled to calculate the value of union; and to inquire of what use to us is this most unequal alliance?"[10]

As the most prominent statesman from South Carolina, John C. Calhoun struggled to balance his nationalist principles with the radical opposition of his political base to the tariff. While serving as Vice President during John Quincy Adams' administration,

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[7] James Hamilton, "Speech at Waterborogh" (1828), *The Nullification Era*, 49. See chapter one for an analysis of normative constitutionalism.

[8] Ibid. Quoting the doctrines of the Virginia and Kentucky Resolutions and Reports.

[9] Hamilton, *The Nullification Era*, 61.

[10] Cooper, *The Nullification Era*, 25.

Calhoun ambition was to succeed Adams as President. When Calhoun failed to muster enough political support and the 1828 "tariff of abominations" outraged the South, Calhoun persuaded his state to vote for Jackson in the hope that Jackson would support tariff reform. For his support, Calhoun was again given the Vice Presidency. To ascend to the Presidency itself, Calhoun would need to balance his increasingly angry base in the Deep South, with support from the pro-tariff Northern and Western states. Unfortunately, for Calhoun, Jackson was equally torn by his need to balance both wings of his party. Jackson took no action on tariff reform.[11]

In the summer of 1831, Jackson decisively broke with Calhoun and chose Martin Van Buren as his heir apparent. Now that he was freed to develop openly the doctrine of nullification, Calhoun published his "Fort Hill Address" in the Pendleton *Messenger*, from whence it was rapidly distributed across the Union. Because he was not constrained by a legislative format or political pressure, Calhoun was able to use his full powers of political analysis and rhetorical force on behalf of his cause. The 1830 state elections had given the State Rights party a majority, but they lacked the two-thirds majority they needed to call a constitutional convention. His major task was to convince South Carolinian moderates that Nullification was a safe and just course of action. Calhoun then presented nullification to the South as a conservative, Union-saving measure.

The "Fort Hill Address" rests on a metaphysical analysis of the Union—that is, it seeks to understand the federal Union by understanding what kind of thing "union" is.

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[11] Furthermore, Calhoun was much damaged by a personal fallout with Jackson over the "Peggy Eaton Affair." The final break came when Jackson discovered Calhoun had opposed Jackson's military conduct in Florida, when Calhoun had been Secretary of War and Jackson was a senior Army commander. The final break with Jackson destroyed Calhoun's national ambitions and freed him to attend to his rebellious political base in South Carolina. Freehling, *Prelude to Civil War*, 186-192. For an account that focuses on Jackson's constitutional and policy differences with Calhoun, see Ellis, 51-56.

The argument does not come from a textual analysis of the Constitution, but from historical reflection on the circumstances of its creation. In his explication of the principles of revolutionary union and the constitutional convention, Calhoun exceeded all of his contemporaries with his depth of insight. [12] He conceded that the nature of the Constitution was a disputed thing. Even at the Convention, "while the Constitution was struggling into existence, there were two parties, as to what the relation should be, whose different sentiments, constituted no small impediment in forming that instrument."[13] Despite the fierce political debate over the nature of the Constitution that characterized both the convention and the early Republic, the state rights, Jeffersonian vision embodied in the Virginia and Kentucky Resolutions prevailed with Jefferson's victory in 1800. Calhoun assumed that, by 1831, the principles of state rights provided the authorized commentary on constitutional meaning.

Calhoun laid out his key assumptions in clear, forceful language:

> General government emanated from the people of the states, forming distinct political communities, and acting in their sovereign capacity, and not from the people forming one aggregate community; that the Constitution of the United States is in fact a compact, to which each state is a party, in the character already described; and that the several states or parties have a right to judge of its infractions, and in all cases of a deliberate, palpable, and dangerous exercise of its power not delegated, they have the right, in the last resort, to use the language of the Virginia resolutions, *"to interpose for arresting the progress of evil, and for maintaining within their respective limits, the authorities, rights, and liberties appertaining to them."*[14]

Calhoun started with the presuppositions that the people of the separate states formed distinct, sovereign political communities, that these communities had formed the Union,

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[12] The best treatment of Calhoun's roots in revolutionary republican ideas can be found in David Ericsons' *The Shaping of American Liberalism*, 75-89, and in Lee Cheek's *Calhoun and Popular Rule*: *The Political Theory of the* Disquisition *and* Discourse (Columbia: *University of Missouri Press*, 2001).

[13] John C. Calhoun, *The Papers of John C. Calhoun*, Clyde N. Wilson ed. (Columbia, South Carolina: University of South Carolina Press, 1978), 11:414.

[14] Ibid., 11:415.

that they had formed the Constitution as a compact, and that the states were still the sovereign parties of that compact. Calhoun was able to draw upon the common revolutionary idea of compact and association to argue that the states sill held their rights, as the sovereign parties, to determine if the contract had been violated. Furthermore, a violation of contract would not necessarily dissolve the compact and return the parties to a state of nature. States could, in the last resort, interpose to protect their Union and to try to force mediation between the states to solve a dispute. Nullification, far from a radical measure, was a "fundamental principle of our system."[15]

In practice, the idea that state legislatures could review the constitutionality of federal action was an established part of the political constitution. As political actors, the states could select senators who shared their views, could organize to support specific causes, or even petition Congress for a constitutional convention. Historically, many states believed their constitutional pronouncements would be decisive, if they could get most of the states to agree with them. Calhoun went beyond this tradition of state rights as it had been practiced in the North. At its essence, his principle of nullification did not depend on a collective state review. Nullification was premised on the idea that a Congressional majority had already determined a course of action (i.e. the tariff of abominations) to be constitutional and just. Calhoun sought to provide a constitutional mechanism for the minority to protect its own state rights.

To justify nullification, Calhoun began to develop what would, in his *Disquisition,* be identified as the theory of the concurrent majority.[16] At the heart of this

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[15] For more evidence, look at the Hamilton letter. Calhoun presented the argument that "the people of the United States have been united as forming political communities, not as individuals" (11:614).

[16] John C. Calhoun, *A Disquisition on Government,* (New York: The Liberal Arts Press, 1953).

argument is the Revolutionary idea of consent: individuals, and by analogy sovereign states possessed a fundamental right to consent to their government. Consent, then, is a natural right, which according to Revolutionary theory, civil governments were created to protect. Majorities, of course, possessed the right to govern, but this right was a civil right, granted to them by the terms of the compact; it was not a natural right. The purpose of a constitution was to provide a government of laws that ensured the equal application of the law. Calhoun argued that sound constitutional theory dictated that minorities should have constitutional mechanisms to protect them from abuse by majorities. Here Calhoun offered solid historical examples. In the ancient Spartan and Roman constitutions, each of the estates represented distinct interests who were given a unique political voice and a "negative on the acts of the co-estates."[17] England had achieved a stable republican government by giving the Crown, Lords, and Commons a necessary role in making law. In America, Calhoun contended, the interests were represented not by class but by geographical sections. To ensure the perfection of the Union, Calhoun argued,

> we must view the central government and the states as a whole, each in its proper sphere sovereign and independent, each perfectly adopted to their respective objects; … to preserve this *sacred distribution*, as originally settled, by coercing each to move in its prescribed orb, is the great and difficult problem, and on the solution of which, the duration of our Constitution, of our Union, and in all probability, our liberty depends.[18]

By securing the constitutional right of consent for the minority, Calhoun hoped to preserve the "sacred distribution" of powers that ultimately protected American liberty.

While the occasion for nullification was Congress' unconstitutional use of the taxing power, Calhoun believed the ultimate threat to the constitutional liberty of the

[17] Ibid., 11:417-418.

[18] Ibid., 11:419, emphasis mine.

minority lay in the practice of giving final interpretative authority to the Federal government. He posited that granting to one power the sole authority to construe the Constitution would ensure that that authority would consolidate all power to itself.[19] In particular, the judiciary was not "a safe depository of that power." Calhoun posed a stark dichotomy of either using nullification, or acquiescing in

> the novel, the hazardous, and … fatal project of giving the government the sole and final right of interpreting the Constitution, … making that instrument the creature of its will, instead of a rule of action impressed on it at its creation, and annihilating in fact the authority which imposed it, and from which the government itself defines its existence.[20]

Drawing upon the Revolutionary constitution of suspicion—that power tends toward corruption—Calhoun insisted that the states must have power to resist the tendency toward consolidation inherent in the constitutional design. In order to limit abuses by a single state, he proposed that the other states, collectively, should hold them accountable on the principle that three quarters of the states already held the power to amend the Constitution and could prevent a state from egregious acts of interposition.[21]

For South Carolinians who refused to countenance secession, nullification provided an attractive political alternative to disunion. Calhoun contended that, "far from anarchical or revolutionary, I solemnly believe [nullification] to be, the only solid foundation of our system, and of the Union itself."[22] The Union was at stake. The

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[19] Every government that has ever existed either preserved the rights of the minority or quickly fell into tyranny. Calhoun implied in his letter to Hamilton that the Union was quickly failing and only by construing the Constitution to include the principle of the concurrent majority could any government endure. "There is not … a single free state whose institutions were not based on the principle of the concurring majority—not one in which the community was not regarded in reference to its different political interests, and which did not, in some form or other, take the assent of each in the operation of government." (Ibid., 11:641).

[20] Ibid., 11:421.

[21] Ibid., 11:420.

[22] Ibid., 11:415-416.

surplus generated by the tariff was already corrupting government. "As the disease will not, then, heal itself, we are brought to the question, can a remedy be applied, and if so, what ought it to be?"[23] Nullification would help to keep the government within its limits. It could guard against the assumption of new powers "under the colour of construction" by Congress, and so preserve the Union against its greatest peril.[24]

In additional public letters, Calhoun explained the practical details of implementing nullification. Before the 1832 elections, the State's Rights party contrived to publish a letter from Calhoun to Governor Hamilton that would soothe the voters' fears that nullification would lead to treason and civil war. Calhoun again recounted the argument that the people of the United States formed that government in distinct communities, and not as one people. The Government of the United States, Calhoun argued, does not have power over its citizens except through the states: "The union is a union of states, as communities not as individuals."[25] The terms of the Constitution do did not authorize the federal government to coerce, veto or exercise judicial power directly over the states. Because of these provisions, the federal government was limited as to how it can respond to state nullification.[26]

Calhoun instructed Governor Hamilton on exactly how to proceed to avoid a conflict. The key was to amend the state constitution by ordinance to require all citizens of the state to accept the ordinance's definition of constitutionality. Juries, judges,

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[23] Ibid., 11:432.

[24] Calhoun, "Letter to Hamilton," *Papers,* 11:630-35.

[25] Ibid., 11:616.

[26] Calhoun could point to the Eleventh Amendment and the early tradition of state resistance to *Chisholm v. Georgia* and the Alien and Sedition Acts. Nationalists, however, could respond with citations to the constitutional text: the supremacy clause, the preamble, and the specific restrictions on state power in Art. I, sec. 10. I am indebted to Paul Dehart for this argument.

attorneys, and anyone who held South Carolina citizenship would be bound by state law as the "highest" authority.

> It would be impossible for the General Government, within the limits of the State, to execute, legally, the act nullified, or any other passed with a view to enforce it; while on the other hand, the State would be able to enforce, legally and peaceably, its declaration of nullification.[27]

Everything was calculated to force a political solution upon the general government. The state legislature could, as the final sovereign, design the laws so that resistance to the tariff would be required by state law. Insurrection, rebellion, treason, or justification would be avoided by legally defining the obligation of state citizens, so that they were required as jurors and judges to sustain nullification in the courts.

> [T]he declaration of Nullification would be obligatory on the citizens of the State, as much so in fact, as its declaration ratifying the Constitution, resting as it does, on the same basis. It would *to them* be the highest possible evidence, that the power contested was not granted, and, or course, that the act of the General Government was unconstitutional. They would be bound in all relations of life, private and political, to respect and obey it; and, when called upon, as Jurymen, or render their verdict accordingly, or as Judges, to pronounce judgment, in conformity to it.[28]

Treason by force would be prevented so that the federal government would lack a compelling justification under existing law to call out the militia. It must either repeal its unconstitutional law or use coercion against the state. Any plan for coercion would be exceedingly difficult for the government to enforce and would arouse the ire of other Southern states. "It will be a legal and constitutional contest, a contest of morals, and not

[27] Calhoun, "Letter to Hamilton," *Papers*, 11:626.

[28] Ibid., 11:626.

physical force—a trial of constitutional, not military power."[29] Even John Marshall, boasted Calhoun, would not use force beyond the Constitution.[30]

[29] Ibid., 11:628.

[30] Ibid., 11:628-29. Calhoun recognized that the President might try to force the issue as a maritime dispute, in which South Carolina would not maintain sovereignty. Yet the government's rights to blockade or abolish a port were extreme measures and would be seen by the other states as belligerent actions of coercion. Calhoun was proved correct on this very point by Jackson. The President supported a measure to shift the collection of tariffs from the port to the harbor aboard federal ships. Calhoun's broader point on the weakness of a federal coercive power also proved correct. Jackson's request for the Force Bill in January 1833 demonstrated that the public did not believe that he already possessed clear constitutional authority to coerce citizens obeying state law. Jackson hoped that the Congress would construe the Constitution to support his exercise of force.

My own analysis of Calhoun follows: The Constitution does give a check to the states, collectively, against the federal government. The states can call a constitutional convention (the ultimate power of constitutional construction) without Congress under Article V. However, this power was not given to the states individually. This is to fall into the error of the medieval Polish constitution, which required unanimity for action. The partition of Poland in the late 18th century exposed the flaw in this constitutional model, as did the Articles of Confederation. Yet Calhoun advocated precisely this theory. He wanted a return to the Articles of Confederation. His theoretical approach appealed to the authority of the states under the Revolutionary political grammar. However, association, even during the Revolution, was understood to be multi-leveled, not unitary. The states shared the use of sovereign power with the Continental Congress. In addition, the Constitution of 1787 did not simply replicate the Revolutionary forms of government. Calhoun's attention to the normative and metaphysical character of a constitution obscures his neglect for the actual provisions of the Constitution. In fairness, Calhoun believed that judicial review was not provided for in the Constitution—the Constitution would have to mandate state review. Without judicial review, a functional Constitution might be said to require individual state review, at least initially, as a precursor to joint action. However, the Constitution disclosed, through the text and the structural needs of the early Republic, that it was supreme over the states, and that the judiciary was given final authority over cases in law and equity.

Calhoun placed much emphasis on developing a balanced construction, with an equilibrium between the powers. Perhaps he believed that rapid industrialization and population growth had unbalanced the existing constitution. In terms of classical and revolutionary theory, Calhoun was right, in that the orders of society ought to be balanced. In point of law and emerging Jacksonian democracy, however, the powers of the state did not extend this far. They did extend to the rights of the states to remonstrate. States could convincingly argue that they had rights to interpret the Constitution as important branches of government, as long as they recognized the Constitution as supreme law. Calhoun went beyond this. Calhoun's doctrine set South Carolina's ordinance up as supreme law and in direct opposition to the constitutional authority of the President and Congress. If judicial review required that disputes were to be handled by the courts in "matters of law and equity" (9:635-637), then Calhoun and the states could persuasively argue that they could adjudicate constitutional disputes. The judiciary's role was then limited to applying the Constitution to particular cases. In this approach, judges would not necessarily be able to say finally what the Constitution said. They would just be the proper body to apply that law to legal disputes.

Calhoun's theory was carried before the constitutional tribunal of the American people through elections, other state legislatures, Congress, and Jackson as the only constitutional representative of the whole people. They ultimately accepted the idea that judicial review is implicit in the principles of the Constitution. Judges, at least, had the power to interpret the Constitution for the judiciary. During the 1820s and 30s the people retained the idea that the states had a constitutional role in remonstrating and defending state rights against consolidation. Nevertheless, they decisively rejected the idea of nullification.

As Election Day approached, Calhoun grew confident that the State Rights party would win a decisive victory. His private correspondence reveals that while he hoped to preserve the Union, he did not believe it could be preserved under the present system. The old constitution was finished. "We have run nearly fifty years on the first track. It was a wonderful run; but it is time to bring up the reckoning, in order to take a fresh departure." Calhoun's strategic goal was to provoke a constitutional crisis that would only be resolved by "a general convention of all the states, in order to adjust all constitutional differences and thusly restore general harmony."[31] Given the state of discontent over the tariff, and the force of his ideas, Calhoun believed he could re-found the Union on the principle of the concurrent majority.

South Carolina clearly disowned the agrarian, state rights Democratic coalition of Jefferson and Jackson for a more militant theory of absolute state sovereignty. Choosing not to support either Jackson's theory or the broad construction of his opponent Henry Clay they cast their electoral votes in 1832 for John Floyd of Virginia. When the State Rights party defeated the Unionists in early October, Calhoun began to draft proclamations for the state convention. Governor Hamilton immediately called a special session of the state legislature for October 22nd, which in turn called a state convention for November 19th. The State Rights party so dominated these elections that nullification was a foregone conclusion. Calhoun himself did not participate since he still held office as Vice President. Together Hayne and McDuffie persuaded the convention to endorse secession immediately if Jackson used force against the state. More cautious delegates staved off an immediate confrontation by suspending the ordinance until February 1,

[31] Calhoun to V[irgil] Maxcy, Fort Hill, October 8, 1832, *Papers*, 11:655.

1833, to give Congress time to respond. The final vote, taken on November 24, endorsed nullification by a 136-26 margin.[32]

The Ordinance of Nullification endorsed the basic theories of Calhoun but staked out even more radical claims for the power of the state to nullify, finally, unconstitutional laws of the central government. It claimed,

> that the states have the right, in the same sovereign capacity in which they adopted the federal constitution, to pronounce, *in the last resort* authoritative judgment on the usurpations of the federal government, and to adopt such measures as they may deem necessary and expedient, to arrest the operation of the unconstitutional acts of that government.[33]

Claiming these rights, South Carolina repudiated any higher constitutional authority. Following Calhoun's 1832 letter to Governor Hamilton, they revised their state law to prevent the federal government from enforcing the Tariff of 1828 or 1832 within the state. A Replevin Law was passed to allow the state to legally restore to any citizen goods which the federal customs agents had seized for non-payment of the tariff. As a condition of active political office and jury service, citizens were required to swear an oath that they would uphold the ordinance and the state's interpretation of nullification. Appeals to the U.S. Supreme Court in cases questioning the legality of the Ordinance were forbidden. The Convention hoped that these provisions would prevent any marshal, juror, judge, or even customs official from acting to enforce the Tariff of 1828 or offering an opinion on whether nullification had any constitutional merit. Due to the

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[32] Prominent party leaders met in committee to draft the necessary documents and put them to the convention for a vote. Senator Hayne drafted the ordinance itself, while McDuffie edited Calhoun's "Address to the People of the United States." See Calhoun's initial draft of the "Address to the People of the United States," November 1, 1833, in *Papers*, 11:669-681. For a narrative of events in South Carolina during the fall of 1833, see Ellis, 74-76. Unionist opposition was largely disorganized. What little leadership that existed was provided by Joel Poinsett in Charlestown, who by virtue of his correspondence with Jackson, was able to exert some influence.

[33] South Carolina, "Address to the People of United States," *State Papers*, 60, Emphasis mine. Calhoun also used the phrase "last resort." (Calhoun, *Papers*, 11:670).

overwhelming support within the state for nullification, delegates believed that if they could silence the Unionists with the oath, no successful challenge could be brought against the Ordinance.[34]

Even though the doctrine was theoretically separate from the doctrines of secession and revolution, other state legislatures might not make this distinction. South Carolina's ultimate goals—the vindication of state sovereignty and the repeal of the tariff—would depend on the constitutional reaction of the other state legislatures. While they hoped that Southern states, angered by the tariff and the presence of Native American peoples within their boundaries, would embrace nullification, their ultimate success would require concession from Northern states. Nullification could anger Northern states if it was perceived as a threat of revolution, or it might overawe them into acquiescence. If Northerners were convinced that low tariffs were the price of Union and that South Carolina meant to secede if their demands were not met, they might be more likely to co-operate. The convention believed that, for the North, mere "pecuniary interest, connected with no shadow of right" was at stake. But for their state,

> it is a question of our most sacred rights—those which our common ancestors left to us as a common inheritance … consecrated in their blood. It is a question of liberty on the one hand, and slavery on the other.
>
> We would infinitely prefer that the territory of the state should be the cemetery of freemen than the habitation of slaves. Activated by these principles, and animated by these sentiments, we will cling to the pillars of the temple of our liberties, and if it must fall, we will perish among the ruins.[35]

The Convention assured the American people that the "sacred rights" of South Carolina to freedom from exorbitant taxation without consent were so essential that it would not surrender them, no matter what the risk. They expressed confidence that, faced with such

[34] South Carolina, "An Ordinance," *State Papers*, 28-38.

[35] South Carolina "Address to the People of United States," *State Papers*, 71.

resolution, the other states and the national government would relent. According to the influential theory of Virginia and Kentucky Resolutions, the states' response would be critical. Overwhelming resolutions of state support for South Carolina would establish nullification as a legitimate check on federal power. If the states, as parties to the federal compact, refused to accept the interpretation, then it would practically and theoretically doom any theory that a single state could set constitutional meaning for itself.

