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Democratic-Republican Societies, Subversion, and the Limits of Legitimate Political Dissent in the Early Republic

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DEMOCRATIC-REPUBLICAN SOCIETIES, SUBVERSION, AND THE LIMITS OF LEGITIMATE POLITICAL DISSENT IN THE EARLY REPUBLIC

ROBERT M. CHESNEY*

Political liberties and the needs of security have clashed often in American history. When asked to identify the seminal incident in this cycle, many if not most of us are inclined to look to the passage of the Alien and Sedition Acts and the series of federal seditious libel prosecutions which took place beginning in 1798. But this overlooks the events of 1794, when Federalists first made a concerted effort to assert the illegitimacy of political criticism of the government. The effort did not take the form of prosecution or legislation, but nonetheless presented a significant challenge to constitutional values. The moment came in the tense, patriotic aftermath of the Whiskey Rebellion and was directed at the Democratic-Republican societies—a loosely-affiliated network of voluntary associations engaged in sharp criticism of Federalist policy. From the Federalist perspective, the societies were inherently illegitimate because the tendency of their speech—indeed, of their very existence—was to foment insurrection and to undermine representative government. Federalists also feared the societies were influenced by, if not subject to the direction and control of, a subversive foreign power—Revolutionary France. Building on these perceptions, President Washington used his annual address to Congress to denounce the existence of the societies. The censure produced an immediate echo in the Senate and a fierce debate in both the House and the partisan press. Republicans insisted upon the right of private citizens to organize and to criticize the actions of elected officials, while Federalists branded political criticism from private groups as inherently disloyal and seditious. It was America’s first sustained debate concerning freedoms of expression, assembly, and the press, but ultimately the decentralized nature of the debate prevented it from

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reaching a clear resolution. James Madison wrote at the time of his concern that the public failed to appreciate that the principle advanced by the Federalists could as well be applied in support of more direct intrusions on political liberties. This, of course, is precisely what happened just a few years later during the Sedition Act controversy.

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It is the unalienable right of a free and independent people to assemble together in a peaceable manner to discuss with firmness and freedom all subjects of public concern, and to publish their sentiments to their fellow citizens, when the same shall tend to the public good.

—Resolution of the Democratic-Republican Society of Washington, North Carolina, April 19, 1794¹

[C]an any thing be more absurd, more arrogant, or more pernicious to the peace of Society, than for . . . a self created, *permanent* body, (for no one denies the right of the people to meet occasionally, to petition for, or to remonstrate against, any Act of the Legislature . . .) to declare that *this act* is unconstitutional, and *that act* is pregnant of mischief; and that all who vote contrary to their dogmas are actuated by selfish motives, or under foreign influence

—George Washington to Burges Ball, September 25, 1794²

1. *Resolution*, N.C. GAZETTE (New Bern), Apr. 19, 1794, quoted in THE DEMOCRATIC-REPUBLICAN SOCIETIES, 1790-1800: A DOCUMENTARY SOURCEBOOK OF CONSTITUTIONS, DECLARATIONS, ADDRESSES, RESOLUTIONS, AND TOASTS 11 (Philip S. Foner ed., 1976) [hereinafter FONER].

2. Letter from President George Washington to Burges Ball (Sept. 25, 1794)

I never did see an opportunity of destroying these self-constituted bodies, until the fruit of their operations was disclosed in the insurrection of Pittsburg They may now, I believe, be crushed. The prospect ought not to be lost.

—Edmund Randolph to George Washington, October 11, 1794³

INTRODUCTION

When did the federal government first test the limits of legitimate political dissent in this country? The traditional answer is 1798, the year that marked the enactment of the Sedition Act and the onset of a campaign to silence the Republican press.⁴ But America's first brush with suppression in fact occurred four years earlier when Federalists attempted—indirectly, but with some success—to silence the purportedly subversive Democratic-Republican societies.⁵

The societies were the first voluntary associations of ordinary citizens to engage in significant and sustained political criticism of the federal government. They emerged in 1793 in the midst of intense debates in America over the course of the French Revolution and American neutrality, and they soon spread across the country. Staunchly pro-French, the societies were incessant critics of the federal government at a time when the scope of legitimate political dissent was untested. Undaunted, they portrayed themselves as sentinels determined to watch over the government on behalf of the people and preserve its republican character.

Today we take this sort of organized citizen participation in political life for granted. We assume its propriety and appreciate the governmental checking function that it serves. But in the context of

[hereinafter Letter from Washington to Ball], in 33 THE WRITINGS OF GEORGE WASHINGTON 506 (John C. Fitzpatrick ed., 1940) [hereinafter WGW].

3. Letter from Secretary of State Edmund Randolph to President George Washington (Oct. 11, 1794) [hereinafter Letter from Randolph to Washington], *microformed on* THE GEORGE WASHINGTON PAPERS, Series 4, Reel 106 (Library of Congress 1964) [hereinafter GWP].

4. An Act for the Punishment of Certain Crimes Against the United States, ch. 74, 1 Stat. 596 (expired 1801).

5. The private political associations known collectively to historians as the "Democratic-Republican Societies" varied widely in their actual titles. Of the forty-two identified in Eugene Perry Link's study, sixteen used a variation of the name "Democratic Society," fifteen used a variation of the name "Republican Society," two actually used the title "Democratic-Republican," and the remainder used a variety of other names. See EUGENE PERRY LINK, DEMOCRATIC-REPUBLICAN SOCIETIES, 1790-1800, at 13-15 (1942). For ease of reference going forward, I refer collectively to these groups as the "societies."

the early republic, the very existence of the societies was deeply controversial. They institutionalized citizen participation in the political process outside the carefully calibrated framework of government established by the Constitution, and in doing so they challenged prevailing Federalist beliefs about the proper role in political life of private citizens. Federalists, in short, perceived the societies as inimical to truly representative government. Moreover, Federalists viewed the societies as actively subversive, contending that they were inspired by, or perhaps even subject to the direction and control of, Revolutionary France—a foreign power espousing what might be described as a radical, transnational ideology.⁶ As a result, fear of subversion—whether real or feigned—dominated Federalist discussion of the societies, and the societies' opposition to Federalist policy became equated with active disloyalty.

Little might have come from these tensions if not for the Whiskey Rebellion in the summer of 1794.⁷ President George Washington believed the Rebellion was the inevitable result of the societies' unwelcome intrusion into politics, and at the urging of Secretary of State Edmond Randolph, he concluded that the time had come to move against them. His action—using his annual address to Congress to denounce the societies as inherently illegitimate—was a far cry from the criminal prosecutions Federalists would launch in order to silence the Republican press just four years later. But as subsequent experience has demonstrated, it is not always necessary to pass a law to disrupt political opposition.⁸ The speech was widely understood at the time not as ordinary political criticism, but instead as a denial of the legality of organized and sustained political dissent tending to undermine public support for elected officials. President Washington had not criticized the societies on the merits, but instead had leveraged his unmatched personal and institutional authority to delegitimize them as participants in the political process. And by the end of the next year, many of the societies had indeed fallen silent.⁹

6. The charge was false, yet has had astonishing staying power. *See, e.g.*, DAVID MCCULLOUGH, JOHN ADAMS 445 (2001) (claiming that the “democratic societies were secret political clubs verging on vigilante groups and seemed truly bent on gaining French control over American politics”).

7. *See infra* notes 142–50 and accompanying text.

8. *See* JAMES X. DEMPSEY & DAVID COLE, TERRORISM & THE CONSTITUTION: SACRIFICING CIVIL LIBERTIES IN THE NAME OF NATIONAL SECURITY 71–75 (2002) (describing abusive practices engaged in by the FBI as documented in 1976 by the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities in Senate Report 755, better known as the “Church Committee” report).

9. A number of factors may have contributed to this sudden silence, but there is a

In this sense, Washington's censure was America's introduction to political suppression.

The story of Washington's clash with the societies provides important insight into the founding generation's understanding of core constitutional rights, including the freedoms of expression, press, and association, as well as the competing conceptions of republicanism, democracy, and popular sovereignty informing these understandings. As recounted in the pages that follow, there was sharp disagreement in 1790s America over the extent to which it was legitimate for citizens to assemble in private political associations, to criticize elected officials, and to disseminate these criticisms. The much-publicized struggle of the societies to establish the propriety of their activities, and the corresponding efforts by opponents to characterize them as subversive and illegitimate, provided contemporary Americans with the first significant and sustained debate over the scope of political liberties under the new constitution.¹⁰ Those debates are a snapshot in time, capturing our constitutional rights in the process of their slow maturation.¹¹

consensus among historians that the Federalist censure was at least a significant factor. See *infra* note 248 and accompanying text.

10. Zechariah Chafee, Jr., wrote, "Men rarely define their inspirations until they are forced into doing so by sharp antagonism," and that it was "not until the Sedition Law of 1798 made the limits of liberty of the press a concrete and burning issue" that we had "much helpful expression of opinion on" that problem. ZECHARIAH CHAFEE, JR., *FREE SPEECH IN THE UNITED STATES* 16 (1941); see also *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 273 (1964) (arguing that the Sedition Act controversy "first crystallized a national awareness of the central meaning of the First Amendment" (citations omitted)). This conclusion seems a bit unfair to those who participated in the extensive debates regarding expressive freedoms prompted by the Federalist attempt to delegitimize the societies, debates that did encompass the role of the press in political expression.

11. Historians of the period have recounted many of the events related here, but they have not done so from this constitutional perspective. See, e.g., SAUL CORNELL, *THE OTHER FOUNDERS: ANTI-FEDERALISM AND THE DISSENTING TRADITION IN AMERICA, 1788-1828*, at 195-99 (1999) (providing an overview of the tensions surrounding the societies); STANLEY ELKINS & ERIC MCKITRICK, *THE AGE OF FEDERALISM* 484-88 (1993) (describing the Federalist censure of the societies and Madison's response); LINK, *supra* note 5, *passim* (providing a comprehensive examination of the rise and fall of the societies); ALFRED F. YOUNG, *THE DEMOCRATIC REPUBLICANS OF NEW YORK: THE ORIGINS, 1763-1797*, at 392-412 (1967) (describing the emergence and activities of societies in New York); Albrecht Koschnik, *The Democratic Societies of Philadelphia and the Limits of the American Public Sphere, Circa 1793-1795*, 58 WM. & MARY Q. 615 *passim* (2001) (providing a sophisticated account of the activities, fate, and political significance of two societies in Philadelphia). Similarly, although a handful of legal scholars have observed the constitutional significance of these events, none have couched their discussion in the context of the complete chain of events that preceded and followed the censure. The most significant contribution is by James P. Martin. See James P. Martin, *When Repression Is Democratic and Constitutional: The Federalist Theory of Representation and the Sedition Act of 1798*, 66 U. CHI. L. REV. 117

At the conclusion of this narrative, I offer some observations about the dynamics involved in the debate over the legitimacy of the societies and the manner in which those dynamics ultimately contributed to, rather than helped prevent, the enactment of the Sedition Act. Because the Federalist attack on the societies was merely rhetorical, the resulting debate was decentralized in the sense that it took place in a diffused way in the media of the day and did not at any point reach a focal point for decision. As a result, there was no real opportunity to rebuff the Federalist interpretation of the legitimate scope of private participation in political life. Instead, that view received a considerable airing, lingered, and grew familiar. And just a few years later, with the onset of renewed national security concerns in 1798, that same Federalist perspective on private political dissent reared its head again in the form of the Sedition Act. The story of the Federalists and the societies thus functions not only to inform our understanding of the origins of modern political freedoms, but also as a cautionary tale regarding government action that challenges constitutional values but nonetheless tends to circumvent focal points for review.

I. BLOOM AND BACKLASH

The great challenge of any examination of historical events is to convey a sense of context. This is particularly true of the story of the

passim (1999) (describing the particular theory of representative government underlying Federalist hostility to the societies and support for the Sedition Act of 1798); see also ROBERT A. HORN, GROUPS AND THE CONSTITUTION 17–18, 155, 176 (Stan. U. Publications, University Series: History, Economics, and Political Science Vol. XII, 1956) (contending, in the context of a broad history of the relationship of groups to the law, that the Federalist attack on the societies somehow can be seen as a victory for freedom of association); LEONARD W. LEVY, EMERGENCE OF A FREE PRESS 291–94 (1985) (describing House debate over Washington’s censure of the societies); CHARLES E. RICE, FREEDOM OF ASSOCIATION 122 (1962) (suggesting incorrectly that the Sedition Act of 1798 was a response to the societies); William T. Mayton, *Seditious Libel and the Lost Guarantee of a Freedom of Expression*, 84 COLUM. L. REV. 91, 122–23 (1984) (discussing the House debate over Washington’s censure of the societies); Jason Mazzone, *Freedom’s Associations*, 77 WASH. L. REV. 639, 734–38 (2002) (relating the story of the societies in the context of a fascinating exploration of the connection between voluntary associations generally and modern freedom of association doctrine); David M. Rabban, *The Ahistorical Historian: Leonard Levy on Freedom of Expression in Early American History*, 37 STAN. L. REV. 795, 843–49 (1985) (book review) (locating the societies in the context of the broader international republican movement, and describing the Federalist attack on the societies as a preview of the Sedition Act debates of 1798). My account differs from much of the foregoing scholarship insofar as it interprets the House debate over the censure not as a victory for the societies but, at best, as a draw. My account also differs in its description of subtle lesson conveyed by the outcome of the debate concerning the societies.

societies because the period from 1793 to 1795 sits squarely between—and is obscured by—more familiar events such as the adoption of the Constitution, the enactment of the Alien and Sedition Acts, and the subsequent ascendancy of Jefferson's Republican Party. But the mid-1790s in fact were deliciously eventful years, spiced with revolution, intrigue, and struggles for power. The societies arose out of this ferment, as did the forces that aligned against them. The first task, then, is to convey a taste of the times.

A. *The Federalist-Republican Divide*

Political life in the early republic was dominated by the inevitable collapse of elite consensus after the adoption of the Federal Constitution and the consequent emergence of the divide between "Federalists" and "Republicans."¹² The Federalists and Republicans at this early stage had not yet developed the attributes of modern political parties.¹³ But the differences of opinion and interest that they represented nonetheless were substantial, and they grew intense as the decade progressed.¹⁴

It was not so at first. The drafters and promoters of the new Federal Constitution had hoped the new system would operate without political parties.¹⁵ These expectations were borne out only briefly in the opening years of the first Washington Administration, however, before diverging economic, sectional, and philosophical interests asserted themselves.¹⁶ Secretary of the Treasury Alexander Hamilton's fiscal proposals aimed at establishing the national credit inserted the first wedge, splitting opinion along lines that would evolve into a lasting partisan divide.¹⁷

12. See JAMES ROGER SHARP, *AMERICAN POLITICS IN THE EARLY REPUBLIC: THE NEW NATION IN CRISIS* 33–34, 59–60 (1993) (indicating that in the Third and Fourth Congresses, seven of ten roll call votes in the House broke down along party lines).

13. See *id.* at 33–34.

14. See, e.g., RICHARD BUEL, JR., *SECURING THE REVOLUTION: IDEOLOGY IN AMERICAN POLITICS, 1789–1815*, at 1–7 (1972) (tracing the evolution of the party system from the cooperative early years through the eventual discord initiated by Hamilton's proposed national credit system).