State Legislative Response

As I argued in chapter one, much of the history of state rights and federalism before the Civil War has been portrayed as a battle between the polar forces of nationalism and state sovereignty. The extensive state responses to the Nullification Crisis did not fit neatly into either the nationalist model or the state sovereignty model. Three different kinds of reactions can be found. First, Southern resolutions portrayed a complex blend of fidelity to the Constitution, rejection of nullification, and pursuit of tariff reform. Second, a few Northern legislatures, especially on the Atlantic seaboard, staked out strong nationalist positions, challenging South Carolina's vision of a union of sovereign states with their own vision of a perpetual union of one people. Third, the majority of Northern states avoided the "speculative" conflict of the "nature and objects of our political system" in favor of a "practical view" of the actual construction and powers of government. Primarily, they restricted their debate to the content of the constitution itself. They believed that the crisis should be framed "not in accordance with the federal doctrine of consolidation, but with the democratic doctrine of state rights, and

a limitation of action of the federal government to the powers expressly delegated to it by the Constitution…"[36]

Of the three responses, those from the Southern states reacted to South Carolina first.[37] Like South Carolina, Southern legislators denounced the tariff as unjust and anti-constitutional. Alabama insisted that it contradicted the Framers' intentions, Mississippi charged that the tariff violated the spirit of the Constitution, and North Carolina contended it was directly unconstitutional. No state directly sanctioned nullification as a legitimate political course. State legislatures labeled the doctrine "revolutionary," "heresy," and "disunion by force."[38] In Georgia and Virginia, minority factions were able to produce strong support for nullification, requiring more moderate language from the legislature. Virginia did not denounce nullification outright, but insisted that "doctrines of State Sovereignty and State Rights" did not "sanction" South Carolina's version of nullification.[39] Georgia's legislature produced resolutions condemning the minority of Georgians who supported the "rash and revolutionary measures" of the Ordinance.[40]

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[36] Maine, House of Representatives, "Resolves," February 18, 1833, *State Papers*, 108. Maryland too supported a strong government within the limits of the constitutional powers given to it. It "wishe[d] every delegated power to be exerted that has a tendency to strengthen the bonds that unite us, and to fortify the hope that the union will be perpetual." Maryland, House of Delegates, "Resolves," February 9, 1833, *State Papers*, 290-291.

[37] For the best treatment of the Southern state's reaction to the Nullification Crisis, see Ellis, 102-140.

[38] North Carolina, General Assembly, "Resolves," January 5, 1833, *State Papers*, 201-202; Georgia, House of Representatives, "Resolves," November 29, 1832, *State Papers*, 271-274; Alabama, "Report" and "Resolves," January 12, 1833, *State Papers*, 219-223; and Mississippi, Legislature, "Report" and "Resolves," *State Papers*, 229-231.

[39] Virginia, House of Delegates, "Resolves," January 26, 1833, *State Papers*, 196. Virginia was careful not to condemn the idea of nullification itself. Rather, it denounced the way that South Carolina had implemented it. Virginia posed as the defender of the Virginia and Kentucky Resolutions against their misapplication by South Carolina. See Ellis, Ch. 6.

[40] Georgia, *State Papers*, 274.

Other Southern legislatures agreed in rejecting both the tariff and nullification; they disagreed over how their grievances should be redressed. Their moderate position stressed the need for patriotic sacrifice and conciliation. The Southern states did not assume the identity of authoritative constitutional actors in a *constitutional* crisis. Alternately, treating the situation as a *political* crisis, they urged that the injured parties exercise conciliation and restraint. Virginia took the lead in appointing a state commissioner to mediate between South Carolina and the general government. Both sides, Virginia believed, ought to pursue a political solution and renounce force. South Carolina should rescind their Ordinance and Congress should lower the tariff. Alabama counseled "patriotism, forbearance, and virtue" while Mississippi urged South Carolina to heed to Jackson's "Proclamation" against nullification.[41]

Georgia, while rejecting nullification, advanced a unique solution. Only a constitutional convention could resolve the debate over how to construe the Constitution; neither the states nor the Supreme Court could speak with finality. Pragmatically, South Carolina must recognize that nullification would fail and weaken the cause of tariff reform. A constitutional convention had the advantage of settling all of the issues at once; it would set limits on the tariff, curtail the jurisdiction of the Supreme Court, and create a new tribunal to settle disputes between the national government and the states. Disputed questions of federalism, banking, internal improvements, the surplus, and other

[41] Virginia, *State Papers*, 195-197, Alabama, *State Papers*, 219-223; and Mississippi, *State Papers*, 229-231.

limits of the delegated powers would be decisively settled by *the* authoritative constitutional voice: a convention of the states.[42]

While South Carolina failed to garner sufficient support for nullification among the Southern states, it triggered a debate in the South on the nature of the Union that strengthened the authority of the states. In 1833, Virginia defended the picture of state authority described in the Virginia Resolution of 1798 as the true interpretation of the Constitution. Alabama recognized that instead of venerating the Constitution, "no inconsiderable portion of the South have begun to estimate its value; and to contemplate even disunion itself, as an evil less formidable than submission to the extractions of the government."[43] Mississippi promised that it would "never stop to calculate [the worth of the Union], holding it as our fathers held it, precious above price." Yet, "she prizes that union less than liberty alone."[44] While the South refused to accept nullification as a

[42] Other states recognized that a constitutional convention would create opportunity for further disagreement, not consensus. Mississippi took a strong anti-convention position in response of Georgia. The Constitution was "the great charter of our national liberties, our independence and union." If a convention were called it would cement the prevailing "wild and latitudinarian construction" of the Constitution into the text. Eighteen of twenty-four states had actually supported the tariff. Why did Georgia believe that a convention would restore strict construction? A new constitution would endanger the liberties that were at least protected by the current text. The Constitution of 1787 was the best that could be hoped for. A political strategy gave the South a better chance of success because the existing balance of power protected small states' independence and autonomy through the Senate. (Mississippi, "Report" and "Resolves," *State Papers*, 277-280). Massachusetts opposed Georgia's call for a convention for different reasons. Massachusetts insisted that the people were sovereign, and not the states. They interpreted the Constitution in such a way as to grant the Supreme Court the power to decide finally what the Constitution said. They opposed a convention, not because it would actually resolve the crisis, but because it would create more confusion. Massachusetts, like Mississippi, stood by the existing constitution. Ohio opposed a convention as "inexpedient;" Connecticut explained that "much would be hazarded, and nothing valuable gained." South Carolina alone supported Georgia's call for a convention. (Massachusetts, Senate, "Report in Part" and "Resolves," March 18, 1833, *State Papers*, 244-257; Ohio, "Resolves," February 25, 1833, *State Papers*, 205-207; Connecticut, General Assembly, "Resolves," *State Papers*, 285; and South Carolina, Senate, December 19th 1832, "Preamble and Resolutions," *State Papers*, 237).

[43] Alabama, *State Papers*, 220.

[44] Alabama, *State Papers*, 230.

legitimate constitutional strategy, they began to apprehend the Constitution as separable from and inferior to their liberty.

Northern nationalists, like Southern particularists, found their theoretical differences intensified by the crisis. While the Nullification Crisis helped to make the South more resolute in support of state sovereignty (not simply state rights), it rallied several prominent Northern legislatures behind a nationalist reading of the Constitution. These states consisted of large industrializing states on the East Coast, the large states of Massachusetts and Pennsylvania, and smaller states like New Jersey and Delaware. Larger states were motivated by the desire for a projectionist tariff, while the smaller states had traditionally supported a strong general government to protect them from the powerful states that surrounded them. Each of these states distinctly opposed the idea of state sovereignty.

> If the general government be one, established by the people of the United States, then they owe to it allegiance, and may be guilty of treason towards it. Its laws are supreme; no portion of the people [i.e. a state] can abrogate them. The state governments are competent but subordinate parts of the system.[45]

Many of these states had been suspicious of Jackson's tariff policy, but they moved to support him in defending the nation. Unlike the Southern resolutions, the Northern nationalist responses made only a brief mention of the tariff. Delaware insisted that South Carolina had "no constitutional complaint" while New Jersey defended the positive right of the general government to enact a tariff for protecting manufactures.[46]

What characterized the nationalists was their detailed critique of state sovereignty as a flawed theory of the Union. They drew upon both history and constitutional texts to

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[45] Delaware, "Resolves," January 16, 1833, *State Papers*, 190-191.

[46] Delaware, "Resolves," January 16, 1833, *State Papers*, 190-191, and New Jersey, "Resolves," February 18, 1833, *State Papers*, 163-165.

challenge the Southern history of the Union. Massachusetts had insisted that the states lacked independence in the 1780s. This Union was created by a social compact of the people and embodied in a real government of limited powers, not a league. The rights of the parties to the compact should be determined by the text of that agreement, the Constitution. The text gave to the U. S. Supreme Court, "The great business of interpreting the Constitution and the laws, and of performing the high office of Arbiter in the last resort, of all questions of disputed power…"[47] As New Jersey insisted, "The sacred charter of our liberties never contemplated that each state reserved to itself an ultimate appeal to its own citizens in their sovereign capacity."[48]

The key nationalist position was the idea that the nation was formed by one people who created a constitutional government that protected their rights through national citizenship. These ties were above all fraternal and patriotic; they were not an artificial product of the compact. New Jersey praised, "our common country, cemented by the blood of our common ancestors."[49] Nullification directly contradicted the essence of the nation itself, "tending to rend asunder those ties of common interest and fraternal regard, of mutual dependence and reciprocal obligation… which have proclaimed us to the world a united people."[50]

The nationalist resolutions recognized a legitimate but limited constitutional role for the states. All agreed that South Carolina should "desist from the irregular, violent,

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[47] Virginia itself had taken this position in response to Pennsylvania's interposition in 1810. Massachusetts, *State Papers*, 252.

[48] New Jersey, *State Papers*, 164.

[49] Ibid.

[50] Ibid.

and unconstitutional attempt to gain redress"[51] and pursue the peaceful political and constitutional options it still had. Disputes about the proper authority of a state could be brought before the judicial tribunals. New Jersey stressed that South Carolina should seek the remedy of a constitutional amendment. Even Massachusetts recognized that South Carolina had a legitimate constitutional voice. South Carolina's convention, instead of assuming a militant tone, should propose changes that contain "the precise points wherein existing provisions of the system were supposed to be doubtful or insufficient, and the nature and extent of the correction proposed to be applied." Nationalists held that South Carolina was uninterested in genuine reform. The real intent of South Carolina was not to work within the political system, but to veto existing laws and trigger a constitutional convention in "the office of umpire and sit in judgment on certain disputes, which are alleged to exist between a state and states, and that nation." If South Carolina would express its grievances legitimately, then the nation could address them.[52]

In contrast to the nationalists' focus on political theory, the majority of the Northern states Maine, New Hampshire, New York, Maryland, Ohio, and Indiana avoided detailed theories of the Union. Like the nationalists, they placed the Union beyond all calculation of worth. Ohio spoke of union as the "first and paramount object of a free people," while Indiana stressed its own obligation "by interest and honor to that Confederacy into which they voluntarily entered, and from which they will never

[51] Massachusetts, "Resolves," February 15, 1833, *State Papers*, 130.

[52] Massachusetts, *State Papers*, 244-45. This seems disingenuous, as Massachusetts opposed even moderate tariff reform.

willingly be severed."[53] Unlike the Eastern manufacturing states, these states believed the tariff to be "impolicy and oppression,"[54] though none labeled it unconstitutional. Ohio and Maryland stressed that the duties ought to be reduced or redistributed so that income did not greatly exceed expenditures and that all states fairly shared the tax burden. Those states that laid out a moderate theory of union carefully distinguished their position from both the nationalists and the nullifiers. They maintained that the Union had been formed by a compact of the people and that the people were organized in the several states. The Union, then, bound both the states and the people from secession or violations of compact.[55]

What bound the Union together? These defenders of moderate state rights largely agreed with the nationalists in that the ultimate bonds of union were virtuous and voluntary associations. They believed that the other states were bound to South Carolina, not simply by compact, but by trade and "national attachment."[56] South Carolina, though it had legitimate grievances, should make a virtuous and "patriotic sacrifice to the cause."[57] The course of nullification violated not only the nature of the Union and text of the Constitution, but also the traditional habits of association exhibited in the American Revolution. Maine assailed South Carolina's policy as "inconsistent with the spirit of forbearance in which our union had its origin and by a preservation in which it can alone

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[53] Ohio, *State Papers*, 205-207; and Indiana, "Resolves," January 9, 1833, *State Papers*, 213-215.

[54] Maine, *State Papers*, 105-106.

[55] Ohio, *State Papers*, 205-207; and Maryland, *State Papers*, 289-292.

[56] Ohio, *State Papers*, 205-207.

[57] Maryland, *State Papers*, 289-292.

be maintained."[58] This spirit of virtuous association required that the states support the President in the preservation of the Union. They were also bound to mediate the crisis through their state legislature. As Maine explained, its task was to "interpose the voice of this state for conciliation and forbearance" to promote "peaceful and lawful redress."[59]

Northern states shared a consensus with all the states that nullification itself violated the Constitution.[60] To refuse to obey the federal tariff, within the boundary of a state, was to resist duly constituted authority. It "must inevitably lead to consequences most disastrous, and ruinous to the peace, prosperity and happiness of our common country."[61] The "heresy" of nullification, Indiana resolved, contained "internal evidence of … impracticality, absurdity, and treasonable tendency."[62] These states stressed their support of Jackson's long defense of state rights within a vigorous union. They agreed that the "Union must be preserved" and that Jackson was bound to uphold his oath to the Union; however, none of the "state rights" Northern legislatures endorsed Jackson's request for a Force Bill (as had many nationalist states). Instead, they preferred to use their influence on Congress. Indiana sought to "express through their representatives, a firm and unwavering determination to protect the 'ark of their political safety' from the hand of violence" while continuing their support of the President.[63] This summarizes the approach of most northern states: eschew theoretical debates in order to support the

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[58] Maine, *State Papers*, 106.

[59] Maine, *State Papers*, 106.

[60] Virginia was ambiguous about the legitimacy of nullification because the state was deeply divided. Georgia denounced nullification, but a significant minority of the legislature had been willing to support South Carolina's policy. Ellis, ch. 5 and 6.

[61] Ohio, *State Papers*, 205.

[62] Indiana, *State Papers*, 213.

[63] New Hampshire, "Resolves," December 10, 1832, *State Papers*, 101; and Indiana, *State Papers*, 214.

President in his constitutional duty while pursuing a reduction of the tariff through the political branches. Above all, they used their voice as states to "interpose" for mutual forbearance to protect the Union from violence.

Jackson's "Sacred Duty"

As the state legislatures rejected the political theory of nullification, Andrew Jackson wrestled with the threat of violent resistance in South Carolina. In South Carolina, Calhoun had privately assured Governor Hamilton that Jackson would be legally and political constrained from bringing force to bear against the legally constituted authority of the state. South Carolina used the full extent of its legislative authority to mandate how its citizens would interpret and implement the U.S. Constitution. Many in South Carolina looked to Old Hickory, to support the cause of tariff reduction, state sovereignty, and strict construction. They chose to focus on his long support of Indian withdrawal and his persistent opposition to the "American system" of expansive federal spending on national infrastructure.[64]

Despite Jackson's reputed hostility to the general government, South Carolina eventually turned against him because he espoused a different brand of state rights. Jackson's approach was essentially agrarian and democratic. It held in suspicion all special privilege, monopoly, or large spending projects. Above all, Jackson sought to make government more responsive to the will of the whole people. Power should be

[64] During the nullification debate, the president faced an ongoing crisis about the place of Native American peoples in the Deep South including the prospect of state resistance to federal authority in Georgia and Alabama. Jackson detailed his troubles to Van Buren, "indisposed by cold, and surrounded with the nullifiers of the South, and the Indians in the South, and West." (Jackson to Martin Van Buren, January 13, 1833, *Correspondence of Andrew Jackson*, John Spencer Bassett, ed. (Washington, D.C.: Carnegie Institute of Washington, 1926-1935), 4:13). When John Marshall upheld the federal treaty rights over state authority in the Cherokee Cases (Cherokee Nation v. Georgia, 5 Peters 1 (1831) and Worcester v. Georgia, 6 Peters 515 (1832)), Andrew Jackson continued to support Georgia (Robert V. Remni, *The Life of Andrew Jackson* (New York: Penguin Books, 1988), 216-217)

removed from the national government to empower the people as farmers and businessmen, not just state governments.[65] South Carolina, in contrast, sought to defend the sovereign state power that the planters effectively controlled. Calhoun's doctrines emphasized autonomy and protection for South Carolina as a minority. Jackson was concerned not so much with minorities, as with vigorously wielding the power of the executive to combat special privilege on behalf of the whole people. Jackson understood that his constitutional duty required him to enforce the law. He proved unsympathetic to South Carolina's claims for its own special privilege.

Jackson's "State of the Union Address"

Jackson's initial response to the crisis fit this pattern. Jackson first discussed the crisis in his December 4, 1832, State of the Union Address. Given the potential for widespread resistance to federal authority, Jackson's chosen successor and close political advisor, Martin Van Buren, had counseled Jackson to limit his response "as strictly as possible."[66] At first, Jackson followed this advice. His response was muted in tone and animated by the guiding principle of commercial agrarian democracy—that the federal government should be limited to its minimal functions so that individual landowners could guide the prosperity of the country. As the federal debt had almost been repaid, Jackson stressed that both spending and taxation should be reduced "with the hope of reducing the General Government to that simple machine which the Constitution created." Its function should be restricted to the strict limits of the Constitution: preserving the peace, reducing debt, and providing a uniform currency and a stable

[65] Ellis, 6-7.

[66] Martin Van Buren to Andrew Jackson, December 27, 1832, *Correspondence*, 3:507.

environment for the enforcement of contracts. These "superintending functions" should be fulfilled with a minimal obligation and interference with state and private liberty.[67]

Jackson's speech genuinely embraced limited government. He denounced monopoly, corruption and concentrations of wealth as unhealthy for the republic. He sought to divest the government of private stock, to limit new internal improvements to genuinely national projects, to prefer local taxation to national taxation, and to sell off the Western lands at prices barely sufficient to cover the cost of sale. These policies pleased the agrarian Democratic base and fulfilled several election promises.

Jackson's description of South Carolina's Ordinance deftly ignored the potential for disunion in South Carolina. Instead, he urged the whole nation to avoid the "evils" of "a spirit of discontent and jealousy" that threatened the entire Union. On the issue of the tariff, Jackson stressed that it should be reduced.[68] Because revenue should be spent solely on national purposes, once the debt was paid off, a protectionist tariff could only be justified if it benefited the whole national interest. "A large portion of the people in one section of the Republic declares it not only inexpedient… but as disturbing the equal relations of property by legislation, and therefore unconstitutional and unjust." Tariffs should be reduced so that they matched the tariffs of other nations, and promoted free trade except in "those articles of manufacture essential to the national independence and safety in time of war." Without declaring the tariff unconstitutional, Jackson suggested

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[67] Jackson, "State of the Union Address," December 4, 1832, *Register of Debates*, 22nd Cong., 2nd sess., Appendix, 5.

[68] "The soundest maxims of public policy and the principles upon which our republican institutions are founded recommend a proper adaptation of the revenue to the expenditure, and they also require that the expenditure shall be limited to what, by an economical administration, shall be consistent with the simplicity of the government and necessary to an efficient public service." (Ibid., 4).

that it was no longer necessary. A downward revision of tariff rates would satisfy its critics.

Jackson addressed the problem in South Carolina itself indirectly, in only one paragraph.

> It is my painful duty to state that in one quarter of the United States opposition to the revenue laws has arisen to a height which threatens to thwart their execution, if not to endanger the integrity of the Union. Whatever obstructions may be thrown in the way of the judicial authorities of the General Government, it is hoped they will be able peaceably to overcome them by the prudence of their own officers and the patriotism of the people.

Should these virtues fail, Jackson assured Congress, the laws were "fully adequate" to deal with any "obstructions."[69]

Jackson's "Proclamation"

Jackson decided that the State of the Union address did not sufficiently address the threat of nullification. Six days later he released a "Proclamation" dealing with nullification specifically. As President and leader of the Democratic Party, Jackson seized personal control of the debate and recast it in terms of treason and personal loyalty to the Union. He first acknowledged the natural right to resist an unconstitutional act. After all, the American justification for the Declaration of Independence had rested on natural rights. But he refused to grant to a single state or to the states collectively the right to nullify an act. The states were bound by their place in the Union. If individual states could determine which laws they would obey, then as Jackson later wrote, the Union was a mere "rope of sand."[70]

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[69] Ibid., 5.

[70] Jackson to Brigadier General John Coffee, December 14, 1832, *Correspondence*, 4:499-500. In fact South Carolina had not claimed the right to nullify any laws, except unconstitutional laws, and that as an extreme and not an ordinary measure.

Jackson believed that while the states played a significant and even a dominant role, within the American Union, they were not completely sovereign. "No one," he promised, "has a higher reverence for the reserved rights of the states, than the magistrate who now addresses you." Equal care, however, must be taken for the "rights … vested in the nation."[71] The constitutional design had delegated critical aspects of sovereignty to the federal government.

> What shows conclusively that the States cannot be said to have reserved an undivided sovereignty, is, that they expressly ceded the right to punish treason—not treason against their separate power—but treason against the United States. Treason is an offense against sovereignty, and sovereignty must reside within the power to punish it.[72]

Jackson readily conceded that the tariff was unwise, unequal, and "must necessarily be removed." He exercised his constructional obligation to advise Congress in the State of the Union that the "inequality" of the tariff "must necessarily be removed."[73] However, Jackson understood that the dispute was more than a dispute between constitutional deliberators (Jackson, Congress, South Carolina, or the states collectively in their legislatures) over whether the Constitution permitted a tariff. It even transcended the difficult interpretive issue of whether the states, as the original parties to that compact and functioning as the people in their highest sovereign capacity, could collectively construe the Constitution under the logic of the Virginia and Kentucky Resolutions. Jackson focused the debate on the loyalty of South Carolina to the Union. Neither prudent statesmanship nor patriotic citizenship permitted the course of action South Carolina had taken. "Their object is disunion; be not deceived by names; disunion by

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[71] Jackson, "Proclamation," *State Papers,* 88.

[72] Jackson, "Proclamation," *State Papers,* 88-89.

[73] Ibid, 94.

armed force is treason."[74] Having encouraged Congress to take the necessary political steps to avert a crisis, Jackson focused on his duty to "execute the Office of President" and "preserve, protect, and defend the Constitution."[75]

If Jackson had defended his actions in terms of his oath of office alone, he would have won the approbation of state rights Democrats as well as nationalists. Yet Jackson felt Calhoun's inquiry into the nature of the Union and its origins required a forceful refutation. To counter Calhoun's claims, Jackson offered a theory based on his own history of the Union. His theory held that the Union was in its essence "a government, not a league." Its historical character was that of a compact, created by the whole people, not the states, for the purpose of perfecting and guaranteeing their Union into perpetuity.[76] The whole people had elected him as President and bound him to enforce

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[74] Ibid, 94. The restraints of prudence and patriotism were referenced in the December 4 State of the Union Address.

[75] Article II, Section 1. See the Oath of Office.

[76] Jackson, "Proclamation," *State Papers*, 87, "The People of the United States formed the Constitution, acting through the state legislatures in making the compact, to meet and discuss its provisions, and acting in separate conventions which they ratified these provisions; but the terms used in its construction show it to be a Government in which the people of all the states collectively are represented."

Jackson believed the Union must be perpetual because it was an essential component of a secure and happy society. "It is a confederal perpetual union, first made by the people in their sovereign capacities, upon which we the people of the United States made a more perfect Union, which can only be dissolved by the people who formed it, and in the way pointed out in the instrument, or by Revolution." (Jackson to Van Buren, December 25, 1832, *Correspondence*, 4:505-506). As he explained to a South Carolina Unionist, "… perpetuity is stamped upon the Constitution by the blood of the Founders—by those who achieved as well as those who improved our system of free government. For this purpose was the principle of amendment inserted in the Constitution which all have sworn to support and in violation of which no state or states have the right to secede, much less to dissolve the union." (Jackson to Poinsett, December 2, 1832, *Correspondence*, 4:493-494). The perpetual character of the union has been addressed by Kenneth M. Stampp's "The Concept of a Perpetual Union," *Journal of American History* 65 (1978): 5-33. Stampp stresses that American nationalists offered a historical argument on the origins of the Union based on a selective reading of the Constitution and the writings of the Founders. As Stampp demonstrates, during the Constitutional Convention of 1787 and ratification debates the nature of the union and its perpetuity were hotly contested. Even ardent nationalists like Washington believed that the union could fail. Stamp explains that "as a matter of logic," the historical debate over the nature of the union before 1787 was "pointless" because the supreme law created by the convention made it irrelevant. (7) Stampp's point mirrors Chipman's own reliance on law over history in analyzing the Constitution. He suggests that the constitutional union of the Articles of Confederation must have come to an end for the Union of 1787 to

legitimate statutory law and the Constitutional provision against treason.[77] Unlike Calhoun, Jackson did not believe the disagreement should be mediated through a constitutional or legal crisis. The nature of the Union was already clear. If the government should exceed constitutional limits, then "the remedy is with the people" through the "peaceful and reasonable course and submitting the whole matter to them at their elections." Because the whole people were the highest sovereigns, and not the states, the people held the final responsibility to determine constitutional meaning. They, and not South Carolina, had the authority to unmake the Union.[78] Because South Carolina was not sovereign, Jackson believed it had no possible justification for any

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begin. Yet, for the Founders, while one form of civil compact was replaced by another, they believed that their social union remained unbroken despite their political change.

Additionally, Stampp seems to imply that because the questions of secession and perpetuity were so hotly contested, the idea of a perpetual union rested more on the victory of nationalists in the civil war, than on any question of theory. Historically speaking, Stampp is right that the victory of perpetual union was resolved "at the cannon's mouth" (33). In point of philosophy, however, a successful battle or war cannot logically establish the truth or falsity of the theory of perpetual union. That a person's view did not prevail in a trial by combat does not mean it was philosophically flawed. Neither does it mean that the ideas at stake were recent inventions. Antebellum theorists' deeply held political beliefs on the perpetuity of the union were not invented out of whole cloth. Jackson did not believe that perpetual union was a recent innovation or doctrine. Rather, he understood that the founders had taken a perpetual confederation (the Articles of Confederation) and made it "more perfect." Jackson did not look to or plan for the collapse of the Union, but focused on the duty that the Constitution disclosed to him. In this belief, he stood within a fifty-year tradition of Revolutionary association that emphasized the binding character of social and civil compacts.

[77] Jackson made much of his own authority as the repository of the popular will. By constitutional design, however, the states determined the mode of elections to the Electoral College. Initially, the selection had been made by state legislatures in a fashion similar to the choice of senators. The selection of the President then might be said to be the choice of all the states together rather than the people. By 1830, extensive revisions to state constitutions had made their government more democratic and had given the choice of presidential electors to the people. For more on the state constitutional convention documents see *Democracy, Liberty, and Property: The State Constitutional Conventions of the 1820's*, ed. Merrill D. Peterson (New York: Bobbs-Merrill, 1966).

[78] Jackson to Robert Y. Hayne, February 8, 1831, *Correspondence*, 4:241-243; Jackson to Brigadier General John Coffee, December 14, 1832, *Correspondence*, 4:499-500.

resistance by force. If the "nullies" formed an army to support their ordinance, Jackson insisted that that was treason and "an act of levying war."[79]

Locating sovereignty directly in the people placed Jackson in opposition to the Virginia and Kentucky Resolutions. Because the states were not individually sovereign, they could not act alone; they could only act in concert, and then through the political process. As Jackson explained in a private letter to Martin Van Buren,

> The absurdity of the Virginia doctrine is too plain to need much comment. If they would say, that the state had the right to fight, and if she has the power, to revolution it would be a right, but at the same time it must be acknowledged, that the other states have equal rights, and the right to preserve the union. …[80]

Jackson's "Second Inaugural"

Jackson's repudiation of the "Virginia doctrine" and his insistence that the whole people were the sovereign party to the constitutional contract confused many political observers. Both Jackson's contemporaries and modern scholars have identified real tension between the nationalism of the Proclamation and the state rights policies of the State of the Union Address.[81] As Henry Clay explained, "One short week produced the

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[79] Jackson to Martin Van Buren, December 25, 1832, *Correspondence*, 4:505-506.

[80] Ibid.

[81] Richard Ellis's work contains the best treatment on the reaction to the speech. In particular, Ellis emphasizes the favorable reaction of Northern nationalist leaders and details the horror Jackson elicited from the South because of his willingness to use force and his repudiation of state sovereignty (Ellis, 81-91). Most scholars recognize that Jackson's efforts to balance consolidation and state sovereignty were at least intellectually consistent. Andrew Lenner compares Jackson's moderation to Madison's defense of a national compact that imposed binding obligation on the parties (Lenner, 178). Lerner's analysis of federal politics is quite astute. In this instance, however, he misapprehends the degree of agreement between Jackson and Madison. Both, it is true, espoused a doctrine of divided sovereignty. However Jackson's defense of the whole people as the sovereign parties was an ultra-nationalist argument of the kind used by James Wilson or Joseph Story. Madison, in his letter to Edward Everett printed in the *North American Review* (October 1830) (quoted in Nathaniel Chipman, *Principles of Government, a treatise on free institutions, including the Constitution of the United States* (Burlington, Vt.: E. Smith, 1833; New York: Da Capo, 1970), 323-330) insisted that the people were sovereign, but only as they acted in the several states. They did not form a consolidated whole.

William Freehling argues "there was no intellectual inconsistency in believing, on the one hand, that the federal Union had always been and would ever be, a nation, and believing, on the other hand, that the

message and the proclamation—the former ultra on the side of State Rights—the later ultra, on the side of Consolidation."[82] The New York *Courier and Enquirer* labeled the proclamation "ultra federal" and "anti-Jeffersonian." At a minimum, the patriotic and emotional support that Jackson gave to the cause of the nation aided the expanded national vision of Webster and Clay more than the cause of state rights. Senator George Dallas wrote to Jackson that even those who had opposed his re-election now supported him and condemned South Carolina's Ordinance and Address.[83] Even Webster praised Jackson's proclamation at Faneuil Hall and adopted a closer relationship with the White House[84]

While Jackson's own political allies rallied to support his defense of the Union, they were quietly alarmed at his nationalist theory of that Union. One prominent Democrat blamed the "Montesquieu of the Cabinet" (probably Edward Livingston) for the "speculative arguments and specious opinions about the origin of the confederation." "The broad errors in doctrine on some fundamental principles of the Constitution which *ornament* the Proclamation, [called] forth the unbounded approbation of every ultra federalist from Maine to Louisiana."[85] Martin Van Buren sent Jackson a carefully

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national government could legitimately exercise very few powers. Still the emotional nationalism Jackson did so much to further could lead to economic nationalism." (Freehling, *Prelude to Disunion*, 294). What Freehling misjudges is the degree to which Jackson's idea of union, and not simply his "emotional nationalism," would support the theory that Webster was advancing and that Story would later perfect in his *Commentaries on the Constitution*.

[82] Henry Clay to Francis Brooke, December 12, 1832, quoted in Andrew Lenner, *The Federal Principle in American Politics, 1790-1833* (New York: Roman, Littlefield, 2001), 177.

[83] George Dallas to Jackson, December 6, 1832, *Correspondence*, 4:496.

[84] Ellis, 93, 147; and Robert V. Remni, *Daniel Webster: The Man and his Time*, (New York: Norton, 1997) 393-394.

[85] C. C. Cambreleg to Van Buren, December 18, 1832, Jackson, *Correspondence*, 4:505. Montesquieu was referenced contemptuously as a speculative European theorist.

worded letter urging further caution. Van Buren feared that Jackson's doctrinal points would undoubtedly bring him into "collision" with the Virginia legislature; Jackson would need the support of the Southern states to defeat South Carolina. Van Buren therefore counseled Jackson to avoid divisive arguments on the nature of the Union and focus future messages to Congress on his constitutional duty. "…I would confine my request, as strictly as possible, to the employment of forces granted by them to the exigencies which render its exercise indispensable to the due execution of the laws." Further theorizing by the President, Van Buren privately feared, would weaken the agrarian, state rights wing of the Democratic Party.[86]

While Jackson's erstwhile allies viewed his political theory with suspicion or as so much heresy, Jackson believed his oath of office required him to consistently support the Founders' balance between the federal and national ideas—that the nation had been given constitutional form in a federal Union of limited powers. Jackson firmly believed national unity to be absolutely essential to the prosperity of both the parts (state liberty) and the whole (the federal rights of the whole people). Therefore, Jackson's approach was more consistent than his contemporaries appreciated.

Jackson's reverence for the legitimate power of the states mirrored South Carolina's defense of the "sacred distribution" and New York's eloquent *apologia* for the "sacred cause of state rights." Yet he valued his constitutional duty above all. In his "Second Inaugural Address," Jackson carefully delineated his dual obligations to limited government and national union. His whole domestic agenda turned on these two primary ends, "the rights of the several states, and the integrity of the union." Rather than seeing these as mutually opposing ends, Jackson believed a strong Union and state liberty were

[86] Martin Van Buren to Jackson, December 27, 1832, 4:506-508.

complementary. They "could only be attained by an enlightened exercise of the power of each within its appropriate sphere in conformity with the public will constitutionally expressed."[87] State control over local concerns prevented the corruption of the central government. Excessive state control, however, would lead to rivalry, revolution, anarchy, and finally military despotism. The prudent statesman would balance these tensions, respecting state rights as essential components of a strong and vigorous union. Jackson pledged himself personally to the task of restraining federal spending and "arresting" any new measure that might lead to consolidation. "But of equal importance and indeed incalculable importance is the union of these states, and the *sacred duty* of all to contribute to its preservation by a liberal support of the general government in the exercise of its just powers."[88] As Washington had challenged them, Americans must always consider the Union as the "Palladium of your political safety and prosperity." [89]

Nullification violated the fundamental law. It claimed for a state the authority to declare finally how the law would apply to it. If every state adopted this practice, it would destroy the Union. As Jackson explained to Van Buren, "this abominable doctrine that strikes at the root of our government and the social compact, and *reduces everything to anarchy*, must be met and put down or our union is gone and our liberties with it

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[87] Andrew Jackson, "Second Inaugural Address," *A Compilation of the Messages and Papers of the Presidents,1789-1908*, ed. James D. Richardson ([Washington, DC]: National Bureau of Literature and Art, 1908), 3:3.

[88] Ibid., 4.

[89] Ibid. Jackson quoted George Washington's Farewell Address (1796). Jackson found a sympathetic ear for his theory of Union in Joel Poinsett, leader of the Unionists in Charleston, South Carolina. He challenged him, "Be firm in support of the Union: it is the sheet anchor of our liberty and prosperity, dissolve it and our fate will be that of unhappy Mexico. But it cannot be dissolved: the national voice from Main[e] to Louisiana with unanimity and resolutions never before exceeded declares that it shall be preserved and those who are assailing it under the guise of nullification and secession shall be consigned to contempt and infamy." Jackson to Poinsett, February 7, 1833, *Correspondence*, 5:15.

forever."[90] South Carolina had committed itself to resistance on February 1 if Congress would not reduce the tariff. In response, Jackson declared that he must enforce the law regardless. Because a single state was not sovereign, it could not be permitted to impede the enforcement of federal statutes. Beyond the Union lay division, not liberty. War between the states would follow, resembling the centuries of warfare among the small states of Europe. Taxation would increase to support standing armies. Personal liberty would perish under the ruin of constant warfare. "The loss of liberty, of all good government, must inevitably follow a dissolution of the Union."

Further, the oath of office bound Jackson to the support of constitutional limits on both state and federal power. Jackson believed himself obligated to "maintain the just powers of the Constitution and to transmit unimpaired to posterity the blessings of federal union." The "sacred duty" bound him to promote the good of all classes and interests, to "inculcate by my official acts the necessity of exercising by the general government those powers only that are clearly delegated."[91]

As the representative of the whole people in the national executive, Jackson was ultimately responsible for collecting and enforcing the "tariff of abominations" in South Carolina. He understood the constitutional duty of the executive branch to interpret and then enforce the Constitution be at least as important, if not more important, than the policy making decisions of Congress, and the judicial power of the Supreme Court.

The duty of faithful constitutional construction did not belong to Jackson alone, but to all citizens. Each branch of government was bound to enforce the construction for

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[90] Jackson to Martin Van Buren, December 23, 1832, *Correspondence*, 504. (Emphasis mine).

[91] Andrew Jackson, "Second Inaugural Address," *A Compilation of the Messages and Papers of the Presidents,1789-1908*, 3:4.

its branch. The people, ultimately, were responsible in the selection of these branches to make sure that their representatives maintained the constitutional balance. "It is a confederal perpetual union, first made by the people in their sovereign capacities, upon which, we the people of these United States made a more perfect union, …."[92] Jackson's "sacred duty" to the perpetual federal Union guided him as he pursued a confrontation with South Carolina.

Jackson's Policy of Confrontation

As February 1—the date South Carolina had set for nullification—drew near, Jackson determined to fulfill his presidential obligations to the whole Union. During the crisis, Jackson knew his administration was in a precarious position. If he supported the abolition of the tariff, then the manufacturing interests in the East might also "secede or nullify. …I have to look at both ends of the Union to preserve it."[93] Jackson was still uncertain about how the individual states would respond. Virginia was a hotbed of nullification and was liable to defend South Carolina's actions with support from North Carolina and Georgia. South Carolina could have allied with Alabama to support squatters on Creek lands. As part of his strategy, then, Jackson looked to loyal state legislatures for support, particularly in New York.[94] When the state legislatures repudiated nullification as a theory, they strengthened Jackson's own constitutional position, even though many states found Jackson's theory to be overly speculative.

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[92] Jackson to Van Buren, December 25, 1832, *Correspondence*, 4:505-06.

[93] Jackson to Van Buren, January 13, 1833, *Correspondence*, 5:2-4.

[94] Jackson to Van Buren, December 23, 1832, *Correspondence*, 4:504; Poinsett to Jackson, January 19, 1833, *Correspondence*, 5:7-8; Jackson to Van Buren, December 25, 1832, *Correspondence*, 4:505-06; and Jackson to Van Buren, November 18, 1832, *Correspondence*, 4:489-90.

Jackson believed that South Carolina's approach must be met with force. He explained to Van Buren his resolve to "act with all the forbearance to do my duty, and extend that protection to our good citizens and the officers of our government in the South who are charged with the execution of the laws.…" To allow South Carolina to persecute or hang those who sought to obey the law would promote disunion everywhere. "No my friend, the crisis must now be met with firmness, our citizens protected and the modern doctrine of nullification and secession put down forever." He planned to ask Congress for authorization to use force against the state. Jackson needed Congress. If Jackson acted independently, he recognized that he would be "branded with the epithet, tyrant." To convince the nation that South Carolina was the threat, Jackson proposed to wait for violence to erupt in South Carolina. Unionists and nullificationists were arming their factions in preparation for violent confrontation. South Carolina had raised 12,000 volunteers in defense of the Ordinance. If the Unionists were assaulted by the state militia, then Jackson could charge the state with the treasonable act of levying war on the Union and bring in militia from the North to arrest them.[95] Jackson's letter to Charlestown Unionists urged them to be brave and steadfast in defense of the Union. When insurrection and war came, the other states would exercise their rights to protect loyal citizens.[96]

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[95] Ibid., Jackson to Van Buren, January 13, 1833, *Correspondence*, 5:2-4.

[96] Jackson offered arms and legal assistance to Poinsett. But from the White House, he recognized that the local unionists would have to take the initiative. He wrote: "The Union must be preserved; and its laws duly executed, but by the proper means. … [W]e must perform our duties without suspecting that there are those around us desiring to tempt us to do wrong. We must act as the instruments of law and if force is offered to us in that capacity, even should we fall as individuals, that the friends of liberty and union will still be strong enough to prostrate their enemies. …"

"Your union men should act in Concert: their designation as unionists should teach them to be prepared for every emergency; and inspire them with the energy to overcome every impediment that may

While Jackson publicly threatened force, he privately assured the South Carolina Unionist leader, Joel Poinsett, that the crisis would be resolved without violence. The rhetoric of force was primarily designed to array the forces of law and government against faction and rebellion. Continued military preparations by the State Rights party would expose their ultimate plans for secession and disunion. Jackson himself believed that the national response would over-awe the South and prevent a widespread rebellion.[97] Others did not share Jackson's confidence. Daniel Webster wrote to Levi Lincoln that a conflict of arms was assured. South Carolina could not back down from its extreme position; Jackson, having framed the issue as a matter of constitutional duty, was similarly bound by his promises to Poinsett and the Unionists.[98] Jackson tried to retain political control over the crisis. While preparing for confrontation in Charlestown and using Democratic political networks to urge the states not to approve the Ordinance, Jackson attempted to arrange a political resolution to the crisis by supporting the lower tariff rates of the Verplank Bill.[99] At the same time, Jackson expected Congress to support his policy of confrontation with South Carolina. By January 16, he requested a collection bill that would allow him to collect the duties off-shore in the harbor rather

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be thrown in the way of the laws of their Constitution, whose cause is not only their cause but that of free institutions throughout the world." (Jackson to Poinsett, December 2, 1832, Correspondence, 4:493-494).

[97] Poinsett to Jackson, January 20, 1833, and Jackson to Poinsett, January 24, 1833, *Correspondence*, 5:8-12.

[98] Daniel Webster to Levi Lincoln, December 17, 1832, quoted in Ellis, 78-79.

[99] New York Jacksonian Gulian C. Verplank had proposed a tariff reform package that would swiftly reduce the tariff to 1816 levels, but not abandon the idea of protectionism altogether. (Ellis, 99-100, 165).

than in custom houses. Finally, Jackson asked Congress for the authorization to use the militia, army and navy to enforce federal law in South Carolina.[100]

In fact, by late January, events were spiraling out of Jackson's control. Northern Jacksonians were dissatisfied with the Verplank bill, and Northeastern nationalists like Webster were openly pledged to defeat it. At any rate, Jackson loyalists like Senator Wright of New York did not believe that a tariff reduction would satisfy South Carolina. The South might be mollified, but Hayne, Calhoun, and Hamilton would still need to be met with force. Both the Force Bill and the Verplank tariff faced certain defeat by early February. The South would not support the use of force, and the North would not support a reduction in the tariff.[101] Jackson complained to Van Buren that "many nullifiers are here [in Washington] in disguise." They would save Calhoun while disgracing Jackson and "their country."[102]

Jackson also faced reversals in his effort to sustain the spirit and militancy of the South Carolina Unionists. The laws of South Carolina had been artfully constructed so that it would be difficult to prosecute state officials who enforced the Ordinance. Joel Poinsett reported that the Union party in Charleston was unwilling to "join in mortal conflict" against so many of their own sons and brothers in the State Rights party. Jackson had hoped that an internal crisis would spark a clear justification for intervention. Poinsett informed Jackson that his best course was to seek a certificate from the federal

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[100] Ellis, 94-95, 160-63.

[101] Senator Silas Wright to Van Buren, January 13, 1833, *Correspondence*, 5:4-5; Ellis, 168; Daniel Webster to Henry Willis Kinsman, January 1, 1833, *The Papers of Daniel Webster, Correspondence,* ed. Charles M. Wiltse (Hanover, NH: Published for Dartmouth College by the University Press of New England, 1997), 3:202-203 (hereafter referred to as PDWC); and Daniel Webster to Stephen White, January 18, 1833, PDWC, 3:208-208.