15. See *id.* at 2–3; see also MICHAEL SCHUDSON, *THE GOOD CITIZEN: A HISTORY OF AMERICAN CIVIC LIFE* 54 (1998) ("On this point at least the founders agreed among themselves."); *id.* at 64 (describing the fears expressed by several participants); SHARP, *supra* note 12, at 50 (writing that in "the first stage of American political development . . . public men naively anticipat[ed] that political and sectional conflict would be resolved institutionally by the checks and balances and federalism of the Constitution and by the dedication and goodwill of a selfless elite").

16. BUEL, *supra* note 14, at 1.

17. See *id.* at 1–2, 8–17; SCHUDSON, *supra* note 15, at 65 (observing that "the beginnings of political organization can be traced to Washington's cabinet where

As that divide deepened, Secretary of State Thomas Jefferson and Representative James Madison found themselves in the vanguard of an incipient loyal opposition movement.¹⁸ Along with those similarly inclined, they adopted the labels “Whig” and “Republican” to signify the shared belief that Hamilton’s economic policies tended to undermine the republican nature of the government and thus threatened liberty.¹⁹ For their part, “Federalists” such as Hamilton construed the emerging opposition as a potential threat to the constitutional settlement achieved in 1789.²⁰

Mutual suspicion contributed to the partisanship.²¹ “One side appears to believe that there is a serious plot to overturn the state Governments and substitute monarchy to the present republican government,” noted Hamilton.²² “The other side,” he added, “firmly believes that there is a serious plot to overturn the General Government and elevate the separate power of the states upon its ruins.”²³ It was quite possible, Hamilton admitted, that both “may be equally wrong” and that “their mutual jealousies may be material causes of the appearances which mutually disturb them, and sharpen them against each other.”²⁴

Because national leaders on both sides of the divide hesitated to embrace partisanship too directly, the maturity of the partisan press—providing an outlet for frank, unrestrained, and often anonymous political commentary—was another critical development. Hamilton and other Federalists already had established John Fenno’s *Gazette of the United States* as a pro-administration, pro-Federalist voice. In

Alexander Hamilton and Thomas Jefferson faced off as representatives of federalist and republican viewpoints,” and noting “lines of cleavage were already forming in the Congress that paralleled” those in the cabinet); SHARP, *supra* note 12, at 34 (describing finance as the “most explosive issue to come before the First Congress”). Other divisive issues included the National Bank and the first reapportionment of House seats. See BUEL, *supra* note 14, at 17, 21–23.

18. See SHARP, *supra* note 12, at 42.

19. *Id.* at 38, 42; see also James Madison, *A Candid State of Parties*, NAT’L GAZETTE (Philadelphia), Sept. 26, 1792, reprinted in XIV THE PAPERS OF JAMES MADISON 370–72 (Robert A. Rutland et al. eds., 1983) [hereinafter PJM] (discussing the divide between what he termed the “republican” and the “antirepublican” parties); James Madison, *Parties*, NAT’L GAZETTE (Philadelphia), Jan. 23, 1792, in XIV PJM, *supra*, at 197–98 (discussing the inevitable rise of parties).

20. See SHARP, *supra* note 12, at 50.

21. See *id.* at 41.

22. Letter from Secretary of Treasury Alexander Hamilton to President George Washington (Aug. 18, 1792), in XII THE PAPERS OF ALEXANDER HAMILTON 253 (Harold C. Syrett ed., 1972) [hereinafter PAH].

23. *Id.*

24. *Id.*

1791, Republicans countered with Philip Freneau's *National Gazette*.²⁵ By 1792, Madison, Jefferson, and Hamilton were trading barbs through their respective papers.²⁶

The new partisanship sharpened dangerously when domestic politics and foreign policy began to intertwine in reaction to the violent fallout from the French Revolution.²⁷ The initial American reaction to the Revolution was broadly enthusiastic, as most interpreted the event (along with the Declaration of the Rights of Man and the French Constitution) as an endorsement of America's political experiment with representative government under a constitution.²⁸ Federalists and Republicans by and large were united on the subject in those early days,²⁹ all the more so when the French declared a republic in September 1792.³⁰

But a shadow fell in early 1793. News arrived that America's

25. SHARP, *supra* note 12, at 43–44. Jefferson and Madison induced Freneau to start the NATIONAL GAZETTE. See *id.*; DONALD H. STEWART, THE OPPOSITION PRESS OF THE FEDERALIST PERIOD 8 (1969). Jefferson previously had funneled news to Benjamin Franklin Bache's *General Advertiser* in Philadelphia, and after the expiration of the NATIONAL GAZETTE in 1793 would shift his support to Bache's paper (soon renamed the *Aurora*). See STEWART, *supra*, at 7, 9. Federalists similarly supported Noah Webster's *American Minerva*. See *id.* at 11.

26. See RICHARD HOFSTADTER, THE IDEA OF A PARTY SYSTEM: THE RISE OF LEGITIMATE OPPOSITION IN THE UNITED STATES, 1780–1840, at 80–86 (1969); SHARP, *supra* note 12, at 46–49.

27. See ELKINS & MCKITRICK, *supra* note 11, at 302, 308–17; see also BUEL, *supra* note 14, at 29 (“From the very beginning, leading figures in the emerging parties disagreed on foreign policy.”). Max Lerner captured the broader context of these tensions when he wrote:

The wheelings and turnings of Federalists and Republicans were not only the maneuverings of propertied groups and the agrarian-labor masses [T]hey were part of a world-wide movement of social struggle fought out in France and England as well as in America. For the history of this period can be written adequately only if it is seen as world history.

Max Lerner, *John Marshall and the Campaign of History*, 39 COLUM. L. REV. 396, 409 (1939).

28. See BUEL, *supra* note 14, at 36; ALEXANDER DECONDE, ENTANGLING ALLIANCE: POLITICS AND DIPLOMACY UNDER GEORGE WASHINGTON 173 (1958); ELKINS & MCKITRICK, *supra* note 11, at 309–10 (stating that “[t]he very thought that a great and ancient kingdom was acting by our example was stupendous,” a sentiment reinforced by Lafayette when he sent Washington the key to the Bastille along with a message referring to the President as the “Patriarch” of liberty); CHARLES DOWNER HAZEN, CONTEMPORARY AMERICAN OPINION OF THE FRENCH REVOLUTION 140–45 (1897).

29. See ELKINS & MCKITRICK, *supra* note 11, at 310.

30. See *id.*; see also DECONDE, *supra* note 28, at 178 (“A French frenzy rolled over the land. America became hysterical.”); FONER, *supra* note 1, at 17 (noting the enthusiastic reception of news of the French Revolution and subsequent republic “by persons of both parties”).

revolutionary patron, King Louis XVI, had been guillotined in January.³¹ Some began to recall news of widespread rioting and massacres in France the year before, news that took on a more sinister hue in retrospect.³² The French had declared war on Britain and Holland, moreover, and the clash of arms presumably would soon extend to their possessions across the Atlantic.³³ At a time when America was militarily weak and commercially dependent on belligerents on both sides of the issue, this was a disturbing prospect.³⁴

American public opinion regarding the course of the French Revolution began to divide in the wake of these events, and this new division broke down like most others in the period along the now-familiar party lines.³⁵ Commercial interests played a role in this split, with critics such as Jefferson suggesting that Federalists insisting upon neutrality in the resulting Franco-British conflict were motivated by economic concerns.³⁶ But the split reflected ideological sympathies as well. Republicans were willing to look past the warts of Revolutionary France, seeing it as the standard bearer for the republican principles initially championed by America—the people of France, in this view, were struggling for their liberty against the forces of monarchy and despotism.³⁷ Federalists focused on the other side of the coin, seeing tumultuous and bloody France as proof of the dangers of excessive democracy and mob rule.³⁸

31. See ELKINS & MCKITRICK, *supra* note 11, at 311, 356–57.

32. See *id.* at 311.

33. See *id.*; FONER, *supra* note 1, at 18.

34. See DECONDE, *supra* note 28, at 188 (noting Hamilton's argument that the dangers of becoming involved in the European war outweighed any benefits to be gained by tilting America's policy in favor of the French, in light of "America's present weakness and meager resources").

35. See ELKINS & MCKITRICK, *supra* note 11, at 311, 356–57 (stating that the execution of Louis XVI "served as the clearest dividing principle so far whereby Republicans and Federalists would go separate ways in their attitudes on the French Revolution"); FONER, *supra* note 1, at 17–18 (noting that for Federalists, "hesitant approval turned to genuine fear and dismay at what they termed the 'violent excesses' of the new regime," while many Republicans viewed "violence and disorder as necessary"); JAMES MORTON SMITH, *FREEDOM'S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES 10–12* (1956) (noting that the French Revolution exacerbated the differences between Federalists and Republicans).

36. See, e.g., ELKINS & MCKITRICK, *supra* note 11, at 357–58 (describing Jefferson's criticisms of "paper dealers" in this context, referring to those with a stake in British commercial loans).

37. See BUEL, *supra* note 14, at 36–49; ELKINS & MCKITRICK, *supra* note 11, at 309, 311, 354–55. See generally HAZEN, *supra* note 28, at 1–299 (describing contemporary views on the French Revolution).

38. See ELKINS & MCKITRICK, *supra* note 11, at 309, 311, 354–55; see also BUEL, *supra* note 14, at 36–49. See generally HAZEN, *supra* note 28, at 1–299 (describing

Acknowledging American dependence on commercial trade with both warring parties—but especially on the British—Washington ultimately decided to pursue a policy of neutrality in the Franco-British conflict, notwithstanding the domestic popularity of the French Revolution and the existence of Franco-American treaties dating back to America's own revolution.³⁹ The arrival in America of the first envoy from the French Republic presented a considerable challenge to that policy, however, one that resonated deeply with underlying Federalist concerns about the democratic forces unleashed in France. Edmond Charles Genet was a “young, gallant, and dashing” man, and his arrival in early April 1793 caused a popular sensation and an outpouring of pro-French enthusiasm.⁴⁰ Greeted by “euphoria” when he disembarked in Charleston, South Carolina, he met with “thunderous welcomes all along the way” during his month-long journey to Philadelphia, and when he arrived at the capital, the city gave “itself over to transports of joy.”⁴¹

Genet arrived in Philadelphia just after Washington issued the Neutrality Proclamation.⁴² The timing was unfortunate, because Genet's mission to call upon American assistance in the Franco-British struggle necessarily clashed with this policy.⁴³ Federalists, aware of the public enthusiasm for the French minister, feared a

contemporary views on the French Revolution).

39. See ELKINS & MCKITRICK, *supra* note 11, at 336–41; FONER, *supra* note 1, at 20. The Neutrality Proclamation prohibited American citizens from participating in the conflict, whether directly or by supplying contraband trade. See ELKINS & MCKITRICK, *supra* note 11, at 337–38. It also barred all the belligerents—including France—from using America to outfit privateers. See *id.* at 340. On the other hand, the Proclamation did not override the provision in the 1788 Franco-American treaty that authorized France to bring her warships and prizes into American ports. See *id.*; JOHN J. REARDON, EDMUND RANDOLPH: A BIOGRAPHY 228 (1975) (“Under Article 17 of our Treaty of Commerce with France the United States was obliged to admit into its ports any vessel which was brought in as a prize by a French warship or privateer.”). The Neutrality Proclamation outraged Republicans, as they generally favored a distinctly pro-French benevolent neutrality, if not open alliance with France. See ELKINS & MCKITRICK, *supra* note 11, at 355–56.

40. ELKINS & MCKITRICK, *supra* note 11, at 330; see also BUEL, *supra* note 14, at 40 (describing the “rapturous reception given Citizen Genet as he toured the United States in 1793”). At that time, the moderate Gironde faction was dominant in the National Convention, and Genet was their emissary. See ELKINS & MCKITRICK, *supra* note 11, at 331. For a discussion of the role of Gironde in the French Revolution, see MICHAEL L. KENNEDY, THE JACOBIN CLUBS IN THE FRENCH REVOLUTION, 1793–1795, at 7–11 (2000).

41. ELKINS & MCKITRICK, *supra* note 11, at 335–36; see also Koschnik, *supra* note 11, at 619 (noting the warm reception that welcomed Genet to Philadelphia).

42. See ELKINS & MCKITRICK, *supra* note 11, at 336–41; FONER, *supra* note 1, at 20.

43. For an overview of Genet's objectives, see ELKINS & MCKITRICK, *supra* note 11, at 332–36.

popular uprising aimed at reversing the neutrality decision.⁴⁴ They determined therefore to break the French hold on public opinion if possible.⁴⁵ Domestic politics, foreign affairs, and national security had fatefully converged.

B. *The Democratic-Republican Societies Emerge*

As early as 1792, the emerging partisan divide prompted calls from administration opponents for the formation of voluntary associations of private citizens to critique the actions of the federal government.⁴⁶ The proposition seems innocuous from the perspective of twenty-first century America, but in the context of the early Republic, it was radical. Voluntary associations of any type were only beginning to become commonplace in that era, and the notion of politically-oriented societies—particularly those advocating democratic reform—was suspect.⁴⁷ The so-called Jacobin clubs

44. John Adams later would refer to the “[t]errorism, excited by Genet,” claiming that thousands gathered daily during that period “threaten[ing] to drag Washington out of his House, and effect a Revolution in the Government, or compell [sic] it to declare War in favour of the French Revolution, and against England.” Letter from John Adams to Thomas Jefferson (June 30, 1813), in II THE ADAMS-JEFFERSON LETTERS: THE COMPLETE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND ABIGAIL AND JOHN ADAMS 346–47 (Lester J. Cappon ed., 1959). The British Minister to the United States, George Hammond, wrote to Lord Grenville in early 1793 predicting that public enthusiasm might evolve into “a decided and open opposition to the government.” Letter from Minister George Hammond to Lord Grenville (Mar. 7, 1793), *quoted in* DECONDE, *supra* note 28, at 164.

45. DECONDE, *supra* note 28, at 181.

46. *See, e.g.*, NAT’L GAZETTE (Philadelphia), July 25, 1792 (declaring that constitutional societies to warn the people against invasions of their liberties “seem absolutely necessary in every country, where the people wish to preserve an uncorrupted legislation”); “W.T.,” NAT’L GAZETTE (Philadelphia), July 4, 1792 (calling for the formation of political societies in America along the lines of the Society for Constitutional Information in London in order to “prevent abuses of power . . . and silent encroachments upon the liberties of the people”); *see also* FONER, *supra* note 1, at 3–4 (citing NAT’L GAZETTE (Philadelphia), July 4, 11 & 18, 1792) (describing an appeal for the creation of the societies that appeared in the National Gazette in 1792).

47. *See* Elkins & McKittrick, *supra* note 11, at 451–56; *cf.* T. M. Parssinen, *Association, Convention and Anti-Parliament in British Radical Politics, 1771–1848*, 88 ENG. HIST. REV. 504, 509 (1973) (discussing the relative novelty of voluntary political associations in Britain in the second half of the Eighteenth century). *See generally* PETER CLARK, *BRITISH CLUBS AND SOCIETIES, 1580–1800: THE ORIGINS OF AN ASSOCIATIONAL WORLD* (2000) (describing the difficult origins of voluntary political societies in the Anglo-American world of the 1700’s). For an entertaining and informative insight into one aspect of British society which contributed, however tangentially, to the growth of a politically-oriented public sphere, *see The Internet in a Cup: Coffee Fueled the Information Exchanges of the 17th and 18th Centuries*, THE ECONOMIST, Dec. 20, 2003, at 88–90, which describes contemporary concerns over “coffee-houses’ alarming potential for facilitating political discussion and activity.”

famously had played a central role in subverting the old regime in France,⁴⁸ and in Britain, reform-oriented societies were under investigation for sedition.⁴⁹ Fair or not, the French and British precedents gave the very notion of a political society a patina of disloyalty.

Notwithstanding such concerns, “Democratic-Republican”⁵⁰ societies sprang up like mushrooms in the political ferment generated by the confluence of domestic politics and foreign policy in America.⁵¹ From 1793 to 1795, approximately forty of the societies were established around the country.⁵² They were present in the North and the South, on the coast and on the western frontier, in cities and in rural regions.⁵³ None were what we would today describe as a mass membership organization; some had as few as twenty or so members,

48. For an overview of the origins and impact of the Jacobin clubs, see generally Kennedy, *supra* note 40.

49. See generally Austin Mitchell, *The Association Movement of 1792–93*, 4 HIST. J. 56 (1961) (describing suppression of political association in Britain in that era). For a collection of contemporary documents reflecting the British debate over suppressing private political associations, see THE HISTORY OF TWO ACTS: AN ACT FOR SAFETY AND PRESERVATION OF HIS MAJESTY’S PERSON AND GOVERNMENT AGAINST TREASONABLE AND SEDITIOUS PRACTICES AND ATTEMPTS, AND AN ACT FOR THE MORE EFFECTUALLY PREVENTING SEDITIOUS MEETINGS AND ASSEMBLIES (1796) [hereinafter TWO ACTS].

50. Despite their similar names and political sympathies, the societies were in no formal sense part of, or predecessors to, the emerging Republican party; most national Republican figures had no affiliation with them. See FONER, *supra* note 1, at 40 (noting disagreement among historians on this point); YOUNG, *supra* note 11, at 575–76 (noting the distinction between the Republican party and the Republican societies); Letter from Rep. James Madison to Minister to France James Monroe (Dec. 4, 1794) [hereinafter Letter from Madison to Monroe], in XV PJM, *supra* note 19, at 407 (objecting to the Federalist attempt “to connect the Republicans in Congs. [sic] with those Societies”).

51. See *supra* notes 15–45 and accompanying text. Genet felt that the societies appeared “as if by magic from one end of the continent to the other . . .” DECONDE, *supra* note 28, at 252 (quoting MEADE MINNIGERODE, JEFFERSON, FRIEND OF FRANCE, 1793: THE CAREER OF EDMOND CHARLES GENET, MINISTER PLENIPOTENTIARY FROM THE FRENCH REPUBLIC TO THE UNITED STATES, AS REVEALED BY HIS PRIVATE PAPERS, 1763–1843, at 219 (1928)).

52. Historians dispute the precise number. Eugene Link, in his trailblazing work on the subject, put the number at thirty-eight in this particular period. See LINK, *supra* note 5, at 13–15. Subsequent research suggests that there may have been more. See FONER, *supra* note 1, at 7 (identifying four additional groups). By Link’s account, almost all of the societies were formed in 1793 (eleven) and 1794 (twenty-four). See LINK, *supra* note 5, at 13–15. A handful more formed in 1795, and none in 1796; as international events raised the temperatures of American politics from 1797 to 1798, a few additional societies emerged. See *id.*

53. See *id.* at 13–15 and frontispiece; Koschnik, *supra* note 11, at 617. The societies were present in all states except Rhode Island and New Hampshire. See LINK, *supra* note 5, at 13–15.

and even the larger ones counted only a few hundred members.⁵⁴ But through the aggressive use of newspapers⁵⁵ and committees of correspondence,⁵⁶ the societies leveraged their impact beyond their numbers.⁵⁷

To what purpose? The societies broke new ground in American society by offering themselves as mediating institutions between the public and the government, identifying the crucial “checking” function such institutions can serve.⁵⁸ On one hand, they proposed to

54. See FONER, *supra* note 1, at 7. Members came from diverse backgrounds, ranging from publishers, merchants, doctors, lawyers, and government employees to smallholding farmers, sailors, and mechanics. See ELKINS & MCKITRICK, *supra* note 11, at 457–58; FONER, *supra* note 1, at 8–9; LINK, *supra* note 5, at 71–74; STEWART, *supra* note 25, at 12; YOUNG, *supra* note 11, at 393–95.

55. By 1796, there were approximately ninety-two pro-Federalist and thirty-four pro-Republican papers around the country. See STEWART, *supra* note 25, at 624. The societies “received every possible notice in the Republican press, which printed frequent accounts of their meetings, toasts, and celebrations.” *Id.* at 434; see also Koschnik, *supra* note 11, at 628 (noting that “the Republican newspapers carried the societies’ resolutions to a national audience that focused on these publications”). The “common practice of copying from other newspapers ensured that major views were widely disseminated.” Michael Durey, *Thomas Paine’s Apostles: Radical Émigrés and the Triumph of Jeffersonian Republicanism*, 44 WM. & MARY Q. 661, 682 (1987). Durey notes the significant impact politically-radical immigrants had on newspaper publishing—and therefore public opinion—in the final decade of the eighteenth century. See *id.* at 681–88.

56. Postal infrastructure expanded rapidly during the Revolutionary War, going from twenty-eight offices in 1776 to seventy-five offices in 1790. See LINK, *supra* note 5, at 57. But that growth paled in comparison to post-war expansion. See *id.* By 1795, there were 453 offices. See *id.* The societies employed this structure to communicate and collaborate. See, e.g., Letter from Henry Kammerer, President, German Republican Society of Philadelphia, to the President and Members of the Democratic Society of Pennsylvania (Feb. 20, 1794), in FONER, *supra* note 1, at 57 (stating that mutual goals can be furthered by “establishment of a mutual correspondence, and a concurrent operation”); Manuscript Minutes of the Democratic Society of Pennsylvania (May 29, 1794), in FONER, *supra* note 1, at 80 (noting a draft of a circular letter to other societies “inviting an [sic] union of efforts”); Manuscript Minutes of the Democratic Society of Pennsylvania (May 8, 1794), in FONER, *supra* note 1, at 79 (noting receipt of a constitution and other documents from the Chittendon Democratic Society “inviting a free communication of any intelligence that may be deemed essential to promote the mutual intention of the sister societies”).

57. See, e.g., YOUNG, *supra* note 11, at 398 (noting the widespread influence of the Democratic societies); Manuscript Minutes of the Democratic Society of Pennsylvania (July 3, 1793), in FONER, *supra* note 1, at 67 (indicating that a correspondence committee was directed to publish the society’s constitution in a Philadelphia newspaper and that a circular letter enclosing copies of the constitution be circulated to the other counties of Pennsylvania).

58. One defender of the societies described the checking function as follows:

In elective governments the security of the people against any unwarrantable stretch of power is not confined to the check which a constitution affords, or the periodical return of elections; but rests also on a jealous examination of all the proceedings of administration, and an open expression of their sentiments thereon. A sense of the importance of this check upon government has given rise to the numerous political societies which are established, and are daily increasing

convey the will of the people to the government more efficiently than could be done in the absence of collective action. On the other, they would be “sentinels” monitoring the government’s actions and making them known to the people, thus overcoming the latter’s inability to do so efficiently on an individual basis.⁵⁹ In both capacities, the societies embodied an understanding of popular sovereignty and representation in which the role of the citizen was not limited to periodic voting, but instead entailed active and constant engagement in political life.⁶⁰ And in both capacities, the societies would check the potential for government abuse by ensuring that

[sic] thro’out [sic] the United States.

“Correspondents,” AURORA GEN. ADVERTISER (Philadelphia), May 16, 1794; cf. ALEXIS DE TOCQUEVILLE, I DEMOCRACY IN AMERICA 194–95 (Henry Reeve & Francis Bowen trans., Phillips Bradley ed., Alfred A. Knopf 1945) (1835) (discussing the checking function performed by voluntary associations in a democratic system). For a discussion of the “checking function” performed by free speech doctrine, see Vincent Blasi, *Free Speech and Good Character From Milton to Brandeis to the Present*, in ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA 61, 87 (Lee C. Bollinger & Geoffrey C. Stone eds., 2002); Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 523. On separation of powers as a “checking” mechanism, see generally MARTIN H. REDISH, THE CONSTITUTION AS POLITICAL STRUCTURE (1995).

59. YOUNG, *supra* note 11, at 575–76 (describing the societies as “sentinels”). Periodic elections and structural protections were insufficient to restrain the government from misbehavior, one society argued, absent a constant and “‘jealous examination of all the proceedings of administration.’” SHARP, *supra* note 12, at 85 (quoting *From Correspondents*, AURORA GEN. ADVERTISER (Philadelphia), May 16, 1794).

60. One society’s constitution insisted it was “the duty of every Freeman to regard with attention, and to discuss without fear, the conduct of the public Servants, in every department of Government.” Democratic Society of Pennsylvania, Principles, Articles, and Regulations, Agreed upon, Drawn, and Adopted (E. Oswald May 30, 1793), reprinted in FONER, *supra* note 1, at 64. *But see* Roland M. Baumann, *The Democratic-Republicans of Philadelphia: The Origins, 1776–1797*, at 582 (1970) (unpublished Ph.D. dissertation, Pennsylvania State University) (concluding that the Democratic Society of Pennsylvania served at least in part to enhance the control of a local leader, Alexander Dallas, over elections). Taking these proclaimed purposes at face value, the societies were inheritors of the “Radical Whig” tradition tracing back to the Leveller movement of Civil War-era England. *See* Michael Kent Curtis, *In Pursuit of Liberty: The Levellers and the American Bill of Rights*, 8 CONST. COMMENT. 359, 367–68, 378 (1991) (describing the Leveller understanding of the principal-agent relationship between the people and the government); Rabban, *supra* note 11, at 845 (describing influence of Radical Whig ideology on the societies); cf. *To the Vigil*, GAZETTE U.S. (Philadelphia), Dec. 6, 1794 (arguing that the societies were democrats and hence levellers). On the influence in America of English conceptions of popular sovereignty, see generally BERNARD BAILYN, THE ORIGINS OF AMERICAN POLITICS: THE CHARLES K. COLVER LECTURES (Vintage Books 1965); MICHAEL KENT CURTIS, FREE SPEECH, “THE PEOPLE’S DARLING PRIVILEGE”: STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY 23–51 (2000) [hereinafter CURTIS, FREE SPEECH]; EDMUND S. MORGAN, INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA (1988); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 344–89 (1969).

elected officials (as agents) conformed to the will of the people (the principals).⁶¹

In the exercise of this mediating function, the societies became engines of political dissent, subjecting both the Washington administration and the Federalist Congress to a steady barrage of criticism.⁶² The societies attacked government policy on a range of issues such as Hamilton's fiscal and commercial policies (deemed to be unduly pro-creditor and pro-British) and the management of frontier expansion (entailing issues such as the failure to remove British forts from the frontier and to obtain from Spain rights of navigation on the Mississippi).⁶³

Above all else, however, the societies objected to the federal government's purported failure to support newly-republican France and to its corresponding tilt toward Britain.⁶⁴ This objection stemmed from the fact that the societies identified the French Revolution with their own republican principles. This was particularly true of the influential "mother society" in Philadelphia, the Democratic Society of Pennsylvania.⁶⁵ The preamble to that society's founding document

61. "The Democratic-Republican clubs insisted that they served to make government more responsive to the people." SCHUDSON, *supra* note 15, at 57. The societies in Kentucky, for example, "had their congressional representatives face questions at their meetings or sent pointed questions to them in Philadelphia, reading and discussing the answers in their meetings." *Id.* at 56.

62. "Without question . . . these societies became centers of criticism of governmental policies." DUMAS MALONE, 3 JEFFERSON AND THE ORDEAL OF LIBERTY 122 (1962).

63. *See, e.g.*, Democratic Society of the County of Washington, *Remonstrance to the President and Congress on Opening Navigation of the Mississippi River*, PITTSBURGH GAZETTE, Mar. 24, 1794, reprinted in FONER, *supra* note 1, at 12-29 (asserting demand for navigational rights); *see also* FONER, *supra* note 1, at 5 (describing the societies' economic concerns); LINK, *supra* note 5, at 71-99 (providing an overview of members' backgrounds and associated economic interests).

64. "[I]t was the French Revolution and the crisis over foreign policy during 1793 and 1794 that integrated all other issues . . . [and] enabled the popular societies to build a following to challenge the Federalists." FONER, *supra* note 1, at 17. The societies "demanded the unhesitating fulfillment of previous treaty obligations to France and found the proclamation abhorrent, a pusillanimous truckling to Britain, despotically conceived and unconstitutionally promulgated." *Id.* at 20; *see, e.g.*, Letter from Rep. James Madison to Thomas Jefferson (May 11, 1794), in XV PJM, *supra* note 19, at 327 (noting society criticism of the appointment of John Jay to negotiate a treaty with Britain); *see also* Circular Letter from Democratic Society of Pennsylvania to Other Democratic Societies (May 20, 1794), in FONER, *supra* note 1, at 80-81 (opposing Jay and the supposed pro-British tilt of policy); Republican Society of the Town of Newark, *Resolutions Adopted on the Excise*, WOOD'S NEWARK GAZETTE, June 18, 1794, reprinted in FONER, *supra* note 1, at 146 (opposing Jay on separation of powers and civil liberty grounds).

65. The Democratic Society of Pennsylvania was one of the first societies to form, and its distinguished membership and location at the capital made it the most influential. *See* LINK, *supra* note 5, at 10-12. Its enthusiasm for France was reflected even in small details, such as the decision to insist on the use of "citizen" as a courtesy title. *See, e.g.*,

explained that the group was committed to republican principles as developed not only in the American, but also in the French Revolution,⁶⁶ and the circular letter announcing the group's formation expressly linked the "glorious efforts of France" with the long term prospects for republicanism in America.⁶⁷ Believing the fate of the two republican movements linked, the Democratic Society of Pennsylvania and other societies were relentless in their expressions of support for France at a time when the fundamental aim of federal policy was to avoid entanglement in the Franco-British war.⁶⁸

C. *The Federalist Perspective: Illegitimacy and Disloyalty*

From the Federalist perspective, there was nothing admirable or innocuous about their new critics.⁶⁹ On the contrary, they viewed the societies as both illegitimate and potentially subversive, and in both respects as a challenge to the stability of the young republic.⁷⁰

Manuscript Minutes of the Democratic Society of Pennsylvania (Mar. 27, 1794), in FONER, *supra* note 1, at 74 ("Resolved . . . the appellation, "Citizen", [sic] shall, exclusively of all titles, be used in the correspondences of this Society"). Their use of "citizen" as a universal form of address anticipates the similar use of "comrade" by communists in the twentieth century. In both cases, the common usage helped to distinguish group members and to build solidarity with underlying principles.

66. See Democratic Society of Pennsylvania, *Principles, Articles, and Regulations, Agreed upon, Drawn, and Adopted* (May 30, 1793), in FONER, *supra* note 1, at 64.

67. See Democratic Society of Pennsylvania, *Circular Letter to the Counties*, NAT'L GAZETTE (Philadelphia), July 17, 1793, reprinted in FONER, *supra* note 1, at 66.

68. See, e.g., Manuscript Minutes of the Democratic Society of Pennsylvania (Apr. 10, 1794), in FONER, *supra* note 1, at 75–78 (showing resolutions of support for France in its war with other European powers, for American opposition to Britain, and for American political and commercial support for France); Manuscript Minutes of the Democratic Society of Pennsylvania (Jan. 9, 1794), in FONER, *supra* note 1, at 68–71 (same); Democratic Society of the City of New York, Address to the Republican Citizens of the United States (May 28, 1794), in FONER, *supra* note 1, at 171, 174–75 ("Yes, fellow-citizens, we take a pleasure in avowing thus publicly to you, that we are lovers of the French nation, that we esteem their cause as our own . . ."). This enthusiasm led one society to ship flour to France and another to deploy its members to ensure that British vessels were not arming in an American port in violation of the neutrality policy. See SCHUDSON, *supra* note 15, at 56.