[102] Jackson to Van Buren, January 13, 1833, *Correspondence*, 5:13.

judge that his administration could not enforce the law in South Carolina. The President could then send the militia into Charlestown, where he would enjoy local support. But the President had formed his strategy in order to pose himself as the defender of the Constitution, and not as the invader of a sovereign state.[103] With a Congress that was unwilling to support Jackson's legislation and Unionists who were reluctant to play their necessary role, Jackson increasingly became isolated and ineffective.

Van Buren and the "Sacred Cause of State Rights"

Torn between the threat of Southern secession and Northern demands for protectionism, Jackson required the political support of his loyal allies in the state legislatures. While most state legislatures had denounced nullification, their personal support of Jackson's Proclamation varied widely. New York's response to the Ordinance assumed special importance because the state was managed by Vice President-elect Martin Van Buren through the political machine of the Albany Regency. Initially, Jackson aggressively entreated Van Buren for his support. Jackson's own strident position had been set forth in the Proclamation and was re-iterated in his letters.

> It will not do now to temporize or falter, … when by crushing this wicked faction in its bed, you strengthen our republican government, both at home and abroad… Let me hear from you soon give me your opinion of the plan I have charted to execute the laws and put down nullification, rebellion and secession …[104]

Van Buren found himself unable to readily support the President. Scholars of both state politics and nullification emphasize the crisis of 1833 as the first major open feud within the heretofore stalwart Albany Regency. Van Buren, representing the agrarian

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[103] Poinsett to Jackson, January 16, 1833, *Correspondence*, 5:6-7. On Jan 19, Poinsett informed Jackson that the Unionists could muster only 1,000 to 1,200 loyalists in Charlestown against an estimated force of 12,000 state militia, several thousand of whom were elite cavalry. (5:7-8).

[104] Jackson to Van Buren, December 15, 1832, *Correspondence*, 4:501.

Democrats, was sympathetic to the state rights claims of the South and no doubt sought to protect his presidential aspirations by demonstrating his loyalty to state rights. But as New York had industrialized, down-state politicians increasingly supported a protectionist tariff as necessary for the economic success of the state. The manufacturing and finance wing of the Regency was led by prominent wool speculator William Knowler and supported by his son in law, Governor Marcy. Van Buren was convinced that the national interest required tariff reduction, and he worked hard to bring the party machine to bear on dissenters. However, Marcy's influence delayed Van Buren's plans. In his annual message to the state in January, Marcy exposed the tense position of the Regency. On the one hand, he denounced nullification sternly. But on the other hand, he supported tariff reform weakly by promising support for reform that provided "substantial relief to every real grievance." In effect, his speech supported Knowler's faction and protectionism.[105]

As Van Buren replied to Jackson's plea for aid, he perceived that Jackson's position had seriously undermined Jacksonian political support in the South, particularly in Virginia. Van Buren gently chided the President for focusing attention on the doctrinal theory of a national union rather than on his duty to uphold the law. Van Buren pointedly failed to approve of all of the Proclamation, citing "honest differences of opinion, upon points which men are so apt to disagree as to the theory and proper operation of our

[105] Ellis, 141-151. See John Niven, *Martin Van Buren: The Romantic Age of American Politics* (New York: Oxford University Press, 1983). See chapter 18 for a treatment of Van Buren, New York politics, and nullification.

peculiar system of government." Jackson's theory of federalism, Van Buren argued, had opened the administration to opposition from erstwhile allies.[106]

The debate over New York's response to Jackson and South Carolina came to a head on January 24th. William Knowler called a public meeting at the Albany City Hall that proposed pro-tariff resolutions. Van Buren organized a heavy turnout of agrarian Democrats at the meeting. When Regency loyalist John A. Dix proposed alternative resolutions calling for tariff reduction, the meeting dissolved in chaos. The majority of attendees retired to the capital building, where they passed Dix's resolutions. Van Buren then drafted a lengthy report justifying Dix's resolutions on traditional state right principles.[107]

Jackson, unaware of the obstacles facing Van Buren, wrote urgently to Van Buren, "Why is your legislature silent at this eventful crisis? Friendship, with candor, compels me to say to you, that your friends are astonished at the silence of your legislatures… The state of Newyork [sic] has not come forth in her majesty and strength at this eventful moment."[108] Finally, Van Buren secured the support of enough Democrats in the state legislature to secure the eventual support of his resolutions, though his political opponents (manufacturing Democrats, Anti-Masons, and National Republicans) managed to delay the final passage of the resolutions until late February.[109]

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[106] Ellis, 151-152; and Van Buren to Jackson, December 27, 1832, *Correspondence*, 4:505.

[107] Niven, 323-325; and Ellis, 150-151.

[108] Jackson to Van Buren, January 25, 1833, *Correspondence*, 4:12.

[109] The critical political deal was achieved by promising a leading state senator who supported manufacturing interests, Nathaniel Tallmadge, a seat in the U.S. Senate in return for his support. (Niven, 325).

Most portrayals of Van Buren focus on his reputation for partisan genius in building the Albany Regency and assembling the Jackson coalition. Van Buren has been so frequently characterized as the "Little Magician" that it is tempting to analyze the New York Report as an expedient effort to secure support for Jackson's agenda and Van Buren's own Presidential aspirations. A close reading of the Report reveals that Van Buren took great personal risks to defend the cause of state rights against the "speculative theories" of both the Proclamation and the Ordinance. In an exercise of the high constitutional politics of statesmanship, Van Buren employed the legislative voice of his state to defend the "Virginia Doctrine" against new and seditious theories of the Union.

Jackson had appealed to all citizens, and especially to Van Buren, to fulfill their duty to the Union by preserving and protecting the federal government. In response, New York accepted its duty to the government, but recognized a higher duty to the Union. The Union contained the balance between the central and state governments; duty to the Union, as it ought to be, superseded but did not negate duty to the existing general government. It was essential that the Union be maintained upon proper principles. The Committee of the New York legislature that approved Van Buren's report stressed "their duty to vindicate and explain the political principles which are entertained by themselves and as they believe by a majority of the good people of the state."[110] Above all, Van Buren sought to defend and reassert the theory of limited government by the people of the sovereign states. For political reasons, he downplayed his differences with Jackson's nationalist Proclamation, and pointedly condemned South Carolina's Ordinance as secessionist in tendency. But the tone of New York's report was moderate. It sought to mediate the crisis by supporting tariff reduction for the good of the Union.

[110] New York, *State Papers,* 151.

South Carolina's Ordinance had advanced new "assumptions of right" that Van Buren felt he must critique. The people, within the states, and not the President were the only parties who could really refute the Ordinances. Yet the people were tragically divided. While disclaiming any need to choose sides in the partisan debate, Van Buren enlisted New York to defend the traditional practice of state rights. Political orthodoxy was endangered and with it the Union. "[S]o much discredit is apprehended to *the sacred cause of State rights* from the excesses of South Carolina…"[111] that the states must rise up in defense of the cause. His defense of the old Republican doctrines of state rights in the Virginia and Kentucky Resolutions revisited the increasing tension between the national and federal principles in American politics. Because Calhoun used the old Republican principles to justify secession, it was imperative that the connection between nullification and the legitimate constitutional role of the state be refuted. This was no less than their "service to the Republic."[112]

New York's report, then, emerges as a Madisonian constitutional gloss on the nature of the Union and the power of the states as constitutional actors within the Union. It provides evidence of a persistent Northern belief in the constitutional authority and limited sovereignty of the states. The primary purpose of the report was to articulate a

[111] Ibid., 137. (Emphasis mine). Van Buren took every step to avoid unnecessary division. He conceded that the disputes over the nature of the union had arisen in the Convention of 1787 itself. One party had insisted that a vigorous government was necessary to defend itself against the states and to attain the objects of union. Others insisted that the danger was consolidation, not disintegration. Unless safeguards were taken against the general government, this party believed, "and the remaining power and sovereignty of the states amply protected, there would be reason to apprehend that the revolution of 1776 would be shorn of its honors and its benefits" (New York, *State Papers,* 135) with a return to monarchy. Although Van Buren clearly preferred the Anti-Federalist argument, he insisted that both parties were legitimate and that New York did not choose sides.

[112] Ibid., 135, 138.

legitimate sphere of state constitutional action. Addressing South Carolina's doctrines was a secondary concern,

> The Committee are advocates for the reserved rights of the States, and a strict construction of the Constitution of the United States. Experience has, they think, fully demonstrated the wisdom of the determination of the Convention to commit to the Federal Government the management of such concerns only, as appertain to the relations of the States with each other, and with foreign nations and certain other matters particularly enumerated in the Constitution: leaving the great mass of the business of the people, relating as it does mainly to their domestic concerns, to the legislation of the States.[113]

Wisely, the people vested these powers in the states, for the safety of liberty. "The great diversity in the interests and conditions of the different states" meant that most political decisions were best made at the state and local level. In the present crisis, the states had proved perfectly capable of rising above their petty differences to support the Union.

Van Buren rooted the principle of state support for a constitutional union in the language of Jefferson. The states were bound to preserve "the general government in its whole constitutional vigor"; good citizens would be loyal to both the states and the general government.[114] The Virginia and Kentucky Resolutions themselves did not justify secession, Van Buren insisted; they were written in response to real encroachments of citizens' liberty. Virginia and Kentucky advanced the position that the central government had been created by a compact to which the states were parties. The states were then duty bound to interpose against violations of that compact as a defense of the constitution and union. States did not presume to act alone, but they looked to other states to support their resistance. While the other states refused the right of interposition as an unconstitutional assumption of authority, Madison and Jefferson maintained their theories. Madison's articulation of his position in the Virginia Report of

[113] Ibid., 136.

[114] Ibid., 138.

1800, New York believed, led to the vindication of the principles in Jefferson's election victory of 1800. These principles became the foundation of orthodox constitutional theory. "[T]he future operations of our political institutions are dependent upon the continued respect and confidence of the people in them."[115]

Recognizing Madison as the authoritative voice on state constitutional action, Van Buren appealed to "that great man" to settle the controversy. In particular, Van Buren quoted Madison's letters to prominent citizens against state and local factionalism. Madison had emphasized that any local disturbance should be channeled through its representatives in Congress. In response to talk of secession in New England, Madison had written to Elbridge Gerry that in cases of disunion, "a government like ours should be slow in believing [talk of rebellion], should put forth its whole might when necessary to suppress it, and promptly return to the paths of reconciliation."[116] Because the sphere of republican government had been extended to the national level, the other states were justified in acting through the Union to quell a local rebellion and preserve the peace of the Union.

Madison granted the states a significant role in constitutional deliberation; he did not seek to replace them with calls for a "common umpire."

> [W]here is the common umpire to decide ultimately between [the state and general government]? In cases of little importance or urgency, the prudence of both parties will keep them aloof from the questionable ground; but if it can neither be avoided or compromised, a convention of the States must be called, to ascribe the doubtful power to that department which they may think best. You will perceive by these details that we have not yet so far perfected our Constitutions as to venture to make them unchangeable. But still, in their present state, we consider them not otherwise changeable than by the authority of the people,

[115] Ibid., 140.

[116] James Madison to Dr. Destutt Tracy Jan 11, 1811 and Madison to Elbridge Gerry, Jan 1812 in quoted in New York, S*tate Papers*, 145. Note the obvious parallels to Lincoln's Civil War policy toward the South.

> on a special election of representatives for that purpose expressly: They are until then the *lex legum*.[117]

Because the Constitution had been ratified by *all* of the people in the several states, change must arise from *all* of the people. Democratic constitutional politics provided the solution to the dangers of consolidation and usurpation. The civil revolutions of 1800 and 1828 had functioned to restore the constitution to its intended limits.[118] Naturally, the people best exercised this political power through the actions of the state, over which they exhibited a tighter control. Although the Report refrained from direct criticism of Jackson's proclamation on this point, it implicitly repudiated any suggestion that the Union was composed of one consolidated body of the people. Jackson had subtly undermined republican orthodoxy by stressing national power to the neglect of state rights. Constitutional authority ultimately lay in either state legislatures or in constitutional conventions. The relative importance given to the states did not diminish the long respect that New York had maintained for the constitutionally mandated authority of the general government. Within its proper sphere, the judiciary was the "exclusive expositor of the Constitution, in cases submitted to its judgment, in the last resort."[119] The judicial power bound the other departments of the government, respecting cases before the courts, but "not in relation to the rights of the parties to the constitutional compact, from which the judicial as well as the other departments hold their delegated

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[117] Madison to Major John Cartwright, June 1824, quoted in New York, *State Papers*, 146.

[118] Ibid., 137.

[119] Ibid., 140.

trusts."[120] Other constitutional actors retained their right to construe the meaning of the Constitution.

During the Sedition Act Crisis, Virginia was justified in declaring the Sedition Act unconstitutional and in sending that pronouncement to the states. It required their support in adopting "necessary and proper measures in each, for co-operating with her in maintaining unimpaired the authorities, rights, and liberties reserved in the States respectively, or to the people."[121] Van Buren carefully explained that 'necessary and proper' in this instance, had not included state resistance to federal law, disobedience to the judiciary, or plans for revolution. Virginia merely suggested that the states use their constitutional power to force a constitutional convention. Two thirds of the states, he explained, held the power to call Congress to account for its actions. The resistance of the states to this idea, however, prevented state review from becoming an established principle of constitutional law. Instead, victory was secured by the civil revolution of 1800.

The united action of the states against South Carolina, particularly in the South where they also suffered under the tariff, demonstrated that the states could rise above local interest.

> [N]ot a single instance has occurred in which the resistance of a single state, to the measures of the Federal Government, has excited sufficient sympathy or countenance from her sister States, to afford cause for a well grounded apprehension of detriment to the Union, but an improper combination amongst its members.[122]

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[120] Ibid., 140-141.

[121] Ibid., 141.

[122] Ibid., 137.

"Who can doubt that now, as in the late war, the federal arm, in the hour of greatest peril, will be upheld by the State authorities?"[123] State action not only helped to maintain the safety of the Union through the right ordering of constitutional principles, but states also used their political power to ensure that the government enacts policies on the Bank, tariff, and internal improvements that support the constitutional principles. Van Buren quoted Jackson approvingly in affirming that state governments, in their everyday political affairs, provide the "surest bulwarks against anti-republican tendencies" by keeping the exercise of power close to the people.[124]

In tone, the New York Report was highly supportive of the President. By stressing the "obvious and imperative" constitutional duty of the President to enforce the law within the bounds of South Carolina, New York could justify every action the President had taken to prepare for conflict.[125] The Committee maintained a critical silence on Jackson's request for Congressional authorization to use force. They downplayed significant disagreement with Jackson's theory of the Union. The question of who formed the Constitution figured centrally in Van Buren's analysis, so he could not afford to wholly avoid significant differences with the President. Van Buren's analysis of the Constitution depended heavily upon the role that the states played both as constitutional deliberators and as the wielders of sovereign political power. It mattered a great deal whether the people or the states were sovereign.[126] If the people were a

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[123] Ibid.

[124] Ibid.

[125] Ibid., 133.

[126] "The comparative weight and influence which would be attached to the allegations and remonstrances of the States, in respect to the supposed infractions of the Compact, might, however, be very different, whether they are regarded as sovereign parties of the Compact, acting upon their reserved rights, or as

wholly consolidated sovereign, and not the states, then New York had no real business debating the meaning of the Constitution. In fact, it made Jackson's own request for New York's resolutions unnecessary. Jackson had insisted that the whole people formed the Union, drawing upon the preamble as his authority that "We the people" were the parties to the Union. Van Buren eluded a direct disagreement with Jackson by defining the states as "the people composing their societies in their highest sovereign capacities." This allowed the people, through the states, to be the parties to the compact, while preserving the states as constituents of the Union. Thus, "the preamble is reconciled with facts, and that is a Constitution established by 'the people of the United States,' not as one consolidated body, but as members of separate and independent communities, each acting for itself, without regard to their comparative members."[127]

To cover any potential disagreement, the Report took great care to praise the strong points of Jackson's leadership. New York praised his attention to the public, his opposition to unconstitutional schemes, his fiscal discipline, his resistance to monopolies, his devotion to republican government, and his determination to interpret the constitution as it was framed.

Having devoted such a large portion of the Report to defending the reserved sovereignty of the states, Van Buren was at pains to explain how sovereignty did not necessarily permit secession. The sovereignty that resided in the states was not unqualified, because the Union was not "a mere confederacy of free and sovereign

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forming only indiscriminate portions of the great body of the people of the United States, thus giving a preponderance to mere numbers, incompatible with the frame and design of the Federal Constitution." (Ibid., 150)

[127] Ibid., 149-150.

states."[128] The people in the several states, working through their several political institutions, or through accepted constitutional channels, held the highest political power. New York did not countenance the idea of secession because they accepted the primacy of the people. The Union they formed was not a simple league. "Though founded on a compact, [It] is nevertheless a government which is made by that compact sovereign and independent as to the powers granted to it, in the same manner as the States are sovereign and independent as to powers not granted."[129] To grant to one state the power to leave or dissolve the Union would be to deny that the people had ever formed the government. Even if the constitution was violated, a dissenting state should seek redress, and remain in the Union out of patriotic devotion.

Van Buren carefully defended secession as a resort to the original right of self-preservation. However, the natural right of secession and revolution must be limited by existing rights guaranteed to the states by the civil compact. The people had created the government, and the states must maintain it perpetually. If a state should insist upon its natural right to independence, the other states would collectively decide whether to release it from its perpetually binding obligation, or to insist on the "preservation of the Union as it is."[130] The states' collective right to decide the fate of the Union was the essence of republican government.

> Strip the states of this right, and a system which but yesterday excited the respect and admiration of the world, must soon, very soon, serve only as an additional argument in the mouths of monarchists and absolutists against the capacity of man for self-government.[131]

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[128] Ibid., 146-147.

[129] Ibid.

[130] Ibid., 148.

[131] Ibid.

New York agreed with Jackson that nullification was an absurd violation of the very notion of self-government.

Finally, the report took a moderate position on the tariff. It echoed Governor Marcy's disdain for any action by which New York might "aggrandize herself at the expense of her sister states, or pervert to local purposes a system of government intended for the common benefit of all."[132] The tariff was undoubtedly constitutional; the Constitution clearly granted Congress the power for regulating commerce through a tariff. Yet the excess of revenue over expenditures and the tariff's function as class legislation to promote manufactures at the expense of southern agriculture suggested that the tariff should be reduced. New York supported the reduction of the tariff as the prudent course of action.

Congress

When a treasonable confrontation between South Carolina and the U.S. failed to materialize and state legislatures had repudiated nullification, the task of negotiating a political settlement fell to Congress. Despite the support of the administration and Jackson loyalists, the reform Verplank tariff bill failed to gain sufficient support. Southerners opposed it because the bill did not completely abandon protectionism. In the North, Jacksonians and National Republicans opposed it as too drastic a reduction.[133] Jackson had turned to Congress on January 16, to ask for a Force Bill to authorize his

[132] Ibid., 153.

[133] Ellis, 99-100; and Webster to Stephen White, January 18, 1833, PDWC, 3:207-08. Massachusetts had instructed all of its congressmen to oppose the bill.

military preparations against South Carolina. Calhoun, now appointed to the U.S. Senate, seized upon the possibility of military coercion to rally the South behind his cause.

Calhoun consistently attempted to shift the issue from the tariff and coercion to the broader nature and purpose of the federal Union. He posed his positions directly against Jackson's request for force, and conveniently ignored the moderate state rights position of Old Republicans like Van Buren. "The great question at issue is," stressed Calhoun, "where is the paramount power? Where [is] the sovereignty in this complex, but beautiful and admirable system … lodged?"[134] Jackson lacked any real authority, Calhoun charged, either to coerce the states, or to operate a tariff for the purpose of raising revenue. Calhoun shifted the Congressional debate back to the constitutional question by proposing resolutions that would recognize the states as the sovereign parties to the Constitution:

> Resolved, that the people of the several states composing these United States are united as parties to a constitutional compact, to which each state acceded as a *separate sovereign community*, each binding itself by its own particular ratification; and that of the Union, of which the said compact is the bond, is a union between the states ratifying the same.[135]

The Senate took up Calhoun's propositions and debated them vigorously. In early February, Calhoun wrote in anticipation to William C. Preston that the South, particularly Virginia and Alabama, was coming over to his position. Calhoun recommended that all conflict with federal authority in South Carolina should be postponed. "To take issue now, would be to play into the hands of the administration."[136]

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[134] Calhoun, *Papers*, 12:20.

[135] Calhoun, January 22, 1833, *Papers*, 12:25. Emphasis mine.

[136] Calhoun to William C. Preston, February 3, 1833, *Papers*, 12:37-39.

In the debate on the Force Bill, Calhoun posed two starkly opposed political theories as alternatives. According to Calhoun, sovereignty was indivisible. So either the states were absolutely sovereign, or the federal government was absolutely sovereign. Calhoun framed the choice of political theory as one of global civilizations: either Asiatic despotism or European federalism. Any suggestion that sovereignty was vested in the whole people led inexorably to total national sovereignty and to the end of minority rights. With no limits on the power of the majority, "faction would take the place of patriotism; and with the loss of patriotism, corruption must necessarily follow, and in its train anarchy, despotism, or the establishment of absolute power in a single individual, as a means of arresting the conflicts of hostile interests." The American government faced this fate. "Our government for many years has been verging to Consolidation; that the Constitution has gradually become a dead letter; and that all restrictions upon the power of government have been virtually removed, so as to practically convert the General Government into a government of an absolute majority…." Interposition and nullification, Calhoun argued, could prevent this slide into anarchy by checking the power of the majority. It would provide, "the strongest cement" for the Union by keeping the constitution within established limits. [137] As Calhoun intended, his rhetoric began to rally the South. It also strengthened the influence of the nationalists in the North who could persuasively argue the opposite position against Calhoun.

The crisis was eventually resolved at the intervention of Jackson's enemy Henry Clay. As with so many antebellum compromises, the parties did not agree on the form or style of the Constitution, but on the political terms of their continued existence together. Clay arranged a compromise by which the tariff would gradually be reduced to a level of

[137] Calhoun, *Papers*, 12:83, 86, 89.

twenty percent over a decade and by which protectionism was refuted as a political principle. More importantly, the Force Bill was passed, giving Jackson a symbolic victory. South Carolina then met in convention to repeal its nullification of the tariffs of 1828 and 1832, but maintained its principles by nullifying the Force Bill. As Ellis suggests, the compromise created embarrassment for Jackson, while vindicating the power of Henry Clay and the opponents of the Tariff.[138]

In a broader perspective, the victors in the North were the nationalists. Daniel Webster rose to prominence as the spokesman of the North. Webster, as the next chapter will argue, astutely looked for opportunities to pose his nationalism against the heterodox approach of Calhoun.[139] After Calhoun spent two days on the floor of the Senate defending the cause of South Carolina against the Force Bill (February 14th and 15th), it was Webster who rose to refute him in a speech he hoped would be greater than his Second Reply to Hayne.[140] In the titanic struggle between Clay and Jackson, and between Webster and Calhoun, it was Van Buren who lost. The sacred cause of state rights, that he sought so earnestly to defend, had indeed been brought into discredit by nullification. As the revolutionary consensus—a nation embodied in a voluntary federal union—fragmented, few participants noticed that the whole nature of the debate had shifted.

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[138] "In several ways the crisis turned out to be a victory for the nullifiers, and especially for Calhoun. South Carolina … forced the federal government to lower the tariff, succeeded in nullifying the Force Act, and was not required to recant on any aspect of its controversial theory… ." Calhoun, having proved his reliability, emerged as the sectional leader of the South in the Senate. Jackson, on the other hand, failed to defeat the nullifiers on the field of battle, lost on the Verplank bill, and abandoned the Unionists of South Carolina to the control of the radicals. (Ellis, 180-181).

[139] Nathan Dane to Webster, March 21, 1830, PDWC, 3:43-48.

[140] Webster to Joseph Hopkinson, January 27, 1833, Hopkinson to Webster, February 6, 1833, Webster to Hopkinson, February 7, February 9, February 15, and February 33, 1833, PDWC, 3:209-215

Madison noticed. In the Nullification Crisis, the aging statesman consciously aligned himself against nullification. He advocated a moderate state rights that retained real authority for the states.. After the debate on the Force Bill, Madison wrote to Webster praising Webster's rejection of nullification, but insisted that Webster's Union of the whole people went beyond the text of the Constitution. "The undisputed fact is, that the Constitution was made by the people, but as embodied in the several states, who were parties to it; and therefore made by the states in their highest authoritative capacity."[141] The people could have made their Confederacy into a "mere league or treaty" or even created one popular sovereign body. But in fact, Madison suggested, they "did by a mixed form make them one people, nation or sovereignty, for certain purposes, and not so for others." Because the Constitution had been created by a competent authority, the sovereign people, the focus of constitutional deliberation should focus on the constitution itself, on what kind of entity it is, rather than a speculative inquiry into who constituted it. The Constitution disclosed a division of powers between state and federal authorities in which supremacy was vested in the federal government.

> Whilst the constitutional compact remains undissolved, it must be executed according to the forms and provisions specified in the compact. It must not be forgotten that compact, expressed or implied, is the vital principle of free governments as contradistinguished from government not free; and that a revolt against this principle leaves no choice between anarchy and despotism …
>
> Such is the Constitution of the United States de jure & de facto; and the name whatever it may be, that may be given to it, can make nothing more or less than what it actually is.[142]

[141] James Madison to Daniel Webster, March 15, 1833, PDWC, 3:222.

[142] James Madison to Daniel Webster, March 15, 1833, PDWC, 3:223. Focus on the text—on what kind of government the people created—had been a staple of moderate nationalist and state rights analysis since Nathaniel Chipman's *Sketches on the Principles of Government* (1793).

Conclusion:

The Nullification Crisis fundamentally altered the cause of state rights. Previously, disputes over the boundary between federal and state powers were argued through a detailed examination of the text of the Constitution in order to determine which powers are necessary and proper, which powers are delegated, and which powers are reserved. The steamboat cases had been argued in both federal and state courts in this manner. The Madisonian position contended that, whatever the original constitutional actors might have been, they were now governed by the compact as created in 1787. The Madisonian institutional analysis was increasingly replaced by a doctrinal analysis of sovereignty, nationalism, and popular will that polarized constitutional construction between national and state sovereignty. The new approach further eroded association, institutions, and textual analysis as the basis of a "partly national-partly federal" analysis that transcended sectional theories.

Finally, the congressional debate revealed deep ambiguities in Americans' loyalty to a union of compromises between the federal and national principle. While suffering a tactical defeat over nullification, Calhoun successfully shifted the terms of the debate from a contest between nullification and union (in which he was in a small minority) to one of state sovereignty versus consolidated nationhood. Over the next decade, Jackson's constitutional argument that the collective political association of one people had formed the nation would provide the most effective rhetoric for statesmen trying to counter Calhoun's claims. The crisis helped to persuade many Northerners that an excessive focus on state sovereignty by the South could best be answered by an Jackson's nationalism. The nationalist cause, and not the cause of state rights, was ultimately aided

by Jackson's decision to answer Calhoun's speculative theory of the Union with his own nationalist theory. A pure state rights analysis would have rested on the content of the Constitution, and not who the parties to the compact were. Madison's insistence on maintaining the Union of 1787—with state rights secured by constitutional restrictions—was marginalized by the ascendancy of Jackson and Calhoun.

After 1833, the debate on the federal question acquired a predominantly sectional character. The middle ground of Madison and Van Buren had depended on an inter-sectional consensus that the nation had been embodied in a federal union. Moderates had stressed that the constitutional balance between the states and central government was instrumental for liberty. After 1833, sectional leaders were able to persuade their regions that liberty depended upon a strong sovereign nation or upon strong sovereign states more than on a careful division of power. Calhoun garnered the support of many Southerners for his assertions of individual state sovereignty. It was left to Webster and Northern nationalists to justify the need for national supremacy. This is the subject of the last chapter.

Chapter 6: "The Great Primeval Compact": Constitutional Commentators and the Rise of American Nationalism

The most prolific outpouring of antebellum nationalist theories of the Union arose in response to the nullification crisis (1828-1833). Between the Founding and the crisis, state legislatures, judicial tribunals, and the partisan press produced the bulk of constitutional commentary for immediate political and legal business. As a part of the rising professionalization of American law, professors of law in Northern universities, James Wilson (1790), then Nathan Dane (1823-34) and James Kent (1826-1830) produced major commentaries on American law. Finally, Joseph Story produced the *Commentaries on the Constitution* (1833) that systemized constitutional scholarship and provided the standard reference on the Constitution for a generation.[1] These commentaries opened new opportunities for more abstract speculation about the Union in a way that the political debates in the Olmsted Crisis and the Steamboat Cases had not permitted. Political actors like Andrew Jackson and Henry Clay naturally concerned themselves with immediate outcomes and gaining a partisan advantage, and so did not undertake the careful deliberation that occasioned the production and publication of the treatises. State and United States Supreme Court opinions were frequently more theoretical than Congress or the President, but they were still limited by the cases that appeared before the judiciary; they could not offer the kind of systematic treatment that law lectures and commentaries provided. The treatises also had the advantage of

[1] Wilson, James, *The Works of the James Wilson*, ed. Robert Green McCloskey, 2 vols. (Cambridge: Belknap Press of Harvard University Press. 1967); Nathan Dane, *A General Abridgement and Digest of American Law, with Occasional Notes and Comments*, 9 vols. (Boston: 1823-24, 1829), and James Kent, *Commentaries on American Law*, 4 vols. (New York: 1826-30); St. George Tucker, *Blackstone's Commentaries: With Notes of Reference, to the Constitution and Laws.*.. (Philadelphia, 1803); and Joseph Story, *Commentaries on the Constitution of the United States*, 3 vols. (Boston, 1833).

addressing the philosophical questions at the heart of the American polity: who were the parties to the Union? How was it formed? What were the purposes of Union? How does the Constitution function in relationship to the Union?

Because of the unfolding crisis of union, authors of treatises addressed their topics in earnest. In the midst of uncertainty, they were acutely aware that "political instruction was necessary to liberty. … Without such knowledge … our happy republic would pursue the same melancholy career which had led to the ruin of free nations of antiquity." The survival of free government required that the public be well informed. Advocates of a particular doctrine turned not only to politics; they tried to educate the public toward their way of thinking in order to best preserve the republic in crisis.[2]

The main purpose of this chapter is to provide an exegesis of the nationalist doctrine as it developed in constitutional treatises and writings in response to the nullification crisis. The early nationalists, James Wilson and Nathaniel Chipman, exercised a decisive role in the formulation of nationalist doctrine. Although St. George Tucker wrote from a distinctly Southern, Jeffersonian perspective, many of the Northern commentators wrote in the shadow of Tucker's exposition of the Jeffersonian doctrine, and so his ideas will also be carefully considered. One of the most important of these texts, Webster's "Second Reply to Hayne" in January of 1830, is not a treatise, but it was based on the seasoned reflection of an established constitutional lawyer as he sought to advance the policy of New England. Joseph Story's magisterial *Commentaries on the Constitution* (1833) surpassed all the other nationalist treatises in its comprehensive exegesis of the nature of the Union and the Constitutional text. Together, Webster and Story aided the dichotomization of theories of the Union into pro-nation and pro-state

[2] Edward Mansfield, *The Political Grammar of the United States* (New York: 1834), especially the preface.

camps. The middle ground of theorists who more accurately captured the character of the Constitution as a product of compromise was blurred.

Early Nationalists

In the early Republic, statesmen like James Wilson and Nathaniel Chipman emphasized that the creation of the Union involved the establishment of a real government, which arose from the needs of the people during the Revolution. As witnesses to the Founding, the early commentators were aware that the Constitution instituted novel political structures and ideals. The people created and established it for their own purposes. Americans viewed it as a decisive break with the past, and not the product of a long evolution from customary English rights. The revolutionary substitution of the Constitution for the Articles of Confederation without violence proved the genius of the American people. Wilson rejoiced in:

> the revolution principle—that the sovereign power residing in the people, they may change their constitution and government whenever they please—is not a principle of discord, rancour, or war: it is a principle of melioration, contentment and peace. … [The principle was] not recommended merely by a flattering theory [but] … recommended by happy experience.[3]

He praised these people for their "warm and keen sense of independence and freedom."[4]

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[3] James Wilson, "Of the Study of Law in the United States," (1790), *Selected Political Essays of James Wilson*, ed. Randolph Greenfield Adams (New York: A. A. Knopf, 1930), 199. Revolution for the Early Nationalists meant the sovereignty of the people over a change of government. They praised, "a scene, hitherto unparalleled, which America now exhibits to the world,--a gentle, a peaceful, a voluntary transition from one constitution of government to another. In other parts of the world, the idea of revolutions in government is by a mournful and indissoluble association, connection with the idea of wars…" (Wilson, "Speech in Pennsylvania Convention, November 24, 1787", *Selected Political Essays*, 179. For more on Wilson's political philosophy see Mark David Hall, *The Political and Legal Philosophy of James Wilson, 1742-1798* (Columbia: University of Missouri Press, 1997).

[4] Ibid., 165.

Wilson was a nationalist because he believed that liberty was a *national* cause, which could only be achieved through an association of states and people in a civil compact. It was a

> Constitution that would produce the advantages of good, and prevent the inconveniences of bad government—a constitution whose beneficence and energy would pervade the whole union, and bind and embrace the interests of every part—a constitution that would ensure peace, freedom, and happiness to the states and people of America.[5]

The early nationalists were acutely aware of the 'partly national, partly federal' character of the Union. Wilson was famous for his emphasis on the people as the source of union. The nation was formed by a social contract of the people to protect the liberty of individual members. Yet the states also played a decisive role in nation formation. During the Pennsylvania ratification debates, Wilson suggested that the Union would, "resign to the national government that part and that part only of their political liberty, which placed in that government, will produce more good to the whole, than if it remained in the several states."[6] In his law lectures, Wilson suggested that the states would be subject to the authority of the federal government, but that disputes between states might be resolved by international law (as would befit sovereigns and not subsidiary units). Wilson's initial suggestion that states might retain their sovereignty with respect to each other reflects the ambiguity of the "partly national, partly federal" compromise of the convention.[7]

If James Wilson stressed the people as the formative element in the Union in building a nation, Nathaniel Chipman emphasized the importance of the legal instrument.

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[5] Ibid., 178.

[6] Ibid., 176.

[7] See Wilson's law lectures (1790), particularly his lecture on the law of nations, *Selected Political Essays*, 295-322.

By creating a government of national scope, the Constitution bound the states for a common and national purpose. The legal character of that Constitution bound them in respect to the general government in national affairs, just as the general government was bound to respect the states in their area of authority. In contrast to Wilson's emphasis on who made the Union, Chipman focused his analysis on how the supreme law functioned and bound the parties after it was made.[8]

Chipman and Wilson understood that the federal government placed significant limitations on the states in order to better protect liberty. Constitutional limitations on the states (popular authority and supreme law) would play an important role in the development of a nationalist doctrine of the Union. Because the people held the superior and ultimate authority to make fundamental law, they could divide the use of sovereignty as they chose and could make that division obligatory on the state and federal governments. Drawing from the experiences of the American Revolution, the early nationalists thought in terms of a social contract. Having experienced the creation of the federal republic in a constitutional "moment," they found it difficult to consider the idea that the government might have evolved. In order to secure their liberty, the people, acting through statesmen guided by right reason, deliberately created spheres of operation and set limits for state and federal governments. Reason, and not the historical process, was their guide.

[8] Chipman, Nathaniel, *Sketches of the Principles of Government* (Rutland, Vermont: J. Lyon, 1793). See also Elhanan Winchester, *A Plain Political Catechism: Intended for Use of schools …* (Greenfield, Mass.: T. Dickman, 1796). Winchester, like many of the lesser commentators from the 1830s, aimed more at educating citizens than at legal commentary.

Early Particularists

Jefferson's presidential victory of 1800 vindicated the state rights theories of the Virginia and Kentucky Resolutions. During his presidency, both the states and the federal government interpreted the Constitution to be a compact between the states. Necessarily, the states were recognized to have a significant role in constitutional deliberation.[9] Social contract theory, strict construction, and a strong bias in favor of the states in disputed matters composed the key elements in Jeffersonian constitutional theorizing.

The early particularists focused on developing the Virginia and Kentucky Resolutions and Jefferson's habits of strict construction into a fully articulated constitutional theory. Exemplified by St. George Tucker, Jeffersonian commentators focused heavily on the authority and sovereignty of the states. Tucker's own commentary on Blackstone's commentaries on the English law heavily influenced the particularists. Because the English common law still provided a firm basis for state law, and potentially federal law, Blackstone offered an essential source for American lawyers.[10] In particular his doctrine of sovereignty exerted a subtle effect on the interpretation of constitutional law. Blackstone's defense of absolute parliamentary sovereignty was supported by a long tradition of parliamentary struggle on behalf of the people against the crown. However, the American Revolution had been waged against Parliament's declaration of

[9] The nationalist reading of Wilson and Chipman remained influential, particularly among Federalists and the legal profession. As chapter two argued, strong, partisan factions within the states took positions on both sides of the issue. For the majority in Pennsylvania, the states were considered to be the sovereign agents of the constitution.

[10] Until the Supreme Court resolved the issue in favor of statutory law, nationalists hoped that federal power might be expanded by the inclusion of English common law into federal law. The issue was finally resolved in U.S. v. Hudson & Goodwin, 7 Cranch 32 (1812).

its own unchecked sovereignty. It was highly unlikely that the states would claim for their own legislatures the absolute sovereignty they had denied to the English. As Tucker wrestled with the problem of sovereignty, he redefined it for the American polity.

The Revolution, for Tucker, provided the real basis for sovereignty. "All authority, among us, is derived [from] the people." This trust can be delegated, through solemn compact, but final authority still rests in the people.

> [W]hen the constitution is founded in voluntary compact and consent, and imposes limits to the efficient force of the government; or administrative authority, the people are sill the sovereign; the government still the mere creature of this will; and those who administer it are their agents and servants.

Governments date from the creation of civil society. They are coeval with the social compact and are themselves created by compact. Tucker was careful, like many of his contemporaries, to distinguish civil society from government. A successful revolution might end a government's authority, but civil society remained. Individuals obligations to respect their mutual rights were not dissolved.[11]

Rather than turning to the specific terms of the Union (i.e. the constitutions) to determine the exact limits on the Union, Tucker drew his argument from the nature of confederal governments. He reasoned that this type of union must distribute power in certain ways. Regarding the American Union, Tucker emphasized that in all confederations the government vests some of the supreme civil power into a "system of states" united by a common bond. The states reserve to themselves "all their former powers, which are not delegated to the United States by the common bond of their Union."[12]

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[11] Tucker, 4, 14.

[12] Tucker, 65. "System of states" is Burlamaqui's term. Tucker's use of Burlamaqui suggests that he thought of the union as a system of sovereign states governed by the law of nations. While Tucker stressed

The evidence for Tucker's theory of the nature of the federal unions came from the nature of older confederacies: The Union of Scotland and England in 1707, the Achaian Confederacy, the Helvetic Confederacy, and the United Provinces. Tucker's evidence for these principles arose from the history of older confederal unions, not from the newer Philadelphia system of a partly federal, partly national government. In consequence, he reasoned from the premise that the Union consisted of allied sovereign states, even though he stated that sovereignty was, in fact, based in popular consent and might not be entirely consolidated in state governments.

For many in the antebellum South, the critical theoretical question about the nature of the Union concerned the rights of resistance that states had against centralization. Tucker embraced the possibility of secession because, historically, that was how confederacies had dissolved. "The dissolution of these systems happens, when all the confederates by mutual consent, or some of them, voluntarily abandon the confederacy and govern their own states apart." The Articles of Confederation were dismantled by the mutual abandonment of the states that were the first to ratify the new Constitution. Although the obligations of the Articles of Confederation remained, by ratifying the constitution, "the seceding states subverted the former federal government"![13]

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that rights were reserved to the states, nationalist commentators delighted to point out the ninth and tenth amendments reserve these powers to the people as well.

[13]Tucker, 73. Nationalist commentators would stress that the end of the Articles of Confederation had the consent of the Congress and the whole people. Tucker perhaps exaggerated the extent to which the ratifying states "subverted" the existing government, but he was correct to point out that the last two states to ratify, North Carolina and Rhode Island, had constitutional rights under the old system that were essentially discarded. However, Tucker did not really want to defend the rights of North Carolina and Rhode Island under the Articles. His real aim was to support secession; The right of Delaware or Pennsylvania to leave the confederacy was equal to the right of North Carolina and Rhode Island to preserve the old confederacy for the states who wished to remain in it. "Their obligation, therefore, to

Tucker formulated a statement of state rights based loosely on the form and style of the Declaration of Independence but subtly altered. He cited Vattel's statement that each state must fulfill a duty "to itself and to its citizens by doing whatsoever may best contribute to its own happiness and prosperity."[14] Tucker found this duty in the Declaration of Independence's assertion of the right to alter or abolish abusive governments. Because the Articles of Confederation were inadequate to provide for the "happiness and prosperity of the state," the states had a right to alter their government.

The Declaration of Independence stressed the need for prudence in making difficult decisions about secession, and stressed not only that the royal government was "inadequate," but abusive and tyrannical. Tucker subtly shifted the justification for revolutionary secession away from constitutional abuse to the imperfection of an existing government. In his re-formulation of the principles of revolution in the Declaration, "governments long established," (i.e Great Britain) became "governments established by compact" (i.e. United States). Whereas the Declaration had opposed a "design to reduce them [the people] to absolute despotism," Tucker now justified revolution against a

> design to invade their [the states'] sovereignty, and extend their own power beyond the terms of the compact, to the detriment of the states respectively, and to reduce them into a state of obedience, and finally to establish themselves in a permanent state of superiority, than it becomes not only their right, but the duty of the states respectively to throw off such governments…

State sovereignty, therefore, became the basis of liberty and the grounds for revolution. In contrast, Jefferson had justified revolution on the invasion of natural rights by the Crown. In Tucker's argument, Sovereignty was ultimately transferred from the

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preserve the present constitution, is not greater than their former obligations were, to adhere to the articles of the confederation; each state possessing the same right of withdrawing itself from the confederacy without the consent of the rest, as any number of them do, or ever did possess." (75).

[14] Tucker, 74, citing Vattel, B.1 c.2.

right of a people to a revolution to *protect their natural rights* against tyranny, to the right of a state to revolution in the form of secession *to protect its sovereignty*. In consequence, Tucker's conception of the American Union emphasized a compact between the states that was entirely federal in character. To a certain extent, he admitted that the Union was rooted in a social compact that operated on individuals, but his admission was balanced by his emphasis the federal principle. Above all, the constitutional character of a federal and social compact meant that it should be strictly construed regarding "the antecedent rights of a state" as well as the personal liberty and freedom that played an integral part in the ends of Union.[15]

Tucker's commentary developed the Virginia and Kentucky Resolutions into the predominant school of constitutional theory. Emphasis on state sovereignty and justifiable secession were adapted and supported by fellow Virginian John Taylor of Caroline and Thomas Cooper of South Carolina.[16] Under the influence of Tucker, Taylor, and Cooper, the doctrines of state rights in the South focused increasingly on the sovereign authority of the state to the exclusion of the national principle. By 1833, John Marshall would despair that "the word 'state rights,' as expounded by the resolutions of '98 and the report of '99, construed by our legislature, has a charm against which all reasoning is vain." The doctrine had become "the creed of every politician who hopes to rise in Virginia. … [E]ven to adopt the construction given by their author [Jefferson] is deemed political sacrilege."[17]

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[15] Tucker, 140-153.