69. Federalists were not inclined to tolerate dissent, viewing it as inherently illegitimate. See CURTIS, *FREE SPEECH*, *supra* note 60, at 59. A "critical [o]pposition," in this view, was "self-seeking at best and seditious at worst." Marshall Smelser, *The Jacobin Phrenzy: Federalism and the Menace of Liberty, Equality, and Fraternity*, 13 REV. POL. 457, 458 (1951).

70. Economic interests played a role as well. The societies' arguments about commercial and fiscal policy threatened creditors and those whose commercial interests lay with Britain, just as some were unsettled by the leveling connotations of increased democracy. See Smelser, *supra* note 69, at 466–67. Similarly, the participation of "non-traditional" (i.e., non-Protestant English) immigrants in the societies reinforced the Federalist view that immigration was introducing dangerous "foreign" ideas into America.

The claim that the societies were illegitimate followed from the particular Federalist understanding of representative government, which to modern readers may appear shockingly narrow.⁷¹ Federalists began from the premise that direct democracy⁷² was neither possible (given the size of the country) nor desirable (given the passions which would influence decision-making), concluding from this that representative democracy was the best method of operationalizing popular sovereignty.⁷³ Representative institutions based on fair elections produced the best possible approximation of the will of the “people” in this view,⁷⁴ and it followed that no other body could claim with legitimacy to represent the “people.”⁷⁵ Insofar

See, e.g., LINK, *supra* note 5, at 87 (describing the influx of immigrants into America and their attraction to democratic ideals); CHARLES WARREN, *JACOBIN AND JUNTO, OR EARLY AMERICAN POLITICS AS VIEWED IN THE DIARY OF DR. NATHANIEL AMES, 1758–1822*, at 54–55 (1968) (quoting a satirical pamphlet written by a Boston minister that referred dismissively to French, Irish, and Scottish members); Letter from Noah Webster to Rep. Theodore Sedgwick (Jan. 2, 1795), *in* LETTERS OF NOAH WEBSTER 124–25 (Harry R. Warfel ed., 1953) [hereinafter LETTERS] (complaining of political support for “Democrats” among recent immigrants).

71. “[T]he Federalists believed that the public interactions and debates that are part of any democracy should take place via the representative mechanisms that operate through the legal institutions of the state.” Martin, *supra* note 11, at 118. To Federalists, “elected officials deliberated for the people and in their place, just as they still pass legislation on behalf of the people and in their name.” *Id.*; *see also id.* at 142 (“Because the Federalists believed that the public had delegated the task of deliberation . . . they concluded that the public should normally be absent from the daily political process.”).

72. The word “democracy” in the 1790s was as much epithet as adjective, full of connotations of mob rule and instability. *See* ELKINS & MCKITRICK, *supra* note 11, at 451, 456. And yet, at least seventeen societies included “democracy” in some manner in their title, more than any other descriptor, including “republican.” *See* LINK, *supra* note 5, at 13–15.

73. *Cf.* THE FEDERALIST NO. 10 (James Madison) (discussing the advantages of representative government).

74. *Cf.* WOOD, *supra* note 60, at 172 (discussing expectations in 1776 that new representative assemblies would be “an exact epitome of the whole people . . . whom the people could trust to represent their interests” (internal quotation marks omitted)).

75. *See* Martin, *supra* note 11, at 130 (“Because the people deliberate through the representative mechanisms of the state, their access to this process can be more evenly, hence democratically, distributed than through direct participation in ‘civil society.’ ”); *id.* at 153 (“The Federalists argued that discussing issues through the medium of the mass media and private political organizations such as parties introduced enormous inequalities of access, inequalities that could be avoided by deliberating through the representative process.”); *id.* at 154 (noting that a Federalist journalist “pointed out that direct deliberations will greatly favor the organized: ‘It is easy to see . . . that if part only of the citizens are formed into Clubs, and the others remain unassociated, the Clubs though a minority would have an over-ruling influence’ ” (quoting *Deodatus—No. II*, COLUMBIAN CENTINEL (Boston), Sept. 27, 1794, at 1)). Adding nuance to the democratic critique, some Federalists emphasized that the majority of the population in rural areas would be at a disadvantage compared to the urban minority when it came to access to the means of citizen participation in political life. *See id.* at 155.

as an individual citizen disliked the policies that resulted, the proper recourse was to vote accordingly during the next election or, if necessary, to submit a petition to elected officials.⁷⁶

Federalists accordingly had no tolerance for self-appointed mediating institutions engaged in criticism of government policy.⁷⁷ There was no such thing as a legitimate intersection between civic society and the political sphere, at least not for purposes of questioning or opposing government policy.⁷⁸ Because the institutions of government had been carefully calibrated to approximate the will of the “people,” a group opposing the decisions of those institutions necessarily spoke only for a self-interested minority or “faction.” For an individual to do so was to be expected

76. While no one denied the importance of popular sovereignty to the republic, there were many who “asserted that its exercise was limited to the election of representatives and, if necessary, to the submission of petitions to legislatures,” and that those “who ventured beyond this realm automatically assumed powers delegated to elected representatives.” Albrecht Koschnik, “A Government Within the Government”: Concerns Over the Influence of Voluntary Associations in Post-Revolutionary Philadelphia 36 (2000) (unpublished Ph.D. dissertation, University of Virginia) (on file with the North Carolina Law Review). These Federalist views reflected a deferential strain of political thought that had been significant in colonial America. See SCHUDSON, *supra* note 15, at 20 (“Deference influenced not only a conception of who was fit for leadership but what was owed leaders in office. One obligation was to trust leaders to make wise decisions.”).

77. See, e.g., “E.F.,” *Desultory Remarks on Democratic Clubs*, GAZETTE U.S. (Philadelphia), July 21, 1794 [hereinafter *Desultory Remarks*] (denying, with specific reference to the assembly clause of the First Amendment, that the “Constitution countenances, much less acknowledges, that any set of men, few or many shall set themselves up as umpires between the people and the government the people themselves have established”). In an interesting echo of Federalist attitudes toward the societies, White House Chief of Staff Andrew Card recently observed with respect to the press that “[t]hey don’t represent the public any more than other people do. In our democracy, the people who represent the public stood for election. . . . I don’t believe you have a check-and-balance function.” Ken Auletta, *Fortress Bush: How the White House Keeps the Press Under Control*, NEW YORKER, Jan. 19, 2004, at 53 (quoting President Bush’s Chief of Staff, Andrew Card).

78. “Modern democratic theory embraces ‘intermediate’ organizations for their role in enabling the people to aggregate and develop public opinion directly by standing between and mediating the relations between citizen and government. The Federalists could not disagree more.” Martin, *supra* note 11, at 140–41; see also SCHUDSON, *supra* note 15, at 62, 87 (noting the Federalist opposition to the activities of private political associations); Koschnik, *supra* note 11, at 624–25 (describing the Democratic societies’ role as mediating institutions and the Federalists’ condemnation of their attempts to fill this role). When considering the Federalist view, it is important to recall the relative novelty of politically-oriented voluntary associations in that era. See ELKINS & MCKITRICK, *supra* note 11, at 455 (discussing the uncertain status of politically-oriented clubs); SCHUDSON, *supra* note 15, at 55 (same). See generally CLARK, *supra* note 47 (documenting the rapid emergence of voluntary associations in seventeenth and eighteenth century Britain and its colonies).

and tolerated,⁷⁹ but for self-perpetuating associations to form in order to carry out such opposition on a sustained basis was another matter.⁸⁰ Following this line of reasoning, Federalists perceived the societies as an illegitimate attempt by an electoral minority to superimpose its will and interests on those of the sovereign “people” as expressed through their representatives.⁸¹

The “self-created” nature of these would-be collective

79. It was “the right of every individual citizen, to express without control his sentiments upon public measures and the conduct of public men.” *Columbus I*, COLUMBIAN CENTINEL (Boston), Nov. 30, 1793, reprinted in I WRITINGS OF JOHN QUINCY ADAMS 149 (Wathington Chauncey Ford ed., 1913) [hereinafter WJQA]; see Letter from Washington to Ball, *supra* note 2, in 33 WGWS, *supra* note 2, at 506. Some Federalists, however, could not countenance even individual dissent. See, e.g., Letter from Noah Webster to Joseph Priestly, in LETTERS, *supra* note 70, at 207–09 (arguing that people are “free” not only to choose representatives but also “to respect them when chosen, to place confidence in them, and obey their laws” (emphasis in original)).

80. See “A Federal Republican,” *On the Democratic Society of the City of New York*, N.Y. J., June 18, 1794, reprinted in FONER, *supra* note 1, at 158–62; “A Friend to Representative Government,” GAZETTE U.S. (Philadelphia), Apr. 4, 1794 [hereinafter Representative Government] (criticizing “Democratical societies” that “attempt to usurp an influence over the public mind” and to “pretend to speak” in the public’s name); “A Republican,” GAZETTE U.S. (Philadelphia), Aug. 5, 1794 (arguing against permanent private groups such as the societies, in contrast to temporary associations for petitioning purposes); “Your Fellow Citizens,” GAZETTE U.S. (Philadelphia), Jan. 15, 1794 (publishing a letter requesting the reprint of a society’s statement of purposes “[w]ith a view of impressing on the minds of our unsuspecting citizens, the evils which naturally arise out of such political institutions”). For help in locating relevant material published in the *Gazette of the United States*, I am indebted to Koschnik, *supra* note 76.

81. “[T]he representative institutions of republicanism were in themselves sufficient as instruments of government, and any attempt to set up political clubs or societies outside them would be an attempt not to extend but to destroy republican institutions.” HOFSTADTER, *supra* note 26, at 95. Lieutenant Governor of Connecticut Oliver Wolcott, Sr., expressed himself in this vein when he wrote to his son, Secretary of the United States Treasury Oliver Wolcott, Jr., that the “demoniacal societies[.] . . . evidently the nurseries of sedition[.] . . . in their institution are unlawful, as they are formed for the avowed purpose of a general influence and control upon the measures of government” Letter from Lieutenant Governor Oliver Wolcott, Sr., to Secretary of Treasury Oliver Wolcott, Jr. (Mar. 26, 1795), in I MEMOIRS OF THE ADMINISTRATIONS OF WASHINGTON AND JOHN ADAMS, EDITED FROM THE PAPERS OF OLIVER WOLCOTT, SECRETARY OF THE TREASURY 178–79 (George Gibbs ed., 1846) [hereinafter MEMOIRS OF THE ADMINISTRATIONS OF WASHINGTON]. On a more practical plane, some Federalists argued that the societies, like the public generally, lacked competence to grapple with major public issues. See, e.g., RICHARD WELCH, JR., THEODORE SEDGWICK, FEDERALIST: A POLITICAL PORTRAIT 130 (1965) (attributing to Rep. Theodore Sedgwick the view that the “complicated problems facing the United States were the task of its duly elected representatives; scatterbrained, troublemaking amateurs had no business offering suggestions or influencing decisions”). “There seem[s] to have been strong underlying doubts everywhere—the members themselves were not untouched by them—as to just how legitimate the societies actually were. They were questioned from the first” ELKINS & MCKITRICK, *supra* note 11, at 460.

participants in the political process was a lightning rod.⁸² Judge Jonathan Sayward of Maine wrote in his diary that he was impressed with the “masterly” declaration of one society’s purposes, but nonetheless was opposed to the existence of “self-created clubbs [sic].”⁸³ Elsewhere, “A Friend to Good Government” asked whether the members of the society in New York City were “chosen by the people,” adding that “[i]f not, as I know of no other authority, I shall hereafter regard them as self-creators, as a branch, perhaps, of the Jacobin Society of Paris.”⁸⁴ The notion of a group of persons appointing themselves to the position of sentinel “implied a real threat to the sovereignty of the people”⁸⁵ Soon, the papers were filled with criticism along these lines.⁸⁶ As one critic summarized the point, the societies threatened the republic because they were an “*Imperium in Imperio*, or one sovereign authority within another . . . presuming to dictate to its constituted authorities”⁸⁷

The question was not merely an abstract one. In Federalist eyes, the societies were nothing short of a network of revolutionary cells.⁸⁸ Young John Quincy Adams wrote that “we now witness the formation of a lengthening chain of democratic societies, assuming to

82. See, e.g., “A Friend to Republican Freedom,” GAZETTE U.S. (Philadelphia), Apr. 10, 1794 [hereinafter Republican Freedom] (criticizing the societies as “self-created, daring and impudent usurpers—Not one of them have any legal authority to assemble themselves together, and . . . might well be . . . subjects of criminal prosecution”); *Desultory Remarks*, *supra* note 77 (arguing that the purpose of the Democratic societies was to incite opposition to the majority).

83. LINK, *supra* note 5, at 12–13 n.10.

84. “A Friend to Good Government,” N.Y. DAILY GAZETTE, Feb. 21, 1794.

85. ELKINS & MCKITRICK, *supra* note 11, at 460.

86. See, e.g., Representative Government, *supra* note 80 (emphasizing the “self-created” nature of the societies, and noting that they were “not delegated by the people”); see also ELKINS & MCKITRICK, *supra* note 11, at 460 (excerpting a newspaper article denouncing the actions of self-created clubs).

87. “Common Sense,” GAZETTE U.S. (Philadelphia), Feb. 4, 1794 (arguing also that the societies were “highly insulting to the great body of the people, who confiding in the wisdom and virtue of their own delegates, wish neither the advice nor interference of self-constituted societies”); see also Christopher, GAZETTE U.S. (Philadelphia), June 19, 1793 (arguing that there was no need for republican societies in the American republic).

88. “Correspondents,” AURORA GEN. ADVERTISER (Philadelphia), May 16, 1794 (contending, in support of the societies, that “in order to sap their growing importance sinister views are imputed to them, they are said to be leagued to combat the measures of the established government and therefore are represented as tending to involve the country in all the evils of anarchy”). Critics of Federalist policy had for many years anticipated such charges of disloyalty. See, e.g., *Rules for Changing a Limited Republican Government into an Unlimited Hereditary One*, NAT’L GAZETTE (Philadelphia), July 7, 1792 (suggesting mockingly that “[n]either lungs nor pens must be spared in charging every man who whispers, or even thinks that the revolution on foot is meditated, with being himself an enemy to the established government, and meaning to overturn it”).

themselves the exercise of privileges, which belong only to the whole people . . . tacitly preparing to control the operations of the government and dictate laws to the country.”⁸⁹ Another critic warned that “[i]f our government is to be overturned, these societies are the best instruments to effect the work, they can answer *no other* purpose”⁹⁰ The *Federalist Gazette of the United States* repeatedly warned that the societies were seedbeds of revolution in America.⁹¹

American experience during and after the Revolutionary War informed these assessments. The organizational structure and rhetoric of the societies—particularly their use of committees of correspondence to ensure coordination—provocatively called to mind Revolutionary War-era bodies such as the Sons of Liberty and the original Committees of Correspondence.⁹² These bodies had proven their capacity for subversion during the Revolution,⁹³ and similar groups had again demonstrated the same capacity more recently

89. *Columbus II*, COLUMBIAN CENTINEL (Boston), Dec. 4, 1793 [hereinafter *Columbus II*], reprinted in WJQA, *supra* note 79, at 155. Noah Webster warned that when private associations

attempt to convert the private attachment of their members into an instrument of political warfare, they are, in all cases, hostile to the government. They are useful in pulling down bad governments; but they are dangerous to good government, and necessarily destroy liberty and equality of rights in a free country.

Noah Webster, *The Revolution in France, Considered in Respect of Its Progress and Effects* (1794), in POLITICAL SERMONS OF THE AMERICAN FOUNDING ERA, 1730–1805, at 1279 (Ellis Sandoz ed., 1991). Webster added that “[e]very club therefore formed for political purposes, is an aristocracy established over their brethren. . . . It is a literal truth . . . that the democratic clubs in the United States, while running mad with the abhorrence of aristocratic influence, are attempting to establish precisely the same influence under a different name.” *Id.* Webster called for “the controlling [sic] power of the laws of the country” to “demolish all such institutions” in the event that public opinion did not first turn against them. *Id.* at 1280.

90. *Desultory Remarks*, *supra* note 77.

91. See, e.g., *id.* (comparing the societies to the Jacobin clubs of France); Republican Freedom, *supra* note 82 (comparing the societies to similar bodies during the American Revolution). The fact that the societies corresponded with one another, operated through committees, and published their sentiments contributed to the revolutionary resemblance. See LINK *supra* note 5, at 21–25; Koschnik, *supra* note 76, at 66–67; cf. “A.Z.,” GAZETTE U.S. (Philadelphia), Dec. 11, 1794 (criticizing the societies as instigators of rebellion, and emphasizing their mutual correspondence and communication links).

92. See LINK, *supra* note 5, at 21–25 (describing overlapping membership and influence); Koschnik, *supra* note 11, at 631 (“For the Federalists the rise of the Democratic societies mirrored the emergence of the Committees of Correspondence, and the usurpation of power by the Revolutionary organizations appeared to provide the blueprint for rebellion in the early republic.”). Some societies actually chose the name “Committee of Correspondence” for themselves. See LINK, *supra* note 5, at 13–15.

93. Koschnik, *supra* note 76, at 66. “Uneasy Federalists who recalled the effectiveness of Committees of Correspondence in 1775 became violently hostile toward the groups.” STEWART, *supra* note 25, at 434.

during Shay's Rebellion.⁹⁴ Many Federalists therefore agreed with the Reverend David Tappan when he argued in a well-circulated sermon that committees of correspondence were useful to combat tyranny, but should not be tolerated when government was free.⁹⁵

But Federalists also assessed the threat posed by the societies through the filter of the contemporaneous European experience with groups that were at least superficially similar to the societies. There had been no republican revolution in Britain yet, but pro-French political societies were advocating republican reforms there, and the British government had serious concerns about the intentions of these groups.⁹⁶ When the Tory administration of William Pitt, the Younger, began to suppress the groups through sedition legislation and prosecutions (and later through harsh restrictions on freedom of assembly), the parallels were not lost on American observers.⁹⁷

It was the example of the Jacobin clubs in France, however, which dominated Federalist thinking about America's societies.⁹⁸ The central role the Jacobin clubs had played, first in instigating the French Revolution and later in destabilizing the French Republic, was widely known. But the Federalist concern was not simply that the

94. See LINK, *supra* note 5, at 33, 181.

95. See *id.* at 123 (describing Tappan's position on the Democratic societies); see also Republican Freedom, *supra* note 82 (noting similarity of the societies to revolutionary bodies, and concluding that the former lack the justification enjoyed by the latter because of the difference between America's representative system and the rule of George III).

96. Edmund Burke contended that "[r]eform societies in England rejoicing in the events in France might well succeed in compromising Englishmen's loyalty to their constitution, and they should be resisted and denounced." ELKINS & MCKITRICK, *supra* note 11, at 326.

97. The American press routinely carried European news of this nature. See MANNING J. DAUER, THE ADAMS FEDERALISTS 158 (1953); WELCH, *supra* note 81, at 121 n.1. In particular, Americans at the time would have been aware of the 1792 Royal Proclamation Against Seditious Writings and Publications and the Parliamentary debate over the British societies that followed that legislation. See FONER, *supra* note 1, at 328, 330-34 (reprinting a January 1795 address by a society in Delaware discussing at length the parallel developments in Britain). For more on the British debate, see generally TWO ACTS, *supra* note 49. For more on the Pitt Administration, see generally JOHN EHRMAN, THE YOUNGER PITT: THE RELUCTANT TRANSITION 53-643 (1983).

98. See, e.g., *Desultory Remarks*, *supra* note 77 (linking the societies to the Jacobins); Order, *From the Poughkeepsie Journal*, GAZETTE U.S. (Philadelphia), Mar. 7, 1794 (asserting that the societies were "apeing the Jacobins of France" and that the "mother Society" was to be found in Paris). Marshall Smelser notes that in America's early years, "Europe was being overrun by French revolutionary forces and ideas. Nation after nation had fallen to the revolutionaries—first weakened by propaganda and subversive organizations, then subdued by soldiery, finally converted into subordinate allies." Smelser, *supra* note 69, at 457. "Watching these successes," Smelser notes, "some Americans feared that the Atlantic was too narrow to keep revolutionary arms and ideology away." *Id.*

Jacobin clubs provided an unsettling analogy; the fear—or, at least, the allegation—was that the societies in America were quite literally extensions of the Jacobin network.⁹⁹

The resolutions produced by the societies, wrote one critic, “speak as plain French as can be written.”¹⁰⁰ John Quincy Adams warned, “[A]s to the democratic societies, they are so perfectly affiliated to the Parisian Jacobins, that their origin from a common parent cannot possibly be mistaken.”¹⁰¹ As most Americans understood the revolution in France, the Jacobin clubs “had created alternative centers of power, usurped local governmental functions, and intimidated the National Assembly into enacting their demands.”¹⁰² According to the Federalist narrative, the French Minister Genet instigated the societies in America upon his arrival in 1793 for much the same purpose.¹⁰³

99. *Columbus II*, *supra* note 89, *reprinted in* I WJQA, *supra* note 79, at 150, 160 (showing that John Quincy Adams argued that the “association of internal faction, and external power” had proven fatal to liberty in Sweden, Geneva, Holland, and Poland in the recent past and warned that France contemplated the same for America now); *see* Koschnik, *supra* note 11, at 631 (“Accounts of the role the Jacobin clubs had played in destabilizing the French republic and radicalizing French politics reinforced [the] perception” that the societies in America were subversive); *cf.* *Communication*, GAZETTE U.S. (Philadelphia), Jan. 7, 1795 (alleging that the societies could be traced to the “Jacobins in Paris”); GAZETTE U.S. (Philadelphia), Nov. 15, 1794 (publishing an unsigned letter arguing that the societies were “servil[e]” to foreign interests, and were “traitorous” for their efforts to discredit for their own government); Letter from Rep. Fisher Ames to Secretary of Treasury Alexander Hamilton (Aug. 31, 1793), *in* II WORKS OF FISHER AMES 965 n.37, 983 (W.B. Allen ed., 1983) [hereinafter WFA] (reprinting an essay Ames sent to Hamilton in which Ames argued that the “Jacobins” founded the society in Philadelphia).

100. GAZETTE U.S. (Philadelphia), Feb. 20, 1794. Oliver Wolcott, Jr., writing to his father, said that it was “well known” in Philadelphia that “the clubs consist of hot-headed, ignorant or wicked men, devoted entirely to the views of France.” Letter from Secretary of Treasury Oliver Wolcott, Jr., to Lieutenant Governor Oliver Wolcott, Sr. (Apr. 14, 1794), *in* I MEMOIRS OF THE ADMINISTRATIONS OF WASHINGTON, *supra* note 81, at 133–34.

101. *Columbus II*, *supra* note 89, *reprinted in* I WJQA, *supra* note 79, at 156. According to one account, these and other anti-Genet letters by John Quincy Adams were instrumental in convincing Washington to appoint the young man to be minister to Holland in May 1795. *See* REARDON, *supra* note 39, at 270.

102. Koschnik, *supra* note 11, at 631.

103. In his memoirs, Oliver Wolcott, Jr., asserted that the “arrival of Genet was the signal for the organization in America of the Jacobin societies.” I MEMOIRS OF THE ADMINISTRATIONS OF WASHINGTON, *supra* note 98, at 97; *see also id.* at 149 (referring to the societies as the “offspring” of Genet, and as “Jacobin societies” intending to carry out “operations against the administration”); *Columbus II*, *supra* note 89, *reprinted in* I WJQA, *supra* note 79, at 155 (alleging a connection between Genet and American republicans, and questioning “whether any regular plan of operation has been concerted between these new associates”); Letter from Rep. Fisher Ames to Thomas Dwight (Sept. 11, 1794) [hereinafter Letter from Ames to Dwight], *in* II WFA, *supra* note 99, at 149–50

The charge that Genet created—let alone directed—the society movement in America was false,¹⁰⁴ but nonetheless effective. The societies' open enthusiasm for France and Genet unwittingly helped the claim to gain traction with the public and officialdom alike.¹⁰⁵ So too did propaganda along the lines of William Cobbett's distorted "History of the American Jacobins."¹⁰⁶ Federalist Representatives Fisher Ames and Theodore Sedgwick also asserted the Genet connection in Congress.¹⁰⁷ Washington himself appears to have believed that Genet created the societies, or at least that they were subject to French influence.¹⁰⁸ On the whole it was an effective use of guilt by association to tar one group with the misdeeds of another.

D. *The Initial Response from the Societies*

The societies were acutely aware of the opposition their activities had generated, and in their constitutions, resolutions, and letters, they endeavored to justify themselves.¹⁰⁹ They disputed the Federalist argument that institutionalized citizen participation in politics was

(arguing that the societies "were born in sin, the impure offspring of Genet"). "[T]he Genet begotten Clubs abuse every man as an enemy to his country who opposes their arrogant assumption of power." DECONDE, *supra* note 28, at 257 (quoting AMERICAN MINERVA (Philadelphia), reprinted in GEORGIA GAZETTE (Savannah), June 19, 1794).

104. See LINK, *supra* note 5, at 19. Genet did, in contrast, play a central role with respect to a group called the *Société Françias des Amis de la Liberté et de L'égalité*, a Philadelphia club formed "to correspond with the Jacobin Clubs, to aid French republicans in the United States, to seek to improve commercial relations between the two countries" and to aid any endeavor that the French republic, or particularly the French Patriots, may have supported. FREDERICK B. TOLLES, GEORGE LOGAN OF PHILADELPHIA 135 (1953). Historians have concluded that the Democratic-Republican Societies and the *Société Françias* should not be "lumped together," but, accidentally or otherwise, critics of the societies may have done precisely that. See LINK, *supra* note 5, at 12 n.9 (explaining the distinction).

105. At a Fourth of July celebration in 1794, members of the Democratic Society of Pennsylvania drank to the "Jacobin Clubs of America." See FONER, *supra* note 1, at 106–07. See generally WARREN, *supra* note 70, at 52–53 (noting that Federalists referred to the societies as "Jacobin Clubs").

106. See William Cobbett, *History of the American Jacobins*, reprinted in PETER PORCUPINE IN AMERICA: PAMPHLETS ON REPUBLICANISM AND REVOLUTION 193 (David A. Wilson ed., 1994) (1795) (asserting that Genet created the societies in order to lay the foundation for revolution).

107. See 4 ANNALS OF CONG. 927–28 (1794) (statement of Rep. Ames); *id.* at 912 (statement of Rep. Sedgwick).

108. See Letter from President George Washington to Major General Daniel Morgan (Oct. 8, 1794) [hereinafter Letter from Washington to Morgan], in 33 WGW, *supra* note 2, at 522, 524.

109. See "A Customer," NAT'L GAZETTE (Philadelphia), Apr. 11, 1793 (noting "a hue and cry" that had "been raised against" a society in Philadelphia "by some who are both ignorant of its principles and its objects" (emphasis in reprint)), reprinted in FONER, *supra* note 1, at 53.

illegitimate, contending that it was in fact the duty of a citizen to be knowledgeable about the actions of elected officials and that this duty could best be achieved through collective action.¹¹⁰ The societies did not rest on the ground of good policy, however, but instead asserted that they had the legal right to exist. One group argued, “[I]t is the undeniable right of all freemen and citizens to form societies, to consult among themselves, and to recommend such means as shall appear best adapted to support public peace, and to promote general benefit.”¹¹¹ A more litigious author “dare[d] the Legislature of the United States to pass a law prohibiting” the societies, insisting that any such law would be unconstitutional.¹¹² A society in Vermont added that the freedom to associate for political purposes “is a right, the disputation of which reflects on political freedom, and wears an appearance particularly absurd, proceeding from the tongue or pen of an American.”¹¹³

The societies repeatedly denied that they were in any sense subversive or otherwise disloyal to the constitutional framework. The Democratic Society of Pennsylvania wrote:

[We] have been charged with a desire to dictate, nay to supersede Government; but how does this charge apply? Does

110. Henry Kammerer, *Friends and Fellow Citizens*, NAT'L GAZETTE (Philadelphia), Apr. 13, 1793 (“[E]very citizen should be capable of judging of the conduct of rulers, and the tendency of laws,” particularly given the “disposition in the human mind to tyrannize when clothed with power Jealousy is a security, nay it is a virtue in a republic, for it begets watchfulness.”), reprinted in FONER, *supra* note 1, at 53–55.

111. The Franklin or Republican Society of Pendleton County, South Carolina, *Resolutions Adopted on a Variety of Subjects*, CITY GAZETTE (Charleston, S.C.), June 30, 1794, reprinted in FONER, *supra* note 1, at 395–96; see also N.C. GAZETTE (New Bern), Apr. 19, 1794, quoted in FONER, *supra* note 1, at 11 (declaring that it is the right of all free people to assemble and discuss public matters).

112. “A Member of the Democratic Society of the City of New York,” N.Y. J., June 18, 1794, reprinted in FONER, *supra* note 1, at 163, 165–66.

113. *Constitution of the Democratic Society in the County of Addison*, 1st Article, THE FARMER'S LIBRARY (Rutland, VT), Sept. 9, 1794, reprinted in VERMONT VOICES, 1609 THROUGH THE 1990S: A DOCUMENTARY HISTORY OF THE GREEN MOUNTAIN STATE 101 (Graffagnino et al. eds., 1999); see also YOUNG, *supra* note 11, at 416 (describing one satirical statement which claimed that the Federalists denied the right of the people to assemble and discuss politics); Address of the Democratic Society in Wythe County, Virginia, to the People of the United States, in N.Y. DAILY GAZETTE, Aug. 5, 1794 (“It is a right of the people peaceably to assemble and deliberate. It is a right of the people to publish their sentiments. These rights we exercise, and esteem invaluable.”); *To the President and Members of the Democratic Society of Pennsylvania*, AURORA GEN. ADVERTISER (Philadelphia), Mar. 10, 1794, reprinted in FONER, *supra* note 1, at 57 (declaring that “this society is sensible of the benefits which result from political associations, and that it feels the right”); Manuscript Minutes of the Democratic Society of Pennsylvania, Jan. 9, 1794, reprinted in FONER, *supra* note 1, at 68 (linking the right to assemble with freedom of expression and the press).

an association of citizens to guard against encroachments upon their constitution, or to remonstrate against unjust measures, or to declare their sentiments on the state of their country, imply a desire to dictate or govern? Should this be true, every citizen who speaks or publishes his opinions, may be characterized as dictator or an usurper; and the right, guaranteed by the principles of freedom and our Constitution, dwindle into a charge of Treason against our Country!¹¹⁴

With unknowing prescience, the Democratic Society of Pennsylvania also sought to show the extremes to which Federalist logic might extend if the criticisms of the societies were accepted:

[The accusation] tends to rob us of one of the most essential rights of Freemen, that of declaring our sentiments: for if a number, and a large one too, are not privileged to offer their opinions, who will be daring enough to say that an individual has this license? Has our Government become so sacred, that it shall be above enquiry? Has our administration the divine characteristic of kings-inviolability? [sic] . . . That Government must be unfit for Freemen, which cannot bear investigation¹¹⁵

Only a few years would pass before this warning about the risk to individual liberties proved correct. In the interim, Federalist hostility toward private political criticism would first find an outlet in connection with the societies themselves.