[16] Elizabeth Kelley Bauer, *Commentaries on the Constitution, 1790-1860* (New York: Columbia University Press, 1952), 168-169.

[17] John Marshall to Joseph Story, July 31, 1833, William Story, ed., *Life and Letters of Joseph Story* (Boston: Little and Brown, 1851), 2:135-136.

The Rise of Nationalism

As this dissertation has argued, the doctrine of state rights was not a peculiarly Southern way of thinking about the Union. While the majority of the nation favored a Jeffersonian platform of limited government and strict construction, the South in particular was the nationalist section of the country from 1800 to 1815. Massachusetts, Connecticut, and Pennsylvania acquired reputations for advancing theories of secession and nullification. After the War of 1812, however, this reputation began to shift. Northern constitutional theorists, especially commentators from New England adopted more nationalistic views. Many nationalists were former Federalists; even those who were not, such as Joseph Story, mistrusted the tendencies of Jeffersonian thought. These commentators and theorists, particularly Kent, Dane, Story, and Webster, drew upon their connection to the early work of Wilson and Chipman. As the idea of a social compact passed out of intellectual favor and was increasingly used by proponents of state sovereignty, nationalists sought another basis for their constitutional theory. They increasingly understood the people to be the integral components of the nation. The people provided the ongoing source of all constitutional authority, not just the initial revolutionary consent to an existing constitutional structure. Nationalists believed further that national association proceeded directly from the people and not through the intermediate associations of the states. The people had created a national government for national purposes, and so their constitutional voice trumped the constitutional authority of intermediate state governments. Nationalists based their constitutional doctrines on a national project of popular government under fundamental law.

On the national level, the most powerful early opponent of Jeffersonian constitutionalism was himself a Virginian. John Marshall's tenure as Chief Justice on the Supreme Court witnessed the rise of judicial review, the assertion of national constitutional supremacy, and the transformation of the contract and commerce clauses into restraints upon state legislative action. In particular, oral arguments before the high court provided an arena for advocates to present arguments on the sources of the Union. In *McCulloch v. Maryland* (1819), counsel for Maryland contended that because the Constitution was an "act of sovereign and independent states," Maryland held a concurrent power to tax. In contrast, Pinkney's argument for the Bank of the United States stressed the popular sources of national authority.

> …[T]he Constitution acts directly upon the people, by means of powers communicated directly from the people. No state, in its corporate capacity ratified it; but it was proposed for adoption to popular conventions. It springs from the people, precisely as the state constitutions spring from the people, and acts on them in a similar manner.[18]

Pinkney's argument countered Maryland's assertion of sovereignty by placing national authority on the same foundation as state authority. Marshall seized upon the authority of the state conventions as the foundation of constitutional authority. Because the states called the ratifying conventions, they indicated their assent to the new Constitution, and the people's ratification obligated the states completely. Marshall indicated:

> The government of the Union, then … is emphatically and truly a government of the people. In form and substance it emanates from them. Its powers are granted by them and are to be exercised directly on them for their benefit.

The popular and national basis of the Constitution, then, conferred legitimacy on the claim that it was the supreme law, enforceable by the judiciary against the states. So sweeping was this claim to authority that Spencer Roane referred to it as a "judicial coup

[18] McCulloch v. Maryland, 17 US 377 (1819).

de main." He feared a court that could rule in defense of a national, popular Constitution. It would undermine the very character of a "confederate republic."[19] As political tensions rose in the 1830s and the sectional gulf widened, the competing ideas of state sovereignty and national sovereignty would become increasingly exclusive.

Marshall's tenure on the Supreme Court also oversaw a transformation in the character of the Constitution as law. Sylvia Snowiss argues the Constitution originally consisted in explicit provisions of fundamental law meant to limit sovereign power. After *Marbury v. Madison* (1803), Marshall used his monopoly on opinion writing and the "unprecedented" application of the rules of statutory construction to transform what had been higher law concerning sovereign power into supreme ordinary law, which the Court oversaw as the adjudicator of disputes about the meaning of the text. Snowiss explains that Marshall, quietly and perhaps unintentionally, showed far less deference to legislative constitutional deliberation than the Founders had contemplated or the earlier judiciary had practiced. By focusing on the Constitution as text rather than as an ordering of sovereign power, the Marshall Court distanced itself from the "metaphysical" speculation that characterized both Jackson and Calhoun's theories of the Union and associated itself with the science of legal analysis. Natural rights, which had played a prominent place in the Revolutionary political grammar, gave way to the positive law of the Constitution.[20]

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[19] Steven A. Engel, "The McCulloch Theory of the Fourteenth Amendment: City of Boerne v. Flores and the Original Understanding of Section 5," *Yale Law Journal* 5 (1999): 138 note 106; and John Marshall, "Essays from the *Alexandria Gazette:* John Marshall, 'A Friend of the Constitution'" ed. Gerald Gunther, *Stanford Law Review*, 21 (Feb., 1969): 457.

[20] Snowiss, Sylvia, *Judicial Review and the Law of the Constitution*, (New York: Yale University Press, 1990). Snowiss' principal aim is to plumb the depths of original intent on judicial review by examining how judicial review was practiced before and after Marshall's tenure as Chief Justice. Snowiss finds that some kind of judicial review was intended by the Founders before 1801, but that Marshall instituted a more

The shift from the Constitution as a compact ordering the state to a written supreme law transformed the character of constitutional deliberation. As the practice of law professionalized, authoritative commentary on the law came increasingly from the courts and law schools. In the Eighteenth Century the authoritative glosses on the Constitution were the *Federalist Papers*, written to influence a political event (the NY constitutional convention) and the Virginia and Kentucky Resolutions (by state legislatures). Neither of these documents were inherently legal. While the Anti-Federalists had favored textualism against the broad construction of the Constitution by Federalists, both parties had reasoned from their political philosophy of the Union rather than from a legal analysis of the text. In the antebellum period, however, the court increasingly issued the authoritative interpretations. By the time of *Dred Scott*, even the Democratic Party believed they could best make authoritative statements about the nature of the Union and Slavery from the high court.

As case law came to occupy a central place in the struggle for constitutional meaning, constitutional arguments were increasingly made in treatises for scholars and law students. In addition, almanacs, textbooks, and copies of the Constitution appeared for popular audiences with *legal* commentary on the character and nature of the Union. As legal analysis superseded institutional and philosophical deliberation, the nationalist lawyers of the Northeast, Dane, Webster, and Story, replaced the role that statesmen like Van Buren and Madison had played as arbiters of constitutional meaning. This change in the medium of constitutional analysis subtly aided the nationalist cause.

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modern form of judicial review than the court had previously exercised. By relaxing the doubtful case rule, which previous courts had instituted to show due deference to legislative constitutional deliberation, Marshall began the process by which the judiciary would assume supremacy over constitutional interpretation.

Several major northern treatises published in the 1820s stressed the themes of fundamental law and popular constitutionalism against the Jeffersonian doctrine of the Constitution as a compact of the states. Thomas Sergeant's *Constitutional Law* (1822) stressed that the Constitution was "ordained and established, not by the States in their sovereign capacity, but emphatically, as the preamble pronounces, by the people of the United States."[21] The extent of constitutional authority, then, ought to be determined by reference to the document. The people had the original right to set up a government on the principles that would best promote their own happiness. Sergeant recognized that the Constitution made different parties competent to decide whether specific provisions of the Constitution were violated. The judiciary had the authority to identify violations of the Constitution as "superior and paramount law," but Congress could identify violations of treaties, which also constituted part of the "supreme law of the land." This provision indicated Sergeant's preference for judicial determination over either state or congressional review. His footnotes largely cite Supreme Court opinion as the authority on the nature of the Constitution, rather than Publius or congressional debate. The Supreme Court was gradually becoming the final word on the Constitution.

Of all the commentators writing in the 1820s, Nathan Dane had the greatest impact in linking the legal, textual analysis of the Constitution to the national principle. The *General Abridgement of American Law* is not a theoretical work; it is a careful distillation of legal knowledge. Dane deliberately styled his approach on that of Viner's *General Abridgement of Law and Equity*. Just as Viner was able to establish the Vinerian Chair of law at Oxford made famous by Blackstone, Dane used $15,000 from the

[21] Thomas Sergeant, *Constitutional Law* (Philadelphia: A. Small, 1822), 266.

proceeds of his *Abridgement* to found the Dane Chair of Law at Harvard with the provision that Joseph Story should be the first occupant.[22]

Securing the placement of Story at Harvard would be enough to guarantee Dane a footnote in the development of nationalist thought. However, the *Abridgement* deserves consideration on its own merits. In response to the mounting nullification crisis, Dane addressed the issue of federalism specifically in an appendix to volume nine of his *Abridgement.* This document presented several of the key positions of the later nationalists, which Story favorably cited. Dane's approach so focused on the textual analysis of statutory law that he regarded the use of metaphysics in legal analysis with scorn. Dane specifically criticized the corrupting influence of the metaphysical approach to political thought on the particularists: "Plato's school, never in the old or new world, however captivating, produced an accurate, close thinking lawyer."[23] Because of his bias against the philosophical approach to the law, Dane paid little attention to the problem of sovereignty. His limited treatment of the problem stressed the absolute sovereignty of the people as the source of all American government. Unlike previous nationalist scholars, especially Wilson, Dane did not recognize any form of the federal principle. From the moment of Independence, July 4, 1776, Dane insisted that the people had vested the general government with all authority and simultaneously created the states as subordinate corporations of the general government. As Dane explained: "These *State* Governments have been, by the people of each state, instituted under and expressly, or impliedly, in subordination to the general government, which is expressly recognized by

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[22] Bauer, 130-131.

[23] Dane, Nathan, *General Abridgement of American Law,* appendix, 9:44-45, sec. 35, quoted in Bauer, 279 note 104.

all, to [be] supreme law…"[24] Previous analysts, like Chipman, had recognized that the role the people had played in vesting authority in the government must be ascertained before the balance of national and federal principles could be determined.[25] Unlike Chipman, however, Dane omitted any recognition of the confederal character of the American Union. Associating the federal principle with Jefferson, Dane disparaged the particularists: "It is only a visionary, metaphysical sort of reasoning, that makes a *state in a union of states*, under and subordinate to it, as sovereign as the whole union."[26] Sovereignty, for Dane, had been solely vested by the people in the central government.

While Dane's approach to sovereignty was too extreme for most nationalists, they found his critique of compact theory persuasive.[27] Dane rejected the idea that the states had compacted to form the Union, in part, because the founding documents had clearly emphasized the role of the people, not the states. Dane found the idea of compact itself inconsistent with the American example. The government of the United States "is neither a *federative compact* nor a *confederacy*, a consolidation or a *central* government; … the whole American system is *sui generis*."[28] According to Dane, the reliance of the particularists on the history of ancient and modern confederacies offered no useful insights into the American Constitution.[29] Because the American example was unique, it was to be analyzed with close attention to the text and not European history or

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[24] Dane, 9:11, sec. 2, quoted in Bauer, 221.

[25] Bauer, 124-128.

[26] Dane, 9:31, sec. 18, quoted in Bauer, 222.

[27] See Bauer, 225-280 for a discussion of the prominent role that Dane played in the decline of compact theory among the nationalists.

[28] Dane, 9:44, sec. 34, quoted in Bauer, 279.

[29] Dane, 9:33.

philosophy. The American Constitution was based in law, and not on metaphysics. Thus, Dane broke the ground for Webster and Story to repudiate compact theory and to base their theory in the distinctly American ends of constitutional government.

Daniel Webster

While Northern nationalist ideas took refuge in law schools and the courts, they lacked the broad popular appeal of the Jeffersonian creed. Nationalists found in Daniel Webster a strong adversary of the reigning Jeffersonian paradigm. Modern scholars have proved highly critical of Webster's role as a nationalist. The image frequently presented is that of the adept conservative politician working to arrest the progress of Jacksonian democracy on behalf of his elite, mercantile constituents. Scholars accuse Webster of deliberately provoking a sectional argument in order to gain an advantage for New England. By baiting Hayne with comments against nullification and slavery, Webster was able to shift a debate on the Western land revenue into a challenge to the national leadership of the South. Scholars allege that while Webster charged the South with calculating the value of union he was actually using nationalist rhetoric in a calculating manner to gain political ascendancy for New England as a section. Webster's frequent uses of history in general and the Pilgrims in particular are portrayed as mere rhetoric used to further his political ends.[30]

Webster presents such a complex figure because these charges contain an element of truth. He was a proud conservative, he deliberately painted his ancestors as mythic figures, he sought to secure New England's leadership with himself at the head as

[30] Paul D. Erickson, "Daniel Webster's Myth of the Pilgrims," *The New England Quarterly* 57 (1984): 44-64; and Harlow W. Sheidley, "The Webster-Hayne Debate: Recasting New England's Sectionalism," *The New England Quarterly* 67 (March 1994): 5-29.

President, and he held close personal and financial ties with the business elite of Massachusetts. In his 1830 speech, the "Second Reply to Hayne," Webster successfully blocked a looming sectional alliance between the South and the West and secured for himself the role of spokesman for the Northeast. But his academic critics do not capture the full truth about Webster. His political creed valued the Union above all else, and his legal work on behalf of property rights, national legislative power, and corporate rights were not simply the corrupt stances of a money-grubbing ambitious politician. Webster's defense of the Union proved so persuasive to his fellow citizens because it was rooted in familiar arguments about the nature and purposes of the Union that many of the people themselves believed.

Webster's "Second Reply" sets him apart as the most forceful advocate of nationalism during the Nullification Crisis. The Senate in January of 1830 had been engaged in a hotly contested debate over how to disperse federal land in the West. South Carolina Senator Robert Y. Hayne had cast aspersions against New England's loyalty to the Union and against Webster's own desire to consolidate power in the national government. Webster, first, countered Hayne's claims. Webster explained that the "consolidation of our union" was the end of the Constitution itself.[31] Within constitutional limits, "the States are one. … In war and peace, we are one; in commerce, one."[32] To the full extent that the general government was empowered, the states were already consolidated. Webster's voting record and advocacy at the bar reveals that he favored an expansive reading of the commerce clause. The Second Reply made proud

[31] Daniel Webster, *The Webster-Hayne Debate on the Nature of the Union*, ed. Herman Belz (Indianapolis: Liberty Fund, 2000), 110.

[32] Ibid., 99.

mention of his long record of support for internal improvements.[33] Webster carefully insisted that he did not intend to carry the Union beyond the limits of the Constitution, but he proved vague as to where the boundaries lay.[34] "The States are, unquestionably, sovereign, so far as their sovereignty is not affected by this supreme law."[35] Clearly, this was more than mere lip service to federalism. Webster believed that nationalism did not permit interference with matters of "domestic policy," like slavery.[36] Webster defended a genuine federal system with powers reserved to the states and the people, as defined by the Constitution. Nevertheless, the limits on federal power were a minor point in this speech.

Webster's rhetorical fire was directed instead against the doctrine of nullification. At issue was the theory that the states had an independent right to interpose their authority against constitutional violations of the general government. Hayne himself defined this position with reference to the Virginia Resolution, and Webster seized upon this admission to make his point. The Constitution, he argued, was created to control state sovereignty, and not to empower it. Because nullification would lead to assertions of state sovereignty backed by force against federal sovereignty backed by force, it would inevitably lead to war. This argument had echoes of the confrontation in Rittenhouse Square (detailed in chapter three) and foreshadowed the eventual destruction of Fort

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[33] Ibid., 100-110. See Webster's argument in Gibbons v. Ogden, 9 Wheaton 4-42 (1824).

[34] "Sir, I do not desire to enlarge the power of the government by any unjustifiable construction; or to exercise any not within a fair interpretation. But when it is believed that a power does exist, then it is, in my judgment, to be exercised for the general benefit of the whole." (Webster, *The Webster-Hayne Debate*, 99)

"… I wished not, in the slightest degree, to augment the powers of this Government; that my object was to preserve, not to enlarge; and that by consolidating the Union, I understood no more than the strengthening of the Union, and perpetuating it." (110)

[35] Ibid., 126.

[36] Ibid., 89.

Sumner in 1861. Webster insisted that "to resist by force, the execution of a law, generally, is treason."[37]

Webster, as the faithful son of Massachusetts, faced the difficult task of defending his state's own conduct during the years of Jeffersonian ascendancy. Massachusetts had actively resisted the Embargo of 1807 and had countenanced a separatist movement in the Hartford Convention of 1814. Webster insisted that Massachusetts's position was distinct from South Carolina's. Massachusetts did not nullify the federal law itself, but memorialized and remonstrated against the embargo to her sister states. It always insisted that judicial tribunals should decide the issue. Perhaps Massachusetts permitted her citizens to disobey unconstitutional law; but, in order to avoid revolution and dismemberment, it never took the fateful step of nullification. Massachusetts had resisted federal authority, but it had never claimed that it could act alone as an authoritative constitutional interpreter. Massachusetts, Webster insisted, was faithful to the real meaning of the Virginia Resolutions. It urged state remonstrance and complaint and efforts to secure an amendment. It did not countenance actual nullification, which was a radical distortion of Jefferson's words.[38]

Webster's defense of New England is vulnerable to critique on nationalist grounds. Massachusetts, if not actively challenging federal law, was certainly encouraging its citizens to resist the officials of the Union. At a minimum, it helped citizens avoid the penalties of the embargo and resisted turning the state militia over to federal authority. Webster was eager to denounce the Hartford Convention as disloyal and to call upon Hayne to do the same. Ultimately, his need to defend New England

[37] Ibid., 122-124, 136, 138-141.

[38] Ibid., 129-135.

qualified his nationalism by forcing him to recognize a legitimate sphere for state protest and agitation within the constitutional limits.

Webster recognized that the doctrine of nullification could not be refuted by proving that it tended toward treason. Practically speaking, a sovereign entity could not engage in treason toward itself. State sovereignty advocates believed the greater threat to the Union lay in consolidation and would not be so persuaded. The debate would be settled by raising ontological questions about the nature of the thing under debate. Asking, "Where is this supposed right of nullification derived?"[39] Webster contrasted Hayne's doctrine of a social compact of sovereign states with the nationalist position that the government was created by the sovereign people.

> I hold it to be a popular government, erected by the People; those who administer it responsible to the people; and itself being capable of being amended and modified, just as the people may choose it should be. It is popular, just as truly emanating from the People, as the State Governments. … We are here to administer a Constitution emanating immediately from the People, and trusted, by them, to our administration. It is not the creature of the State Governments.[40]

Even the Senate, appointed by the state legislatures, derived its authority from the people's distribution of powers in the Constitution and from a compact between the states. To determine the nature of the Union, then, Webster reasoned from the text of the "People's Constitution," and not from the pronouncements of the states. The people created a supreme law expressly to rule the states and to remedy the crisis of the 1780s. Because the Constitution was law, at its essence, it was to be studied and treated as law. The government created by the Constitution was not a party to the contract; it was a government, "vested by it with the powers of deciding and trying doubtful questions."

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[39] Ibid., 135.

[40] Ibid., 136-136.

The people created government and gave to it a fundamental law so that it would continue to follow their will.

The people gave adjudication of that law to an independent judicial power with authority to decide all cases under the supreme law. The authority of the government rested on the Constitution's status as law. Hayne reasoned that because the Constitution was a treaty, the states were the signatories of the treaty; they alone could determine violations of the treaty. Webster's response to Hayne was explicit: "…[I]t cannot be shown, that the Constitution is a compact between State Governments. The Constitution itself, in its very front, refutes that idea: it declares that it is ordained and established *by the People of the United States*."[41] Webster rested his ontological case on the identity of the Constitution as law (not a treaty) and the general government as a government (not a compact).

While Webster derived the nature of the Union from an analysis of the Constitution, he based his analysis of the purposes of union on ambiguous references to liberty. In his stirring conclusion, Webster identified the purpose of union as "natural, social, and personal happiness." In the final phrase, the purpose was "liberty and union." Webster argued that liberty is a transcendent right that was not created by the positive law of the legislatures or by the people during the Revolution. Instead, Webster found the meaning of liberty in the ancient and mythic roots of the Union, in what the Revolutionaries would have called customary rights or natural rights. This is not the same thing as turning to history. Webster was not a historicist; he did not believe that history revealed how American rights were simply contingent on a particular historical

[41] Ibid., 137, 153-154.

moment. Instead, Webster believed a study of American history would reveal the transcendent natural principles of liberty and justice as Americans had experienced them.

Both Webster and Hayne employed history to buttress their arguments. Hayne eloquently defended South Carolina's revolutionary patriotism while raising the specter of Hartford to cast aspersions on Webster's credentials. Webster, for his part, returned a blow by blow refutation of the charges against New England. He treated in detail the labor of Nathan Dane against slavery in the Northwest Territories that, in part, proved New England's own love of liberty. Neither Webster not Hayne took much trouble to defend liberty since it could be taken for granted as the purpose of the nation. While the ambiguity inherent in the nature of the Union generated fierce debate, ambiguity over the nature of liberty paradoxically created agreement, rather than disagreement, because as an abstract value it could be used to unite diverse opinions behind either the national or the state rights cause.