II. THE WASHINGTON ADMINISTRATION TAKES NOTICE OF THE SOCIETIES

Whether the federal government truly deemed itself beyond criticism from political associations was uncertain in the summer of 1793. But in a series of small steps beginning that August, we can detect a pattern of mounting frustration that over the course of a little more than one year would prod Washington to take action to delegitimize the societies.

The initial step occurred shortly after French naval officers in Philadelphia attempted to arm a recently captured British ship as a privateer.¹¹⁶ Genet, the popular French minister, refused to comply

114. Manuscript Minutes of the Democratic Society of Pennsylvania, Address to the Citizens of the United States Respecting the Adoption of Democratic Societies, June 5, 1794, in FONER, *supra* note 1, at 84.

115. *Id.*

116. ELKINS & MCKITRICK, *supra* note 11, at 350; see also Cabinet Meeting, *Opinion on the Case of the Little Sarah*, July 8, 1793, in XV PAH, *supra* note 22, at 70–72 & n.2

with the Neutrality Proclamation by ordering the ship not to sail, and apparently boiling over with frustration at the neutrality policy, purportedly declared his intent to take his case directly to the American people in an effort to compel the Washington Administration to adopt a more flexible attitude.¹¹⁷ Whether Genet in fact made this threat would become a matter of some dispute,¹¹⁸ but the allegation lit a fire under Federalists who believed (or at least contended¹¹⁹) that Genet just might attempt to ignite a popular revolt to further French interests.¹²⁰ Hamilton and Secretary of War Henry Knox in particular urged this view on Washington.¹²¹

When Washington summoned his cabinet to discuss how best to respond to Genet's conduct, all agreed that the administration should request that the French recall Genet.¹²² Hamilton and Knox argued, however, that Genet's recall was insufficient to stave off the threat of insurgency and that the threat posed by Genet in fact was intertwined with the Democratic-Republican societies.¹²³ As Jefferson described

(discussing the privateer incident).

117. ELKINS & MCKITRICK, *supra* note 11, at 350.

118. Genet fiercely denied that he threatened an appeal to the people, and went so far as to retain counsel to bring an action against Federalists John Jay and Rufus King for their role in publicizing the allegation that he had. The matter ended only with the arrival of the new French minister, who threatened "that if [Genet] did not discontinue his suit Genet's mother and sisters in France would stand hostage for his conduct." XV PAH, *supra* note 22, at 233, 239 (editor's introductory note).

119. Unquestionably, Federalists such as Hamilton, Jay, and King hoped to turn the incident to domestic political advantage by putting "as great a share of the onus on the Republicans as they could, to exhibit them as enemies of peace and order." ELKINS & MCKITRICK, *supra* note 11, at 355.

120. "The declaration of the Ambassador, was understood, at the time, as meaning, that he would raise an insurrection of the people against the measures of the government." *Columbus II*, *supra* note 89, reprinted in I WJQA, *supra* note 79, at 150, 154; see also ELKINS & MCKITRICK, *supra* note 11, at 351 (describing various instances in which Genet threatened to appeal to the people).

121. Hamilton and Knox argued that Genet's threat reflected a "regular system . . . to controul [sic] the Government itself, by creating, if possible, a scism [sic] between it and the people and inlisting [sic] them on the side of France, in opposition to their own constitutional authorities." Alexander Hamilton & Henry Knox, *Reasons for the Opinion of the Secretary of the Treasury and the Secretary at War Respecting the Brigantine Little Sarah* (July 8, 1793), in XV PAH, *supra* note 22, at 74-75. They warned that it "would be a fatal blindness" to ignore "the spirit" underlying Genet's statement, "and an ill-omened passiveness not to resolve to withstand it with energy." *Id.* at 76; see also Letter from Sen. Rufus King to Secretary of Treasury Alexander Hamilton (Aug. 3, 1793), in XV PAH, *supra* note 22, at 173.

122. See Memorandum of Cabinet Meetings (Aug. 1-2, 1793), in GWP Series 4, <http://www.memory.loc.gov/mss/mgw/mgw4/104/0300/0355.gif> (last visited Jan. 31, 2004) (on file with the North Carolina Law Review).

123. See ELKINS & MCKITRICK, *supra* note 11, at 363 (providing an overview of the Genet cabinet meeting); SHARP, *supra* note 12, at 82 (same); Letter from Secretary of

the scene to Madison:

Hamilton & Knox have pressed an appeal to the people with an eagerness I never before saw in them. They made the establishment of the democratic society here [in Philadelphia] the ground for sounding an alarm that this society (which they considered as the *antifederal & discontented faction*) was put into motion by [Genet] and would by their corresponding societies in all the state draw the mass of the people, by dint of misinformation, into their vortex & overset the governmt [sic].¹²⁴

Jefferson in turn denied that Genet created the societies or that France sought to subvert America's government through a network of insurgent political clubs.¹²⁵

It is not entirely clear from the historical record what remedy Hamilton had in mind to eliminate the "threat" posed by the societies. As indicated above, Jefferson's notes for the most part suggest that Hamilton merely pressed Washington to attempt to recapture popular support for the administration by going public with his own version of Genet's conduct. But there also is a hint that Hamilton may have proposed legal action. Jefferson recalled arguing to Washington that any move to *proscribe* the societies would be counterproductive, and would likely motivate "multitudes" to join them "merely to assert the right of voluntary associations."¹²⁶ It is possible of course that Jefferson made this argument in an excess of caution, that his recollection was faulty, or that he chose to misconvey the event. But it also is possible that Hamilton suggested proscription of the societies. In any event, Attorney General Edmund Randolph defused the situation when he persuaded Washington simply to put

State Thomas Jefferson to Rep. James Madison (Aug. 3, 1793) [hereinafter Letter from Jefferson to Madison I], in XV PJM, *supra* note 19, at 50 (describing Hamilton's argument); Thomas Jefferson, Notes of Cabinet Meeting on Edmond Charles Genet (Aug. 2, 1794) [hereinafter Notes on Genet], in THOMAS JEFFERSON, THE ANAS, *reprinted in* 26 PAPERS OF THOMAS JEFFERSON 601-02 (John Catanzariti et al. eds., 1995) [hereinafter PTJ].

124. Letter from Jefferson to Madison I, *supra* note 123, in XV PJM, *supra* note 19, at 56-57.

125. See Notes on Genet, *supra* note 123, in 26 PTJ, *supra* note 123, at 601. Jefferson also played to Washington's distaste for faction, telling "the President plainly in their presence, that the intention was to dismount him from being the head of the nation, & make him the head of a party: that this would be the effect of making him in an appeal to the people declare war against the Republican party." Letter from Secretary of State Thomas Jefferson to Rep. James Madison (Aug. 11, 1793) [hereinafter Letter from Jefferson to Madison II], in XV PJM, *supra* note 19, at 57.

126. See Notes on Genet, *supra* note 123, in PTJ, *supra* note 123, at 602.

off the issue for the time being.¹²⁷

Washington, however, remained deeply concerned about the societies. In a letter to Virginia Governor Henry Lee in October 1793, Washington maintained that the societies were “aiming at nothing short of the subversion of the Government of these States, even at the expence [sic] of plunging this Country in the horrors of a disastrous War”¹²⁸ He added that he intended to wait and see whether “legally constituted bodies”—i.e., Congress or the state legislatures—might intervene.¹²⁹

The winter passed uneventfully, but by the spring of 1794, new tensions between the societies and the federal government were building. In April, Washington received an aggressive “remonstrance” issued by a newly-established society in a western Pennsylvania town that happened to be named for Washington.¹³⁰ The society objected in fierce terms to the fact that the government had not yet secured freedom of navigation on the Mississippi and warned that if the government failed to do so soon they would take the matter into their own hands.¹³¹ For good measure, the society added that the people of the region would never submit to the hated excise tax on whiskey—part of Hamilton’s controversial fiscal program—which had proven nearly uncollectible in the region over the past several years.¹³² Washington dispatched the remonstrance to Edmund Randolph (now Secretary of State in Jefferson’s stead)

127. Letter from Jefferson to Madison II, *supra* note 125, in XV PJM, *supra* note 19, at 57 (“The Pr. [sic] came into his idea; or rather concluded that the question on it might be put off indefinitely to be governed by events.”). Hamilton in any event ensured that the administration’s case was laid before the public as persuasively as possible, writing a series of pseudonymous letters criticizing Genet’s conduct and lauding the President’s. See Alexander Hamilton, *No Jacobin Nos. I–IX*, in XV PAH, *supra* note 22, at 145, 184, 203, 224, 243, 249, 268, 281, 304. In *No Jacobin No. VIII*, notably, Hamilton emphatically warned the public against the prospect that a foreign power (i.e., France) might attempt to instigate “sedition” by encouraging a “schism” between the people and their elected representatives. See *id.* at 283. Hamilton also conceded that the “right of appealing from the rulers of a nation to the nation itself, as far as it has foundation in truth, belongs exclusively to the members of that nation.” *Id.* He added, however, that in exercising this right the people “must confine themselves within the limits of the laws” or face the consequences. *Id.* at 283–84.

128. Letter from President George Washington to Governor Henry Lee (Oct. 16, 1793), in 33 WGW, *supra* note 2, at 132–33.

129. *Id.*

130. See Democratic Society of the County of Washington, *Remonstrance to the President and Congress on Opening Navigation of the Mississippi River* (Mar. 24, 1794), PITTSBURGH GAZETTE, Apr. 5, 1794, reprinted in FONER, *supra* note 1, at 127–28.

131. See *id.*

132. See *id.*; see also XVI PAH, *supra* note 22, at 258–59 n.1 (reprinting portions of the March 24 remonstrance received by Washington).

accompanied by a terse message: "Sir: The first fruit of the Democratic Society begins, more and more, to unfold itself. You will report what is necessary to be done with the specimen of it which I herewith send . . ."133

Randolph conveyed Washington's order to his fellow cabinet members.¹³⁴ Clearly Washington could neither accept the remonstrance nor pass it on to Congress, to whom it also was addressed. Randolph suggested instead the course of "[s]ilent contempt."¹³⁵ Hamilton, however, suggested going much further. The remonstrance, he argued, should be "referred to the Atty [sic] General to examine carefully if it does not contain criminal matter & that if it does it ought to be put in a train of prosecution."¹³⁶

William Bradford, the Attorney General, did not much appreciate the suggestion. He countered that however "reprehensible" the remonstrance was, he "doubt[ed] whether it would be considered *per se*, as a proper subject for a criminal prosecution, without some *extrinsic* proof of a seditious intention."¹³⁷ Bradford emphasized the Constitution's protection for the right of petition, adding that juries were unlikely to convict for the abuse of that right except in "flagrant" cases.¹³⁸ Because he could not be certain of conviction in this instance, and because "[a]n unsuccessful prosecution for seditious writings generally does harm," Bradford recommended against prosecution.¹³⁹ Knox agreed with Bradford and Randolph,¹⁴⁰ and once more nothing came from Hamilton's suggestion.¹⁴¹

133. Letter from President George Washington to Secretary of State Edmund Randolph (Apr. 11, 1794) [hereinafter Letter from Washington to Randolph I], in 33 WGW, *supra* note 2, at 321. As indicated in the editor's note to Washington's letters, the "specimen" is not contained in Washington's papers. *See id.* at 321, 322 n.46.

134. *See* Letter from Secretary of State Edmund Randolph to Secretary of Treasury Alexander Hamilton, Secretary of War Henry Knox, and Attorney General William Bradford (Apr. 14, 1794), in XVI PAH, *supra* note 22, at 258–59.

135. *See id.* at 259 ("To acknowledge the body, as such, is in every view inadmissible.").

136. *Id.* at 260 n.2. Each cabinet member's views were written above the author's signature at the bottom of Randolph's letter. *See id.*

137. *Id.*

138. *Id.*

139. *Id.* Intriguingly, Bradford added that "[m]ore exceptionable matter appears frequently in the public prints: but these abuses are endured from a fear of injuring the freedom of the press." *Id.*

140. *Id.* (indicating that Knox called for "[n]o prosecution—but no answer of any sort").

141. Letter from Washington to Randolph I, *supra* note 133, in 33 WGW, *supra* note 2, at 322 n.47 (indicating that Randolph forwarded to Washington the opinions of the cabinet). Sometime thereafter, Washington purportedly instructed Major General Daniel

Soon, however, the attention of the entire country would be focused on the disgruntled residents of the four westernmost counties of Pennsylvania lying beyond the Alleghenies. As indicated by the aggressive remonstrance sent to Washington, relations between locals and the federal government had been tense in that region since the adoption of the whiskey excise in 1791, and with renewed enforcement efforts in the late spring and early summer of 1794, tensions reached new heights.¹⁴² By the summer, it appeared to Treasury officials that the situation was degrading “from sporadic outbursts of violence by the westerners to a systematic and popularly supported campaign designed to shut down operation of the federal revenue system” in western Pennsylvania.¹⁴³ Tax resisters reached the point of no return in mid-July when they surrounded the home of a local Treasury official and a gunfight occurred.¹⁴⁴ Although the official escaped, his home was burned to the ground and a number of men were shot.¹⁴⁵ A few weeks later, a force of at least 5,000 men from the backcountry massed outside Pittsburgh and proceeded to march through the town in a dramatic show of force.¹⁴⁶ It proved to be the high tide of the Whiskey Rebellion.¹⁴⁷

The federal government responded quickly to the lawlessness. After commissioners reported to Washington that the insurgents were not clearly willing to disperse and submit to federal authority, approximately 15,000 militiamen drawn from the mid-Atlantic region

Morgan to arrange an effort to discourage people from joining the local societies in western Pennsylvania, and to encourage them instead to join pro-administration groups. The story is related in LINK, *supra* note 5, at 188, through a letter Daniel Morgan wrote to Benjamin Biggs in 1794. Later that summer, Hamilton may have gained the distinction of being the first federal official to direct an investigation of an employee’s political memberships. See Letter from Secretary of Treasury Alexander Hamilton to Commissioner of the Revenue Tench Coxe (June 19, 1794), in XXVI PAH, *supra* note 22, at 732 (directing Coxe to determine whether a Treasury employee named “Newton” was the same Newton who served as an officer in the society in Norfolk).

142. See generally James Kirby Martin, *Introduction: The Whiskey Rebellion Redivivus*, in THE WHISKEY REBELLION: PAST AND PRESENT PERSPECTIVES (Steven R. Boyd ed., 1985) [hereinafter THE WHISKEY REBELLION] (describing the background of the Whiskey Rebellion).

143. JACOB E. COOKE, TENCH COXE AND THE EARLY REPUBLIC 257–58 (1978).

144. *Id.* at 257–59; ELKINS & MCKITRICK, *supra* note 11, at 463; Martin, *supra* note 142, in THE WHISKEY REBELLION, *supra* note 142, at 5–6 (describing how the Pennsylvania farmers were adamant about defeating the whiskey tax).

145. COOKE, *supra* note 143, at 257–59; ELKINS & MCKITRICK, *supra* note 11, at 463; Martin, *supra* note 142, in THE WHISKEY REBELLION, *supra* note 142, at 5–6.

146. COOKE, *supra* note 143, at 258–59; ELKINS & MCKITRICK, *supra* note 11, at 463; Martin, *supra* note 142, in THE WHISKEY REBELLION, *supra* note 142, at 5–6.

147. COOKE, *supra* note 143, at 258–59; ELKINS & MCKITRICK, *supra* note 11, at 463; Martin, *supra* note 142, in THE WHISKEY REBELLION, *supra* note 142, at 5–6.

marched—with Washington and Hamilton in nominal command—to impose federal authority.¹⁴⁸ By the time the soldiers crossed the Alleghenies, resistance had completely disappeared.¹⁴⁹ The expeditionary force made a number of arrests without incident, and with that the immediate issue was resolved.¹⁵⁰ But the political ramifications were just beginning to be felt.

Many societies around the country had fiercely criticized the whiskey excise, but many were at pains to publicly condemn outright resistance to federal law.¹⁵¹ More meaningfully, many society members were prominent members of the militia that marched under Washington to suppress the insurgents.¹⁵² Nonetheless, many Americans—led by the Federalist press—were prepared to lay the blame for the rebellion at the societies' doorsteps,¹⁵³ particularly after it emerged that members and leaders of several recently established societies in the western Pennsylvania area had played central roles in the insurgency.¹⁵⁴ The Whiskey Rebellion, in this telling, represented

148. COOKE, *supra* note 143, at 261; ELKINS & MCKITRICK, *supra* note 11, at 463.

149. See ELKINS & MCKITRICK, *supra* note 11, at 463 (stating “all signs of rebellion had vanished” by October).

150. See Richard A. Ifft, *Treason in the Early Republic: The Federal Courts, Popular Protest, and Federalism During the Whiskey Insurrection*, in *THE WHISKEY REBELLION*, *supra* note 142, at 170–71; Martin, *supra* note 142, in *THE WHISKEY REBELLION*, *supra* note 142, at 6.

151. See, e.g., German Republican Society, *Resolutions Adopted on the Resistance of Citizens in Western Pennsylvania* (July 29, 1794), in FONER, *supra* note 1, at 59; Manuscript Minutes of the Democratic Society of Pennsylvania (July 31, 1794), in FONER, *supra* note 1, at 88; Democratic Society of New York, *Resolutions Adopted on the Conduct of Citizens in Western Pennsylvania* (Aug. 20, 1794), in FONER, *supra* note 1, at 183 (disapproving of the conduct of the insurgents in resisting the excise laws, however “odious” the laws may be); see also FONER, *supra* note 1, at 29–30 (describing general opposition to unlawful resistance).

152. “[A]ttacks on the Democratic Societies led Philadelphia publishers to urge members to answer slurs on their loyalty by helping suppress the revolt.” STEWART, *supra* note 25, at 87.

153. See, e.g., GAZETTE U.S. (Philadelphia), Nov. 15, 1794 (publishing an unsigned letter asserting that the efforts of the societies and the press to turn the people against their elected representatives caused the rebellion, and that more sedition would follow); “A Massachusetts Farmer,” GAZETTE U.S. (Philadelphia), Aug. 26, 1794 (arguing that the denunciation of the insurrection by the Democratic Society of Pennsylvania was hypocritical); Koschnik, *supra* note 11, at 633–34 (noting that the Federalists blamed the Democratic-Republican societies for laying the groundwork for inspiring the Whiskey Rebellion); see also *Communications*, N.Y. DAILY ADVERTISER, Oct. 10, 1794 (letter referring to the societies as “Jacobin Clubs” and contending that they intended “to promote insurrections”); *Princeton*, Sept. 25, N.Y. DAILY ADVERTISER, Oct. 4, 1794 (noting that Princeton’s commencement included a “dispute on the question—is the institution of voluntary popular societies to watch the motions of government, in the present state of this country, wise or useful”).

154. The three societies involved were the Mingo Creek Society, the Republican

the “first fruits of [the societies’] blessed harvest.”¹⁵⁵

The charge that the societies were responsible for instigating the Whiskey Rebellion was simply false.¹⁵⁶ But it caught on with Federalists, resonating with their long-standing argument that the societies’ criticisms promoted sedition by turning the people against their elected representatives.¹⁵⁷

Washington was among those who felt that the societies’ activities had precipitated the lawlessness. The Whiskey Rebellion, he wrote, was the “first *ripe fruit*” of the societies, a natural consequence of their efforts “to poison and discontent the minds of the people against the government”¹⁵⁸ He had long expected something like this to happen;¹⁵⁹ Genet had created the societies, after all, in order to “sow sedition.”¹⁶⁰

In a remarkable letter to Burges Ball, Washington explained his understanding of the line between legitimate political dissent and subversion.¹⁶¹ “[C]an any thing be more absurd, more arrogant, or more pernicious to the peace of Society,” he asked, “than for self created bodies [to] form[] themselves into *permanent* Censors, and . . . resolving [against] acts of Congress which have undergone the most deliberate, and solemn discussion by the Representatives of the people . . . to form *that will* into Laws for the government of the whole . . . [?]”¹⁶² Washington flatly rejected the notion that this was

Society of the Yough, and the Democratic Society of Washington. See LINK, *supra* note 5, at 145. Members and leaders of the Mingo group in particular were heavily involved, although some historians have questioned whether the Mingo group was involved in any official capacity. See FONER, *supra* note 1, at 29.

155. STEWART, *supra* note 25, at 87 (quoting AURORA GEN. ADVERTISER (Philadelphia), Aug. 21, 1794).

156. ELKINS & MCKITRICK, *supra* note 11, at 484–85 (noting that the “insurrection was the product primarily of the region rather than its societies”).

157. See *infra* notes 190–200 and accompanying text.

158. Letter from Washington to Ball, *supra* note 2, in 33 WGW, *supra* note 2, at 505–07; see also Letter from President George Washington to Governor Henry Lee (Aug. 26, 1794) [hereinafter Letter from Washington to Lee], in 33 WGW, *supra* note 2, at 474–75 (“[T]his insurrection [is] the first *formidable* fruit of the Democratic Societies” (emphasis in original)).

159. Letter from Washington to Ball, *supra* note 2, in 33 WGW, *supra* note 2, at 505–07.

160. See Letter from Washington to Morgan, *supra* note 108, in 33 WGW, *supra* note 2, at 524.

161. See Letter from Washington to Ball, *supra* note 2, in 33 WGW, *supra* note 2, at 505–07; cf. SCHUDSON, *supra* note 15, at 61 (“Washington expressed the sense that the mechanics of government were complete in themselves and that the establishment of other political organizations could only be a way of highlighting ‘interest’ over virtue, and faction over the mechanisms that enabled legislators to ascertain the public good.”).

162. Letter from Washington to Ball, *supra* note 2, in 33 WGW, *supra* note 2, at 505–

appropriate “for a self created, *permanent* body, (for no one denies the right of a people to meet occasionally, to petition for, or to remonstrate against, any Act of the Legislature . . .) to declare *this act* is unconstitutional, and *that act* is pregnant of mischief . . .”¹⁶³ To Washington, institutionalized private political criticism was “such a stretch of arrogant presumption as is not to be reconciled with laudable motives: especially when we see the same set of men endeavoring to destroy all confidence in the Administration.”¹⁶⁴ Simply put, political dissent may be permissible when carried out by individuals or ad hoc, temporary gatherings, but institutionalized dissent was seditious.

Observing the groundswell of public support for the government that followed the Whiskey Rebellion, Washington sensed that the political climate gave him an opportunity to attempt the “annihilation” of the societies.¹⁶⁵ Secretary of State Randolph agreed. In a letter to Washington in October 1794, he wrote that he previously had not seen “an opportunity of destroying these self-constituted bodies,” at least not “until the fruit of their operations was disclosed in the insurrection at Pittsburg.”¹⁶⁶ The Whiskey Rebellion, however, had changed the political calculus. Randolph urged Washington not to let the opportunity slip: “They may now I believe be crushed. The prospect ought not to be lost.”¹⁶⁷

In the past year, both Jefferson and Bradford had warned Washington that efforts to prosecute or proscribe the societies might backfire, and Washington was mindful of that advice.¹⁶⁸ Rather than run the risks of prosecution, he would proceed without resort to the

07.

163. *Id.*

164. *Id.*

165. Letter from Washington to Lee, *supra* note 158, in 33 WGW, *supra* note 2, at 475; *see also* Letter from President George Washington to Chief Justice John Jay (Nov. 1[–5], 1794), in 34 WGW, *supra* note 2, at 17 (arguing that the societies fomented the Whiskey Rebellion, but noting that this created an opportunity to destroy them).

166. Letter from Randolph to Washington, *supra* note 3, in GWP, *supra* note 3, Series 4, Reel 106. In August 1793 it was Randolph who convinced Washington to wait before making an appeal to the public in an effort to undermine both Genet and the societies. *See supra* note 127 and accompanying text. The events of the summer of 1794 evidently convinced him that delay was no longer the best policy.

167. Letter from Randolph to Washington, *supra* note 3, in GWP, *supra* note 3, Series 4, Reel 106; *see also* Letter from Thomas Jefferson to Rep. William Branch Giles (Dec. 31, 1795), in 28 PTJ, *supra* note 123, at 566 (observing that Randolph had “advised the denunciation of the popular societies”).

168. Letter from Washington to Lee, *supra* note 158, in 33 WGW, *supra* note 2, at 476 (writing that he had long felt it necessary to take action against the societies, but had not for fear that prosecutions would “make them grow stronger”).

mechanisms of the law. He would use instead his unique prestige and the bully pulpit of his office to convince the public that the societies were illegitimate and seditious.¹⁶⁹

Washington recognized that his upcoming annual address to Congress would provide an opportunity to denounce the societies for maximum effect. He asked Randolph, who already had the task of drafting the speech,¹⁷⁰ to include some form of censure in it. "My mind is . . . perfectly convinced," he explained, "that if these self-created societies [sic] cannot be discountenanced . . . they will destroy the government of this Country," as so "I have asked myself . . . where wd. [sic] be the impropriety of glancing at them in my Speech."¹⁷¹

III. CENSURE AND DEBATE

On Wednesday, November 19, 1794, Washington entered the House chamber to address the assembled Senators and Representatives.¹⁷² He spoke briefly, focusing primarily on the events of the Whiskey Rebellion and the reasons he handled it as he did.¹⁷³ The insurrection, Washington explained, was "fomented by combinations of men, who, careless of consequences . . . have disseminated, from an ignorance or perversion of facts, suspicions,

169. Other leading Federalists were of the same mind. See, e.g., Letter from Ames to Dwight, *supra* note 103, in II WFA, *supra* note 99, at 150 ("Such strong ground may be taken against those clubs, that it ought not to be delayed."). Ames, comparing the clubs to a cancer which would regenerate if not completely excised, concluded that they must be "utterly discredited" so that they would retain "no influence." *Id.* (emphasis in original); see also WELCH, *supra* note 81, at 130 (noting that after the Whiskey Rebellion, Sedgwick "began to urge a frontal attack on these societies"). Elkins and McKittrick contend that "Washington did not intend to 'crush' them exactly," although "he did want to say something." ELKINS & MCKITRICK, *supra* note 11, at 484. This is not an unreasonable conclusion to draw from the indirect language Washington ultimately used in his speech and the fact that he did not seek legislation outlawing them. But the record of his correspondence makes clear that he believed the societies to pose a seditious threat and that he hoped that his indirect approach would undermine them fatally.

170. Letter from President George Washington to Secretary of State Edmund Randolph (Oct. 6, 1794), in 33 WGW, *supra* note 2, at 521-22.

171. Letter from President George Washington to Secretary of State Edmund Randolph (Oct. 16, 1794) [hereinafter Letter from Washington to Randolph II], in 34 WGW, *supra* note 2, at 2, 4 & n. 5 (describing the original language proposed by Washington, which would have mildly criticized the press as well). The speech was delayed when Congress could not at first assemble a quorum, and Randolph and Washington used the additional time to refine that portion of the speech that would censure the societies. See REARDON, *supra* note 39, at 280.

172. 4 ANNALS OF CONG. 891 (1794) (statement of President George Washington).

173. *Id.* at 787-92.

jealousies, and accusations, of the whole government.”¹⁷⁴ In this account, the crucial moment came when “certain *self created societies* assumed the tone of condemnation” against federal law.¹⁷⁵ Washington concluded by praying that “the Supreme Ruler of Nations” would “enable us, at all times, to root out internal sedition.”¹⁷⁶

However these words may appear when taken out of context by modern readers, they were understood at the time as a frontal assault on the legitimacy of the societies. As one society described the event soon afterward, “the highest authority” in the country had “denied” the “legality of our associations.”¹⁷⁷ Washington had used the unique leverage of his incomparable prestige and authority¹⁷⁸—he was, after all, the living embodiment of the nation—to support the longstanding Federalist critique that people had no right to form “self-created” voluntary associations to engage in institutionalized political dissent.¹⁷⁹ It was not a question of the merits of the societies’ arguments; it was a question of their right to dissent.

This potent attempt to delegitimize the societies prompted America’s first extensive national debate regarding the permissible scope of political dissent, exploring a range of constitutional questions that continue to be meaningful to the present day. The debate would

174. *Id.* at 791.

175. *Id.* at 788 (emphasis added).

176. *Id.* at 792. The speech was reprinted in the papers the next day. See, e.g., DUNLAP & CLAYPOOL’S AM. DAILY ADVERTISER (Philadelphia), Nov. 20, 1794.

177. *The Address of the Patriotic Society of the County of Newcastle, State of Delaware: To the People of the United States of America*, AURORA GEN. ADVERTISER (Philadelphia), Jan. 20, 1795, in FONER, *supra* note 1, at 329. “Washington’s statement about ‘self-created’ societies seemed to imply that voluntary political organizations critical of government policies had no right to exist.” HOFSTADTER, *supra* note 26, at 94; see also TOLLES, *supra* note 104, at 142 (noting, from the perspective of Democratic Society of Pennsylvania member Dr. George Logan, “the imputation that [the societies] had no right to exist in a free country was an offense against Americans, even against man”).

178. It also was significant that Washington, as President, spoke with the unified authority of the executive branch. Cf. Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1165 (1992) (“Unitary executive theorists read [the Constitution] as creating a hierarchical, unified executive department under the direct control of the President.”).

179. See IRVING BRANT, JAMES MADISON: FATHER OF THE CONSTITUTION, 1787–1800, at 417 (1950) (noting that the “tremendous weight of Washington’s prestige was being thrown against the Democratic Societies. The damning epithet ‘self-created’ indorsed the current notion that ordinary people had no right to come together for political purposes”); ELKINS & MCKITRICK, *supra* note 11, at 460 (noting that Washington’s “expletive phrase ‘self-created societies’ did not originate with him at all, being part of the common currency”). Link describes Washington’s censure as “awe-inspiring,” but notes that it did not intimidate everyone. LINK, *supra* note 5, at 193.

eventually spread to the rough-and-tumble world of the partisan press, but it began in Congress the moment that Washington left the building.