For Webster, Union was the primary good. It received far more praise than liberty. The sacrifices of the great Revolutionary families of South Carolina and the blood of the sons of New England established their political credentials. Their common strife and sacrifice for the Union were the bonds of Union. Implicit in his praise for the fallen dead is praise for the purposes of liberty for which they struggled.[42]

Webster's profound respect for the American tradition of liberty under law is more completely expounded in his 1820 "Plymouth Oration." At the bicentennial of the first colony in New England the main theme of the celebration was pride in the accomplishments of the Pilgrims.

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[42] Ibid., 121-23.

> By ascending to an association with our ancestors; by contemplating their example and studying their character… we become their contemporaries, live the lives which they lived, endure what they endured and partake in the rewards in which they enjoyed.[43]

Webster sought to uncover the essence of New England character and values for his listeners. He celebrated above all the customary rights of his forebears as the cause of their own happiness. These liberties emerged from the desire for religious liberty, but Webster does not present the legacy as an explicitly Calvinist creed.[44] Liberty was highly political, growing out of a "repugnance of entire submission to the control of British legislation."[45] His ancestors participated in the overthrow of James II, for "violating the original compact between King and people."[46] As they fled from unjust hierarchy, they sought to set up civil governments that would preserve their liberty. Their system of government was based entirely upon their own assent and secured through guarantees of property rights, the abolition of primogeniture, and the right to bear arms. However, unlike so many Puritan preachers before him, Webster did not deliver a Jeremiad on a distant glorious past. He believed that the New England way had prospered, spreading across "the banks of the Ohio. … Two thousand miles westward from the rock where their forefathers landed, may now be found the sons of the pilgrims … cherishing, we trust, the patrimonial blessings of wise institutions, of liberty, and religion." [47] Neither did Webster paint a vision of endless progress where the virtues of the past were replaced by new and better virtues. He chastised his listeners for their failure to live up to the

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[43] Daniel Webster, *A Discourse, Delivered at Plymouth, December 22, 1820* … (Boston: Wells and Lilly, 1825), 6.

[44] Instead he presents the religious legacy as the "immeasurable blessings of rational existence, the immortal hope of Christianity, and the light of everlasting truth" (75).

[45] Ibid., 34.

[46] Ibid., 42.

[47] Ibid., 45.

moral sentiment of their forebears. Of the African slave trade, he urged, "let it cease to be of New England."[48] Webster understood that New England's duty to its forebears' project of liberty was not yet realized.

Webster's attitude toward slavery in the Second Reply mirrored his attitude of ten years prior. He denounced domestic slavery as "one of the greatest of evils both moral and political,"[49] and he praised the wisdom of the Founders, and especially Nathan Dane, for excluding slavery from the territories. However, he recognized that the Union protected the existence of slavery in the South. It even granted the South preference by partly counting the slaves for purposes of representation. Nevertheless, Webster advocated no change in the Constitution. "It is the original bargain—the compact—let it stand: let the advantage of it be fully enjoyed. The Union itself is too full of benefit to be hazarded in propositions for changing its original basis. I go for the Constitution as it is, and for the Union as it is."[50] Webster refused to abandon the Constitution and the protections that it offered to customary rights for an idyllic pursuit of liberty that abolitionists would soon take up. He believed that liberty needed to be sought with prudence. Yet Webster also assailed the evil of slavery. He favored the pursuit of natural right, under the law of the Union.

Webster frequently accused Hayne of "calculating the value of union" while rhetorically refusing to consider for himself a world without union.[51] Denouncing the Hartford convention, he called upon the South to do likewise. He presented the Union as

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[48] Ibid., 68.

[49] Webster, *The Webster-Hayne Debate*,89.

[50] Ibid., 91.

[51] Ibid., 120, 143.

the only way to reach liberty. It provided "safety at home, and consideration and dignity abroad. .. a copious fountain of natural, social, and personal happiness."[52] With great rhetorical flourish, Webster provided the rallying cry for nationalists into the Civil War, "Liberty and Union, now and forever, one and inseparable."[53]

In the Senate, Webster's adversaries reacted with disdain. Senator Benton characterized the speech as "gratuitous aggression," and a political attempt to break up a pending alliance between Southern and Western factions.[54] Hayne insisted that he labored against consolidation because he wanted to protect liberty under union.[55] The states, he insisted, were "the people composing these political societies in their highest sovereign capacity."[56] Senator John Rowan (KY) added that the people could only act "through their constitutional functionaries, or by convention."[57]

Webster's argument affected the debate on the nature of union. In the sphere of partisan politics, Webster helped to persuade the public that the people were sovereign and that the Constitution was law. He lent nationalism political credibility in the North. *The National Intelligencer* printed forty thousand copies of the speech, and stated that twenty other editions were also in circulation. For a generation, it proved an authoritative statement of the relationship between the people and the Union.[58]

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[52] Webster Ibid., 143.

[53] Ibid., 144.

[54] Thomas Hart Benton, *The Webster-Hayne Debate*, 204-05.

[55] Robert Y. Hayne, *The Webster-Hayne Debate,* 183.

[56] Hayne, *The Webster-Hayne Debate,* 168.

[57] John Rowan, *The Webster-Hayne Debate*, 274.

[58] Remni, *Life of Daniel Webster*, 328-331.

The founders, Madison in particular, had sketched out a delicate balance between the "partly national, and partly federal" Union through compromise. In the *North American Review* (1830), Madison adopted many of the same positions as Webster. He denied that the states could decide for themselves whether the Constitution had been violated. At the least, arbitrating constitutional meaning among the states would impair the "salutary veneration" for government. Solving disputes by state negotiation was a resort to the law of nations, not the Constitution. Madison firmly rejected the possibility of nullification as a constitutional doctrine. Yet he just as persistently insisted that the Constitution was not framed by the whole people but by the people acting in their separate states. "The supreme powers of government are divided." Although the states could not be trusted with co-ordinate authority in all areas, Madison insisted their power was nevertheless essential.[59] Moderate positions like Madison's were displaced by the positions of Webster and Dane on the one hand and Calhoun and Tucker on the other. The middle ground began to shrink.

Joseph Story

The political turmoil surrounding nullification that occasioned Webster's address spurred a new wave of treatises and commentaries on the Constitution. The most prominent and enduring of these treatises was Joseph Story's *Commentaries on the Constitution*. Written to serve as a textbook at Harvard and to fulfill his obligations as

[59] Quoted in Nathaniel Chipman, *Principles of Government, a treatise on free institutions, including the Constitution of the United States* (Burlington, Vt.: E. Smith, 1833; New York: Da Capo, 1970), Appendix, 323-330.

Madison's treatment of nullification clearly recalled his own experience during the Olmsted crisis. "Scenes could not be avoided, in which a ministerial officer of the United States, and the correspondent officer of an individual state, would have rencontres (sic) in executing conflicting decrees; the result of which would depend on the comparative force of the local posses attending them; and that a casualty depending upon the political opinions and party feelings in different states" (325).

Dane Professor of Law, Story's *Commentaries* were to constitutional law what Webster's Second Reply was to nationalist politics. The treatise surveyed dozens of authors and cases. It carefully treated the original argument for the education of the reader before giving Story's own view. Story drew extensively upon the leading theoreticians of his day: Locke, Montesquieu, Burlamaqui, Wooddeson, Vattel, Burke, and Blackstone, while relating them to the American Constitution and preceding commentators. The genius of the work is in its careful, logical treatment of the issues and not in its novel approach to the law. Most significantly, Story sought to secure the American Constitution against the instability of revolutionary compact theory by recourse to a Burkean defense of tradition and liberal natural rights theory. Rather than offer a systematic refutation of the dominant state rights view, Story aimed to set up a system of jurisprudence on "liberal principles of national and constitutional law."[60]

His contemporaries understood the *Commentaries* to be written in direct opposition to the Jeffersonian, compact-centered reading of the Constitution. Kent complimented the "bold and free defense of sound doctrine, against the insidious, mischievous, and malignant attacks of Jefferson."[61] Chief Justice Marshall praised it as "a comprehensive and an accurate commentary on the Constitution, formed in the spirit of the original text." He saw it as a reasoned challenge to the "political metaphysics" of

[60] Story to James Kent, August 15, 1820, *Life and Letters*, 1:379. See *Commentaries*, §320. After a long section detailing Tucker's view of the Constitution, Story observed that it was not his task to refute Tucker. "It will be sufficient for all the practical objects we have here in view, to suggest the difficulties of maintaining its leading positions, to expand the objections, which have been urged against them, and to bring into notice these opinions, which rest on a very different basis of principles."

[61] James Kent to Story, June 17, 1833, Story, *Life and Letters*, 2: 134-35.

the South.[62] Many others turned to Story to counter what they perceived as dangerous rights claims of the Jeffersonians.

Story treated Jefferson and Tucker more directly than any other previous nationalist had. According to Story, Tucker at least had the virtue of asking the right sort of questions about the "true nature and import of the instrument"—the Constitution.[63] According to the state rights view, the Constitution was an "original, written, federal, and social compact, freely voluntarily, and solemnly entered into by the several states." The states had ratified it, and now it mutually bound the people, the states, and the general government.[64] Story took strong exception to this Jeffersonian model of constitutional construction. Jefferson's interpretation of the Constitution left the presumption in constitutional disputes in favor of the states. The authority that this granted to the states to resolve doubtful cases led Story to fear that states would readily challenge federal law. It might result in the sort of instability and fear of rebellion that characterized the Confederation period (1781-1787). Jefferson himself suggested "the tree of liberty must be refreshed from time to time with the blood of patriots & tyrants;" St. George Tucker had made revolution the core of his treatment of sovereignty.[65] Such a specter threatened Story's conservative sentiments. Frequent assertions of right and liberty could quickly threaten the Union. Undoubtedly, they resurrected fears of the revolutionary threat to both property and commerce. Second, Story objected to Jeffersonian constitutional

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[62] He continued, "In the South, we are so far gone into political metaphysics, that I fear no demonstration can restore us to common sense. The word "state rights" as expounded by the resolution of '98 and the report of '99, construed by our legislature, has a charm against which all reasoning is vain." John Marshall to Story, July 31, 1833, Story, *Life and Letters*, 2:135.

[63] Story, *Commentaries*, §308.

[64] Ibid., §310.

[65] Thomas Jefferson to William Smith, Paris, November 13, 1787, Library of Congress.

interpretation because it was too focused on discerning intent from scattered documents of the Founding and not focused enough on the nature and text of the constitutional instrument. "Is the sense of the Constitution to be ascertained, not by its own text, but by 'probable meaning' to be gathered by conjectures from scattered documents, from private papers, from the table talk of some statesmen or the jealous exaggeration of others?"[66] Story believed that constitutional reasoning had gone astray because insufficient attention had been paid to the explicit textual provisions of the Constitution and its authoritative interpreters, the courts.

Like Webster and Dane before him, Story sought to ground constitutional law in the original sovereignty of the people. The state consisted in a body politic, "united together for promoting their mutual safety and advanced by their combined strength."[67] He went further than his predecessors, though, by describing the Union as the product of one people, who, in 1774, formed a *de facto* government to meet the ends of Union.[68] This act, he suggested, was a revolutionary act, but Story did not focus on the act of revolution, but instead stressed that the Union was created for higher objects than revolutionary violence. He did not forbid revolution altogether, but because the revolutionary violence was so costly to the social order, he would only countenance revolution if it was carefully directed towards the proper ends. In the American example, the people had acted for their mutual safety and happiness, so that the government that

[66] Story, *Commentaries*, §407, see footnote.

[67] Ibid., §207, citing Vattel and Wilson.

[68] Ibid., §201.

grew out of the revolutionary Congress was coextensive with the objects of union.[69] Unlike Webster, Story did not emphasize the fraternal shedding of blood as binding Boston together with Charlestown. Instead he focused on the gradual formation of government and law out of the crisis. Story stressed that while no governmental body had formally acknowledged Congress' gradual increases in power, the people's implicit consent to the act of Congress had actually created the nation.

> The Union, thus formed, grew out of the exigencies of the times; and from its nature and objects might be deemed temporary, extending only to the maintenance of common liberties and independence of the states, and to terminate with the return of peace with Great Britain, and the accomplishment of the ends of the revolutionary contest. It was obvious to reflecting minds, that such a future separation of states into absolute, independent communities with no mutual ties, or controlling national government, would be fraught with the most imminent dangers to their common safety and peace.[70]

The Union was not fashioned by a deliberate contract. As events disclosed the nature and meaning of their constitutional union during the Revolution, Americans' understanding of their union 'grew.' Story did not insist, however that the Constitution itself was organic. Story could not have envisioned a "living Constitution" that evolved in a Hegelian or Darwinian fashion from one species of government (i.e. republican) into another (i.e. democratic) over the centuries. The supreme law did not spring from the needs of the Revolution, but was the result of 'reflecting minds' who sought to secure their dearly purchased 'common safety and peace.' The Constitution was itself artificial. Because he was suspicious of revolution and popular tyranny, Story stressed that the

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[69] Story's analysis of the origins of the Union in the people in Chisholm v. Georgia, 2 Dallas 419 (1793), Penhallow v. Doane, 3 Dallas 54 (1795), and Ware v. Hylton 3 Dallas 199 (1796) does not completely resolve the question of the Union's origins. Chief Justice Jay in Chisholm stressed that one people in thirteen sovereignties had created the union, while Justice Chase in Ware v. Hylton stressed that the people retained internal sovereignty while Congress grew to exercise elements of external sovereignty out of necessity (§212-217).

[70] Story, *Commentaries*, §218.

Constitution was formed to guard the liberal ends of society from the violent disintegration of the Union.[71]

Story accepted the limited idea of a social compact that bound all people in a nation together. However, he defined it in very limited terms as "voluntary consent or submission." His chosen authorities on compact were the ancient and early modern defenders of customary natural right (Cicero, Coke, Burke, Vattel, Burlamaqui, Wooddeson and to some extent Locke) and not the radical contract theorists (Hobbes and Rousseau). This strain of compact theory emphasized that the compact was rooted in *aggregatio mentium* (Coke). Voluntarily, people compact with one another, "by a common interest, by common laws, to which they submit with one accord." (Burlamaqui) These contracts are made on an everyday level through individual agreements to live together in society for their safety and happiness. This might even be considered a re-statement of Aristotle's dictum that man is a political animal. The difference lies in Story's emphasis on the nation as the authoritative political unit; for Aristotle, it was the *polis.*[72]

It is in this view of compact as consent that Story's Burkean philosophy is most apparent. In an extensive footnote, Story quotes Burke's *Reflections on the Revolution in France* to the effect that

> Society is indeed a compact. Subordinate contracts for objects of more occasional interest may be deposited at pleasure. But the state ought not to be considered as nothing better than a partnership agreement in a trade of pepper and coffee, calico or tobacco… to be taken up for a little temporary interest, to be dissolved at the fancy of the parties.

This compact was not to be analyzed like a treaty or commercial contract. Society and the state alike were bound in a partnership toward higher ends.

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[71] Ibid., §208. In particular, see the footnote citing John Quincy Adam's oration.

[72] Ibid., §325. *Aggregatio mentium* literally means, aggregate of minds, or a mutual consent.

> It is to be looked on with other reverence; because it is not a partnership in things, subservient only to the gross animal existence, of a temporary and perishable nature. It is a partnership in all science; a partnership in all art; a partnership in every virtue, and in all perfection. As the ends of such a partnership cannot be obtained in many generations, it becomes not only a partnership between those, who are living, but between those, who are living, those, who are dead, and those, who are to be born.[73]

For Story, the American compact was perpetual. The Constitution bound not only the present community but also the nation past and present. The ends pursued by the Constitution were timeless as well. This was precisely what Webster invoked in his Plymouth Oration: a community of liberty with his forebears. It was not an artificial agreement that people decided to join merely to protect their individual rights. It was also a community of virtue; people joined together to direct themselves toward the liberal ends of the American Revolution: life, liberty, and the pursuit of happiness.[74]

The means necessary to accomplish these liberal ends was particularly important for Story and the nationalists. They were not content to assert that society was an historic partnership between all of the people. Historically, organic theories of the state are usually associated with monarchical, totalitarian, or fascist regimes. For Webster and Story, the government was a liberal constitutional regime. It was not an organic living Constitution, but supreme ordinary law codified as positive law, with protections for

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[73] Burke, *Reflections on the Revolution in France,* quoted in Story, *Commentaries*, §325.

[74] The leading biographer of Story, R Kent Newmyer, notes the close relationship between Edmund Burke and Story's philosophy but does not closely examine the way that Story employs Burke's view of compact. Story in fact, read Burke critically, deploying him to buttress American conservatism. Newmyer explains that Story's use of Burke reveals his belief in the "organic historic origins or the American Constitution" In fact Story accepted Burke's view of an organic social contract, but insisted on a liberal constitutionalism, which was founded in a liberal civil contract. (R. Kent Newmyer, *Supreme Court Justice Joseph Story: Statesman of the Old Republic* (Chapel Hill, The University of North Carolina Press, 1985): 232. Gerald T. Dunne also notes Story's use of Burke in his speeches (the Phi Beta Kappa Oration in 1826) and his letters (to James Kent in 1835) but does not explain *how* Burke influenced Story's jurisprudence or conservatism. (Dunne, *Justice Joseph Story and the Rise of the Supreme Court* (New York, Simon and Schuster, 1971), 259, 338. The best analysis of Story's jurisprudence and legal philosophy can be found in James McClellan, *Joseph Story and the American Constitution: a Study in Political and Legal Thought* (Norman, OK: University of Oklahoma Press, 1971). McClellan is particularly attuned to Story's reliance on natural law and Burke. (For more on how Story develops these themes in his theory of the Union, see 238-269).

natural right from the customs of the community, which amounts to preserved natural law. The good society and liberal ends could not be adequately preserved without the kind of normative constitutionalism central to Revolutionary constitutionalism. While the nationalists were suspicious of revolutions, they maintained the need for constitutional guarantees of liberty, either through a constitution of customary rights (e.g. England) or through written fundamental law. The nationalists did not turn to the state but to constitutions to protect their liberty. Webster and Story's philosophy embraced an organic view of society but not an organic view of the law.

Story's idea of compact is inimical to the Jeffersonian view. It was not an original compact planted in a moment of time during the Founding. Story sided with Blackstone in arguing that man's need for social union kept society together. "The community should guard the rights of each individual member, and in return for this protection, each individual should submit to the laws of the community."[75] The Union was only one compact by which Americans were bound together. They were also bound by

> the great primeval compact of eternal society, linking the lower with the higher natures, connecting the visible and invisible worlds, according to a fixed compact, sanctioned by an invisible oath, which holds all physical and all moral nations in their appointed place.[76]

Thus, Story could not accept the idea of an original, written, revocable compact of the states as the foundation for society. His vision of international society was founded on a permanent moral order. It was not subject to the whim of state legislatures.

As a practical example of how a compact might work, Story proudly pointed to in the constitution of Massachusetts. The preamble stated that the body politic was formed

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[75] Blackstone, quoted in Story, *Commentaries*, §326.

[76] Burke, quoted in Story, *Commentaries*, §325.

by a voluntary association of individuals. But it was not a compact in a technical sense. The people were not absolved from their obligations by a breach of one of the parties (as in a business contract). Neither could a secondary unit such as a town withdraw from the polity at will. The counties of Massachusetts did not relate to one another by the law of nations but by their constitution. In the same way, the states were governed by the federal Constitution. Story conceded that even if the Constitution was a compact, it was a compact rooted in a higher, social community. The idea of a social compact, Story recommended, should be analyzed through the natural meaning of communities formed by mutual association.[77]

While Story embraced the organic view of the nation detailed by Burke, his view of the Constitution was distinctly liberal. Constitutions might be written with the protection of customary rights in mind; but people institute these protections through text-bound positive laws. The language of constitution itself clearly states that the people "ordain and establish" the Constitution, not "contract and stipulate."[78] Although the Constitution was a compact of mutual obligations,[79] it was decidedly more than a compact. "The people, … in their sovereign capacity, meet and declare, what shall be the fundamental LAW for the government of themselves and their posterity."[80] The

[77] Story, *Commentaries*, §323, 333-337. "Did the people intend that it should be the power of any individual to dissolve the whole government at his pleasure, or to absolve himself from all obligations and duties thereto, at his choice?" McClellan explains that Story's theory of the Union "stemmed from an organic conception of the Union, rejected the Jeffersonian doctrine that American revolutionaries had made a radical break with the past, and upheld the idea that the Constitution in essence was a continuation of pre-revolutionary principles of law." (240).

[78] Story, *Commentaries*, §352.

[79] Ibid., §351

[80] Ibid., §338.

Constitution, although partaking of the character of a contract, stood outside of history as positive law.

Story recognized that the majoritarianism inherent in contract thinking required limits on what the majority could accomplish. A frame of government could be duly constituted by a majority, but it might not serve the good of all citizens. It might not even have the consent of a large minority of its members.[81] A society created purely on revolutionary compact theory frequently acts for the good of the majority of the present time at the expense of the minority and principles of justice. During the American Revolution, Story reminded his readers, Americans violated natural rights of property by punishing loyalty to the crown by "confiscation, forfeiture, and personal, and even capital punishment."[82] Yet Story defended majoritarian government as a necessary right of society to rule according to the fundamental laws. Lockean compact theory made the majority an "absolute and sovereign." The people were only limited by their own will. Story did not go this far. He found the solution in the Declaration of Independence—that people consent to be governed to better protect their inalienable rights. Because the law should be interpreted in light of objectives and the intentions of the framers, the law does not function solely as the will of the majority. It also exists to protect the natural rights of life, liberty, and the pursuit of happiness. Fundamental law should act to preserve the natural rights enshrined in the Declaration of Independence.[83] The Constitution, then, does not merely partake in the will of a majority, but in permanent and transcendent rights.

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[81] Ibid., §330, Story cited Burke's Appeal from the New to the Old Whigs.

[82] Ibid., §330-331.

[83] Ibid., §330-331. Story also cites Burke's "Appeal from the New to the Old Whigs" here.

> It would indeed be an extraordinary use of language to consider a declaration of rights in a constitution, and especially of rights which it proclaims to be 'inalienable and indefeasible,' to be a matter of contract and resting on such a basis rather than a solemn recognition and admission of those rights, arising from the law of nature, and the gift of Providence, and incapable of being transferred or surrendered.[84]

Story stood with Webster in pairing liberty and natural right with the Constitution. He favorably cited Adams's 1831 oration that "Union was as vital as freedom and independence" to the American project. Together, the nationalists focused the Constitution on its purpose: securing liberty under law through the Union. If Webster focused more on the nature of Union, and Story more on the purpose of law, they both believed the security of natural rights to be the essential purpose of the Union.

The nationalists challenged the old Anti-Federalist theory of association. Anti-Federalists had insisted that liberty could not be secured without strong and independent state governments to protect liberty from a consolidated sovereign (see chapter two). Now the nationalists charged that the Union, more than the states, was essential to the project of liberty and natural rights. Only a national constitution could unite the states and provide the normative guarantees of rights required by liberal constitutionalism. Thus Webster could argue that liberty without union was an absurdity.

Webster and Story helped to diminish the Madisonian middle ground in constitutional thought. They posed the conflict in an either/or logic of national union verses state sovereignty, rather than maintaining the ambiguous idea of a "partly national, and partly federal" Union. Story identified his approach with the cause of "nation" and the approach of Jefferson and Tucker with "compact." Both sides claimed to preserve liberty and love the Union. However the either/or rhetoric distracted from theories that both renounced nullification and stressed that the Union was a federative compact.

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[84] Ibid., §340.

Story's erudition and attention to detail prevented him from neglecting these ideas altogether. Pennsylvanian William Rawle's distinct theory of compact and secession received a careful refutation,[85] and Madison's nuanced treatment of the people in the several states also merited Story's attention. But when Story raised the fundamental questions, there were only two options.

> In what light is the Constitution of the United States to be regarded? Is it a mere compact, treaty, or confederation of the states composing the union, or the people thereof, whereby each of the several states and the people thereof, have respectively bound themselves to each other? Or is it a form of government, which, having been ratified by a majority of the people in all states, is obligatory upon them, as the prescribed rule of conduct of the sovereign power to the extent of its provisions?[86]

Natural Right and American Nationalism

While repudiating compact theory as the means by which natural rights were secured under law to society, American nationalists sought to explain natural right through the work of Edmund Burke. The nationalists had already adapted to the new patterns of thought in ways that Burke would have found objectionable. Webster's emphasis on popular sovereignty and Story's stress on the Constitution as written positive law were more definitely nineteenth century innovations. But in their treatment of the nature and ends of society, the nationalists shared much in common with the English Whig. Like Burke, Webster believed that civil society was the "true state of nature;" it was the default condition of man. Instead of being an artificial agreement, society reflected the natural order of the cosmos. "The great primeval contract of eternal

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[85] Rawle, though a Federalist, believed that the union was not perpetual. The last chapter of his *A View of the Constitution of the United States of America* (Philadelphia, 1825; New York: Da Capo, 1970) argued that a right of secession remained in the people that was ancillary to their right of consent to government. (Bauer, 63).

[86] Story, *Commentaries*, §350.

society" that Story cited was a partnership between all things.[87] It could not be broken. Returning to natural right, Burke's approach had much to offer conservatives like Webster and Story, in the midst of tumultuous democratic times. They took duties as obligations created by natural right. In the words of Burke, the foundation of government was not in "imaginary right of men," but "in a provision for our wants and in a conformity to our duties."[88]

Story and Webster found Burke's appreciation for the voice of the past appealing. Because of their own intrinsic conservatism and innate respect for the Anglo-American legal legacy, the nationalists used tradition to support property and the social order against an excess of revolutionary-contractarian philosophy. Legitimate political authority arose from ancient sources, from the "beneficent working through many generations or from its fruits." Webster's filial piety toward the Pilgrims and Story's history of the Union both fit this mold of political analysis. In particular Story's *Commentary* employs a "historical view of the actual and slow progress toward independence,"[89] by which the union as a political society of the people was formed and limited by the needs of the American Revolution. It was created by popular acquiescence in Congressional authority, and not by positive action. "The Union, thus formed, grew out of the exigencies of the times, extending only to the maintenance of common liberties

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[87] Ibid., §325.

[88] Leo Strauss, *Natural Right and History,* (University of Chicago Press: Chicago, 1953), 298. For more on this aspect of Burke, see Randall B. Ripley, "Adams, Burke, and Eighteenth Century Conservatism," *Political Science Quarterly* 80 (1965): 216-235; Francis Canavan, S.J., "Edmund Burke" in *History of Political Philosophy*, eds. Leo Strauss and Joseph Cropsey (Chicago: Rand McNally, 1972), 659-678; and Steven. J. Lenzer, "Strauss's Three Burkes: The Problem of Edmund Burke in Natural Right and History," *Political Theory* 19 (1991): 364-300.

[89] Story, *Commentaries*, §206

and … the accomplishment of the ends of the revolutionary contest."[90] Webster stretched this history back two centuries to the landing at Plymouth. History offered the nationalists a prudential guide to their Union. Liberty was not justified solely by the logic of revolution but by centuries of the American experience.

However, their connection with the liberal ends of the American Revolution meant that the nationalists did not abolish reason in favor of history as a guide. Reason and tradition could operate in tandem. While Story was critical of Jefferson's "metaphysical" style, he complimented Madison as an "enlightened statesmen" and praised the "reflecting minds" of the Founding for seizing upon the opportunities of the Revolution to cement the Union in a permanent government. In contrast, Burke opposed the rationalism of modernity (Locke and the Enlightenment) almost because it preferred reason to the past. He chose the "collected reason of ages" over the immediate reason of the present.[91]

According to political philosopher Leo Strauss, Burke "rejects the idea that constitutions can be 'made,' in favor of the view that they must 'grow.' Therefore, he especially repudiates the idea that the best social order can or ought to be the work of an individual, or a wise 'legislator' or founder."[92] For Strauss, three key elements in the American tradition prevented a complete synthesis of American conservatives with

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[90] Ibid., §218.

[91] Burke, Edmund, *Reflections of the Revolution in France,* ed. J. C. D. Clark, (Stanford, Stanford University Press, 2001), 259-260.

[92] Strauss, 313. This is distinctly different from the American revolutionary experience. John Adams (the quintessential American revolutionary conservative) was essentially a lawyer and philosopher of constitutional models. He opposed the Crown because its actions were unconstitutional, and a gross violation. Burke remained deeply suspicious of legal and philosophical reasoning and sided with the American Revolution because he thought the British policy was imprudent and destined to drive the colonists away. See Ripley, "Adams, Burke, and Eighteenth Century Conservatism."

Burke. First, claims of inalienable natural rights, outside of tradition and time, were made on behalf of all men in the Declaration of Independence. These rights were known to the framers through right reason as well as by recourse to English customary rights. Second, these rights were believed to limit the growth of government in an anti-republican direction and guide legislators in the pursuit of liberty. Finally, the American tradition placed these limitations in written, fixed constitutions to ensure their permanence. These elements distinguished American nationalism from Burkean conservatism.

While deeply admiring Burke's attempt to return politics to a foundation of natural right, Strauss argued that Burke ultimately undermined his own attempt because he was unwilling to choose philosophy over history. "Burke denies the possibility of an absolute moment; man can never become the seeing master of his fate; what the wisest individual can think out for himself is always inferior to what has been produced, in a length of time and by a great variety of accidents." According to Strauss, what Burke wanted was "not 'metaphysical jurisprudence,' but 'historical jurisprudence.'" But in choosing history over philosophy, Burke unwittingly embraced the revolutionary repudiation of natural right that he sought so desperately to avert. Strauss faulted Burke as "oblivious to the nobility of last ditch resistance" to the march of modernity.

> He does not consider this because he is too certain that man can know whether a cause lost now is lost forever or that man can understand sufficiently the meaning of providential dispensation, as distinguished from the moral law. It is only a short step from this thought of Burke to the supersession of the distinction between good and bad by the distinction between progressive and retrograde, or between what is and what is not in harmony with the historical process.

Reliance on historical tradition would lead Burke to find truth wherever the march of history might lead. "What could appear as a return to the primeval equation of the good

with the ancestral is, in fact, a preparation for Hegel."[93] Strauss feared that if historical events turned against natural rights, then Burke would choose history over liberty.

While not immune from the lure of history, romanticism, or proto-Hegelianism, Webster and Story escaped the worst perils of Burke because of their fidelity to their own historical tradition of liberal constitutionalism. Taking a "last stand" against the rising tide of popular democracy, revolutionary theory, and (for Story) legal positivism, they attempted to re-found American law on the principles of natural right. Until the Civil War, they were largely successful. Ultimately, the Northern nationalist legal tradition would succumb to the pressures of historicism and legal realism.

While the American nationalists shared Burke's love of the past and his suspicion of revolutionary regimes, they recognized that the creation of the American Constitution, as opposed to the development of society, was the work of a moment. In many ways, they were inspired by Burke. They emphasized that the Constitution was the creation of the whole people rather than a compact between independent, sovereign states. It certainly drew upon the wisdom of customary right. Webster and Story even downplayed the revolutionary implications of both the Declaration and the Constitution. Yet in all these things, the nationalists maintained that the Constitution was a legal artifice.

Like many European Romantics, the nationalists viewed state and society as an organism of sorts, "where the integral parts, classes and orders are so balanced, or so interdependent as to constitute, more or less, a moral unit, an absolute whole."[94] Yet in

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[93]Strauss, 315-319.

[94] Coleridge quoted in Mark Neely, "Romanticism, Nationalism, and the New Economics: Elisha Mulford and the Organic Theory of the State," *American Quarterly* 29 (1977): 410. Many scholars have recognized a tendency in Webster and Story toward European romantic nationalism, which I do not see. Francis G. Wilson argued that "the purely legalistic and historic conceptions of Webster and Story give place lightly to the conception of the moral unity of a people which is superior to any documentary technicality" (Wilson,

the final analysis, the nationalists' sentimental view of their society did not translate into a full-fledged European statism. They knew that the Constitution, at its essence, was a law, which could only be changed through a legal process. It did not evolve. The American nationalists thus broke decisively with European traditionalist romantics (Burke) and rationalist romantics (Hegel) who emphasized history as the primary moral force, over reason and classical natural law. The American project of liberty under law separated the Constitution from politics as a way of protecting natural rights from the majority. The European theorists would insist that "The constitutions of states cannot be invented, the cleverest calculation in this matter is as futile as total ignorance. There is no substitute for the spirit of the people, and the strength and order arising thereform, and it is not to be found even in the brightest minds or in the greatest geniuses."[95] In contrast, Webster and Story knew that the American Constitution was created by "enlightened statesmen" whose "reflecting minds" sought to preserve Union and liberty under fundamental law. If the spirit of the people spoke, it was through the Constitutional Convention. Historians tend to view the march of nationalism as toward organic, statist ends. In fact, Webster and Story espoused an American nationalism of a classical (natural rights) liberal variety. By the Civil War, their expression of American Union would become the dominant one.

"The Revival of Organic Theory," *American Political Science Review* 36 (1942): 455). This is patently false. As constitutionalists, Webster and Story believed that the moral unity of the American pursuit of liberty under law was embodied in the textual provisions of the American Constitution.

[95] Karl Manheim, *Ideology and Utopia*, quoted in Herman Belz, *Abraham Lincoln, Constitutionalism, and Equal Rights in the Civil War Era,* (New York, Fordham University Press, 1998), 95.

The Madisonian Middle Ground

Despite Story's influence, during the 1830s the dominant Northern perspective on Union was still the Madisonian middle ground of "partly national and partly federal." Most held that the Union was a social compact, not an organic community. While Northerners rejected the theories of nullification and secession, they still believed that their states possessed considerable sovereignty and power. Yet the nationalist doctrine made a pervasive impact upon the treatises and textbooks of subsequent Northern writers. Lesser commentators than Story and Webster disseminated the arguments of the more sophisticated constitutional theorists into a wide reading public. Few spoke to a specifically legal audience.[96] Many of these authors held on to the tenants of social compact theory and limited state sovereignty long after they ceased to be taught by leading nationalists. Of the nationalist ideas, the important argument was the insistence (dating back to Wilson) that the Constitution was the work of the people. Joseph Burleigh's *American Manual* (1848) contended that "it is a contract binding alike each and every citizen within the United States, to establish and maintain a government for the benefit of the whole people."[97] Edward Mansfield's *Political Grammar* (1834) carefully defined the constitution as "fundamental law; the regulation that determines the manner

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[96] James Bayard explained: "Although several works have been written … by men of great learning and ability … nothing has been attempted in the way of a short and simple exposition of the principles of the constitution, for the use of young persons, and such as may not have the time for more extended research." (James Bayard, *A Brief Exposition of the Constitution of the United States* (Philadelphia: 1833), 5). Edwin Williams' *Book of the Constitution* (1833) billed itself as a "useful depositary of information to both parties." It contained synopses of state constitutions, resolutions from the Hartford Convention, the South Carolina Ordinances, and the Virginia and Kentucky Resolutions. However it also presented the leading challenges to radical state sovereignty: Jackson's proclamation of 1832, the Webster-Hayne Debate, and Madison's Letter to Edward Everett on Nullification (1830). As William's work suggests, many authors were primarily editors of documentary collections. (Williams, *The Book of the Constitution.…*, (New York: 1833)).

[97] Joseph Burleigh, *The American Manual.…*, (Philadelphia: Grigg, Elliot, 1848), 150.

in which the authority vested in government is to be executed. It is delineated by the hand of the people."[98] Sovereign power was vested "in the hands of the whole people."[99] Mansfield also devoted a chapter to the history and origins of the Union to establish the growth of the government from colonial origins through the Revolution into the Founding. For most of the nationalists, the people remained the focus.[100]

Story's arguments dominated subsequent treatise writers, both nationalists and particularists. R. K. Moulton is a good example. Like many popular works, his *Constitutional Guide* was directed at the specific issue of the national bank, the tariff, and the constitutionality of nullification. The bulk of his text consists of commentaries on the Constitution, culled from the works of Kent, Story, and Madison. He, too, recognized the people as the "only legitimate authority, their happiness and prosperity, as far as good argument is concerned, depends entirely upon themselves."[101] Other commentators mentioned the nationalist ideas only in scorn. Henry Baldwin (1837) held the doctrine that the nation was a "body politic … formed by the people within certain boundaries," but he held the nationalist doctrine of a community of the people in aggregate to be a "perversion." Instead, he emphasized that the constituent parts of the Union were the states. With the ratification conventions, the people of the several states affirmed this status. Attacking *McCulloch v. Maryland* directly, he stressed that the people should be

[98] Mansfield, §4.

[99] Mansfield, ch. V, pt 3.

[100] Baldwin, ch. 1.

[101] R. K. Moulton, *Constitutional Guide* (New York, 1834), iii.

considered as residing in the states, not as a "compound mass" and not as "the organic power."[102]

Many authors disagreed with Story on the nature of the Union, but they used his arguments to direct their attacks on nullification and secession. Edwin William's *Book of the Constitution* (1833) offered a collection of documents designed to buttress the Union. William argued that even if the United States was created by the several states, acting as sovereigns, "a common umpire has been appointed by the instrument of confederation, to whose whole decision all questions arising as to its construction would be freed, [and] the right of disunion by a single state would be entirely excluded."[103] Like Webster, he believed that the fundamental law of Union provided for the adjudication of constitutional disputes.

Story's law students also contributed to the spread of nationalist ideas. Timothy Walker proceeded from a roughly Lockean understanding of the state of nature and natural right, but when reasoning about the law, he followed Story's analysis. The purpose of the Union was consolidation: "to unite the people of the several states into one nation for national purposes."[104] Respecting federal power, the state governments had no function at all. But, regarding municipal authority, the states had real power. Ultimately, however, their power was limited, and nullification and secession had no constitutional basis.[105]

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[102] Baldwin, 29-32.

[103] Williams, *The Book of the Constitution,* iv.

[104] Timothy Walker, *Introduction to American Law* (Philadelphia, 1837; New York: Da Capo, 1972), §25.

[105] Walker, §60-67.

Some ardent nationalists alive in the 1830s still remembered the events of the Revolution and Founding. Although they appreciated the rhetorical power of Webster and Story, they defended the Madisonian middle ground against the newer nationalist perspective ideas. Nathaniel Chipman reacted directly to Webster's "Second Reply" in his *Principles of Government* (1833). Chipman had observed the New York ratification convention personally in 1788, and had served as a Federalist Senator in the 1790s. He had long contended that the meaning of the Constitution was not to be understood from history, but exegeted from the text. The long debate about who formed the Union, and who was sovereign at the beginning, he considered to be irrelevant.

> The great point, however, is not so much what precise character the states sustained at that time, as whether the compact was executed by a power in each state competent to bind the community and all its members and, in concurrence with the same power in all states, to bind the whole in a national union under a national government.[106]

Yet Chipman immediately asserted, based on the logic of revolution, that "this point cannot be successfully controverted, nor that such power resides in the sovereign people only, without sapping the very foundations of all our civil institutions."[107] The people established the Constitution as law to protect their natural rights. Chipman used this argument to challenge theorists on both sides. He opposed Jefferson's Kentucky Resolution because it asserted that the states were the parties to the compact. The states, while independent, could not be accurately described as co-ordinate departments of an integral union (Jefferson's argument) because the federal government was not required to coordinate with the states. If the states, or even branches of government, could set limits

[106] Chipman, *Principles of Government*, 270.

[107] Ibid.

on their own power, that would create a government of wills and not the government of law created by the people.[108]

Chipman also felt bound to challenge the nationalists on their weak use of compact theory.

> The constitution of the state, has for centuries been denominated by all political writers and publicists, … a compact and by way of distinction, the civil compact. I have always considered the constitution of the United States as a compact, to which the people of the United States were the only efficient parties. Every constitution of government is a compact sui generis. One thing that distinguishes it from ordinary compact is, that in and by it is instituted a power to make laws and rules for the conduct of the citizens, and a power to enforce the obedience to those laws;--essential powers of government.[109]

Popular ratification strengthened the authority of a constitutional compact. When the nationalists argued that the states were not party to the Constitution, because it was not a compact, Chipman feared that the nationalists would remove the role of the people in consenting to the Union as well.

John Quincy Adams's 1831 Independence Day Oration was favorably cited by the nationalists, especially Story, for his stress on the popular basis of the Constitution. Adams himself, however, held none of the later nationalists' tendencies to abandon the compact theory. He held that the Declaration of Independence, in terms of diplomacy, transformed the colonies into "united, free, and independent states." In social terms, though, the people "bound themselves, before God, to a primitive social compact of Union, freedom and independence."[110] However, he resisted the idea that the people were sovereign. The revolution itself arose from Parliament's assertion (in the

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[108] Chipman, 270-280.

[109] Chipman, 267-68. See footnote.

[110] Adams, John Quincy, *Oration Addressed to the Citizens of Quincy…*, (Boston: Richardson, Lord, & Holbrook, 1831), 7. "Our Declaration of Independence, our confederation, the constitution of the United States, and all our state constitutions, without a single exception, have been voluntary compacts, deriving all authority from the free consent of the parties assigned to them" (33).

Declaratory Acts) that it held sovereign power to bind the colonies. American statesmen wisely resisted the temptation to consolidate sovereignty and did not mention the concept itself in the original compact. Adams himself asserted that sovereignty was incompatible with natural rights. Liberty and not sovereignty was the true focus of the Union.

Webster's main theme of Union, however, was warmly adopted by Adams. Building on the rhetorical theme of the Second Reply, Adams made "Independence and Union" his own refrain.

> To this compact, Union was as vital as freedom or independence…. [N]o one of the states whose people were parties to it, could, without violation of the primitive compact, secede or separate from the rest. Each was pledged to all, and all were pledged by a consent of souls, without limitation of time, in the presence of Almighty God, and proclaimed to all mankind.
>
> They are united, free and independent states. Each of these propositions is equally essential to their existence. Without Union, the covenant contains no pledge of freedom or independence; without freedom, none of independence or Union; without independence, none of Union or freedom.[111]

Like Webster, Adams believed that these last three objects of association were quite inseparable.

Linking the liberal ends of society with the cause of Union, through the Declaration of Independence, would become the most forceful argument of the nationalists. By the Civil War, Lincoln would rededicate the Union to precisely this task: that the nation was "dedicated to the proposition that all men are created equal;" that this "government of the people, by the people, and for the people might not perish from the earth."[112]

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[111] Adams, John Quincy, 17-18.

[112] Lincoln, Abraham, "Address Delivered at the Dedication of the Cemetery at Gettysburg," *Abraham Lincoln: His Speeches and Writings*, ed. Roy Basler (Cleveland: Word, 1946; reprint, New York: De Capo Press, 1990), 734.

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Key to Abbreviations:

CCFU	Constitutional Convention and the Formation of the Union
DHRC	Documentary History of the Ratification of the Constitution
DUA	Drew University Archives, Madison, NJ
JCC	Journals of the Continental Congress
PDWC	Papers of Daniel Webster, Correspondence
SDFR	State Documents on Federal Relations
SPN	State Papers on Nullification

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