A. *The Congressional Debate*

The Federalist-dominated Senate quickly produced a resolution that echoed, even expanded upon, Washington's censure. The Senate asserted that the activities of "certain self-created societies" were "calculated, if not intended, to disorganize our Government."¹⁸⁰ Washington thanked the Senate for its response, and in particular for singling out for censure those who "would arrogate the direction of our affairs, without any degree of authority derived from the people."¹⁸¹

In the House, however, Washington's censure ran into a buzzsaw of criticism from Republican representatives. For five days, Republicans and Federalists engaged in an elaborate debate over the range of issues raised by the censure: did the societies have a constitutional right to exist; had their rhetoric stimulated the insurgency; did the censure have any practical significance; did Congress even have authority to comment on the societies?¹⁸² The papers reported it all.¹⁸³

Debate began when James Madison, Theodore Sedgwick,¹⁸⁴ and Thomas Scott were assigned the task of drafting a reply to Washington's address.¹⁸⁵ An ardent Federalist, Sedgwick was eager to use the House response to enhance the impact of Washington's

180. 4 ANNALS OF CONG. 794.

181. *Id.* at 795–96. Aaron Burr, a New York Republican, moved unsuccessfully to strike the reference to the self-created societies from the Senate response. *See id.* at 794.

182. *See id.* at 892–950 (describing the Congressional debate).

183. *See* YOUNG, *supra* note 11, at 418 (noting that Greenleaf's *New York Journal* published the debates); GAZETTE U.S. (Philadelphia), Nov. 25–29, Dec. 1–3, 6, 8, 11, 1794 (reprinting House debates); House Address to the President (Nov. 27, 1794), in XV PJM, *supra* note 19, at 390, 392 (indicating that the *Gazette of the United States, Supplement to the Philadelphia Gazette*, and *Independent Gazetteer* all published portions of the House debate); Letter from Rep. James Madison to Thomas Jefferson (Nov. 30, 1794), in XV PJM, *supra* note 19, at 396–97 [hereinafter Letter from Madison to Jefferson] (observing that the debates were available in the Virginia papers); DUNLAP & CLAYPOOL'S AM. DAILY ADVERTISER (Philadelphia), Dec. 1, 1794 (printing the text of the House response to Washington's speech).

184. According to one biographer, Sedgwick "was inclined to confuse opposition to his views with immorality of conduct," and viewed "talk of the 'rights of man,' . . . [or] 'the liberties of the citizen,' . . . as camouflage for the evil designs of self-seeking demagogues." WELCH, *supra* note 81, at 117.

185. 4 ANNALS OF CONG. 891–92.

censure.¹⁸⁶ Madison, however, was determined not to add the prestige of the House to that of Washington.¹⁸⁷ Scott sided with Madison, and the committee produced a draft that was conspicuously silent regarding the societies.¹⁸⁸

Federalist Representatives were not inclined to let the matter rest so easily. The House had the weekend to mull over Madison's draft—the same weekend that papers reported the Senate's criticism of the societies and Washington's reply.¹⁸⁹ The following Monday, Thomas Fitzsimons, a Federalist from Pennsylvania, moved that the draft be amended to condemn “the self created societies” which have “misrepresent[ed] the conduct of the Government” and thereby “stimulated and urged the insurrection.”¹⁹⁰

A sharp, and at times acrimonious, debate began immediately. The Federalists did not directly deny that citizens had the right to criticize the government or to assemble for political purposes. But arguing along the lines of the distinction between license and liberty,¹⁹¹ they contended that the societies had abused these rights by

186. See WELCH, *supra* note 81, at 130. In a letter to Ephraim Williams, Sedgwick expressed his desire not only to “reecho” Washington's words but to extend the censure to include the “factious & seditious speeches of members of the legislature.” Letter from Rep. Theodore Sedgwick to Ephraim Williams (Nov. 20, 1794), in *The Sedgwick Papers*, Massachusetts Historical Society, *quoted in* WELCH, *supra* note 81, at 131. Years earlier, during the Bill of Rights debate, Sedgwick had said the right to assemble for expression was “self-evident, unalienable . . . certainly a thing that never would be called in question . . .” 1 ANNALS OF CONG. 731 (Joseph Gales ed., 1789) (statement of Rep. Sedgwick).

187. See BRANT, *supra* note 179, at 417–18. Washington had anticipated the possibility of interference from Madison, writing that he “should be extremely sorry . . . if Mr. M[adison]n from any cause whatsoever should get entangled with [the societies], or their politics” in response to Washington's speech. Letter from Washington to Randolph II, *supra* note 171, in 34 WGW, *supra* note 2, at 2–3.

188. See 4 ANNALS OF CONG. 894–99; BRANT, *supra* note 179, at 417–18; WELCH, *supra* note 81, at 130; Letter from Madison to Jefferson, *supra* note 183, in XV PJM, *supra* note 19, at 397. Brant claims that Madison convinced Sedgwick that this course “was best for the President's sake and for general harmony,” BRANT, *supra* note 179, at 417–18, but Welch suggests that Sedgwick was merely outnumbered two-to-one. See WELCH, *supra* note 81, at 130.

189. See DUNLAP & CLAYPOOL'S AM. DAILY ADVERTISER (Philadelphia), Nov. 24, 1794 (providing copies of the Senate resolution and the President's reply thereto). Madison believed that the text of the Senate's response and Washington's reply had been rushed to the newspapers in order to increase pressure on the House to follow suit. See BRANT, *supra* note 179, at 418.

190. 4 ANNALS OF CONG. 899 (statement of Rep. Fitzsimons). Sedgwick had “helped secure the services” of Fitzsimons for this purpose. WELCH, *supra* note 81, at 131.

191. For an example of the significant role that the license/liberty distinction played in that era, consider the charge provided to the grand juries in western Pennsylvania considering indictments arising out of the Whiskey Rebellion. See *A Charge Delivered to the Several Grand Juries of the Counties of Allegheny, Westmoreland, Fayette, and*

using them to undermine the government.¹⁹² In particular, they argued that the natural effect of the societies' political expressions—their resolutions, addresses, and other communications—was to produce rebellion.¹⁹³ Indeed, they contended, such was the natural tendency of all such political clubs, as demonstrated in France and in America's own revolution.¹⁹⁴

Given this bad tendency, Samuel Dexter argued, Congress had the power to outlaw the societies altogether.¹⁹⁵ And if that were true, he concluded, Congress could take the lesser step of censuring the societies for their "abuses."¹⁹⁶ Other Federalists concurred, emphasizing that the purpose of the motion was to express an opinion and not to invoke the machinery of the law to silence the societies.¹⁹⁷ Fisher Ames added that the entire country seemed to be following the course of this debate, and that if the House refused to echo Washington's censure, it would "rekindl[e] the fire-brands of sedition . . . [and] unchain[] the demon of anarchy."¹⁹⁸

Washington, at December Sessions, 1794, by Alexander Addison, President of the Courts of Common Pleas in Those Counties, DUNLAP & CLAYPOOL'S AM. DAILY ADVERTISER (Philadelphia), Jan. 3, 1795 (using "the words of scripture" to illustrate the distinction between liberty ("the daughter of heaven") and licentiousness ("the offspring of hell")).

192. "It is not . . . the right to meet, it is the abuse of the right after they have met, that is charged upon them." 4 ANNALS OF CONG. 922 (statement of Rep. Ames). Representative Dexter framed the issue as follows:

Let men meet for deliberating on public matters; let them freely express their opinions in conversation or in print, but let them do this with a decent respect for the will of the majority, and for the Government and rulers which the people have appointed; let them not . . . make and propagate falsehood and slander . . . [or] instigate to the highest crimes against society; and . . . let not us encourage them in these outrages by calling them the exercise of the inviolable rights of freemen.

Id. at 936 (statement of Rep. Dexter).

193. *See id.* at 901–02 (statement of Rep. Smith); *id.* at 904–05 (statement of Rep. Dayton); *id.* at 906–07 (statement of Rep. Murray); *id.* at 912–13 (statement of Rep. Hillhouse); *id.* at 922, 931 (statement of Rep. Ames); *id.* at 937–38 (statement of Rep. Dexter).

194. *See id.* at 906–07 (statement of Rep. Murray); *id.* at 927 (statement of Rep. Ames).

195. *See id.* at 937 (statement of Rep. Dexter).

196. *Id.*

197. *See, e.g., id.* at 903 (statement of Rep. Tracy) (explaining that the goal is to "discourage" the societies by "uniting all men of sense against them"); *id.* at 906 (statement of Rep. Murray) (clarifying that the goal is to caution the "thoughtless," and provoke the public to consider the limits in which it is "safe" to exercise expressive rights); *id.* at 911–12 (statement of Rep. Sedgwick) (noting that the proposed censure had "a tendency to plunge these societies into contempt, and to sink them still further into abhorrence and detestation"); *id.* at 919–20 (statement of Rep. Boudinot) (stating that the censure would "operate as a warning, both to the societies themselves and to other citizens").

198. *Id.* at 922 (statement of Rep. Ames).

The Federalists also made a point of explaining their position in terms of their understanding of representative government and popular sovereignty. The people, Ames argued, spoke only through the representative institutions established by the Constitution.¹⁹⁹ The societies by definition did not represent the “people,” but only their own interests. If they prevailed “it would be an usurpation, and the power of the few over the many, in every view infinitely worse than sedition itself, will represent this Government.”²⁰⁰

William Branch Giles of Virginia led a vigorous Republican response, correctly observing that “he enjoyed the consolation of having come forward to oppose the very first step made in America to curb public opinion.”²⁰¹ Giles pointed out that America had laws to punish illegal conduct—including treason—and argued that the censure thus served merely to restrain public opinion.²⁰² He and other Republicans repeatedly asserted that freedoms of expression, publication, and assembly were at issue and warned that Congress was on the slippery slope to censorship.²⁰³ John Nicholas, anticipating the modern notion of a free marketplace of ideas, argued that if the societies promoted false views, then “they will defeat themselves.”²⁰⁴ Thomas Carnes asserted that the censure would tend to “lock the mouths of men,” and with citizens unable to criticize the government, “bad men” could then do with the government as they pleased.²⁰⁵

199. *Id.* at 923.

200. *Id.*; *see also id.* at 910, 938 (statement of Rep. Dexter) (arguing that societies are proper only in a despotism and not in a republican system, and that the societies were attacking the Republican form of the government by “usurp[ing] a power which the people never delegated to them”).

201. *Id.* at 919 (statement of Rep. Giles). As an indication of the sheer force of Washington’s prestige, Giles and other Republican speakers in the debate were at pains to assert their respect for the President before proceeding to oppose the censure. *See, e.g., id.* at 899 (statement of Rep. Giles) (commending the President’s character). And as an indication of the odium attached to the societies, many of the Republicans were equally at pains to clarify that as a personal matter they were opposed to them. *See, e.g., id.* at 901 (stating that he had nothing to do with the Democratic-Republican Societies); *id.* at 904–05 (statement of Rep. Nicholas) (same). Gabriel Christie and Josiah Parker were rare exceptions. *See id.* at 908–09 (statement of Rep. Christie); *id.* at 912–13 (statement of Rep. Parker).

202. *Id.* at 900 (statement of Rep. Giles).

203. *Id.*; *id.* at 901 (statement of Rep. Lyman); *id.* at 910 (statement of Rep. Venable); *id.* at 940 (statement of Rep. Nicholas); *id.* at 941 (statement of Rep. Carnes) (“I hope, sir, that the day will never come, when the people of America shall not have leave to assemble, and speak their mind.”). Both Carnes and Giles analogized the censure of the societies to contemporaneous British sedition and treason prosecutions. *See id.* at 919 (statement of Rep. Giles); *id.* at 942 (statement of Rep. Carnes).

204. *Id.* at 940 (statement of Rep. Nicholas).

205. *Id.* at 941 (statement of Rep. Carnes).

James Madison was silent until the fourth day of the debate. But when he rose at last, he cut to the heart of the matter. He flatly rejected the notion that the censure was merely a meaningless expression of opinion, insisting that “it will be a severe punishment” for the societies.²⁰⁶ Madison appeared concerned that some might fail to appreciate the larger stakes in the debate, perhaps thinking the issue inapplicable beyond the specific case of the societies. To counteract this short-sighted mode of thinking, he warned that the real significance of the censure debate lay in the attempt by the Federalists to establish a “pernicious” principle that would apply generally to “liberty of speech, and of the press.”²⁰⁷ The censure was a precedent that future governments could use for other purposes.²⁰⁸

After a series of close votes and legislative maneuvers, it eventually became apparent to the Federalists that they were a few votes shy of being able to put strong language regarding the societies into the House’s response to Washington’s speech. Indeed, it was apparent by this time that the House was too closely divided along partisan lines either to conclusively affirm or rebuke the cramped vision of permissible political dissent invoked by Washington. Accordingly, a large majority of both parties agreed in the end to an ambiguous statement referring only in a general way to the role that “combinations” of men—not “self-created societies”—might have played in fomenting the Whiskey Rebellion.²⁰⁹ It was a draw, and in its wake the debate quickly shifted from the halls of Congress to the forum of public opinion.

B. *The Public Debate*

The public had followed the House debate through the newspapers,²¹⁰ and in its aftermath both the societies and their critics produced a flurry of letters, resolutions, and debates variously upholding or denying the legitimacy of the societies.²¹¹

206. *Id.* at 934 (statement of Rep. Madison).

207. *Id.*

208. *Id.* at 935. Madison also argued that government criticism of the societies—motivated by the societies’ criticism of the government—ran contrary to the republican spirit: “If we advert to the nature of Republican Government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people.” *Id.* at 934.

209. *Id.* at 947–48 (text of House Address).

210. See *supra* note 183 and accompanying text.

211. See FONER, *supra* note 1, at 33 (showing that in the wake of Washington’s censure, “[s]pirited debates concerning the legitimacy of the societies were conducted in every community where a society existed”); see also *Address of the Massachusetts*

The societies' defenders, following Madison, did their best to convey to the public that there were fundamental constitutional rights at issue in the debate.²¹² Republican publisher Thomas Greenleaf of the *New York Journal* asserted that Washington's denunciation of the societies was an attack on the "liberty of *meeting* to converse on political topics, of *speaking*, *writing*, and *publishing* the political sentiments of [America's] hitherto supposed *independent* citizens."²¹³ One correspondent wrote in Philadelphia's *Independent Gazetteer* that "there never was a more daring attempt upon the privileges of freemen than the denunciation of Democratic Societies, as it, at a blow, levelled the protection of our Constitution, and prostrated the security guaranteed by the instrument . . ."²¹⁴ A society in Vermont insisted that it had a constitutional right to exist: "We claim it from the original intention of the Constitution, and more particularly from the amendment thereof, which took place on the 4th of March 1789,

Constitutional Society, GREENLEAF'S N.Y. J. & PATRIOTIC REG., Jan. 24, 1795 (defending the right of the societies to exist and denouncing the Federalist attempt to discourage them); "Democratus," GREENLEAF'S N.Y. J. & PATRIOTIC REG., Jan. 10, 1795 (referring to "[t]he failure of the late attempt . . . to check the freedom of social and political discussion and speech," and enclosing a parody critical of the arguments against the societies); *The Democratic Society of the City of New York, to their Brethren the Citizens of the United States*, GREENLEAF'S N.Y. J. & PATRIOTIC REG., Jan. 17, 1795 (affirming the societies' mission and speaking out against the Federalist position); Letter from Fisher Ames to Thomas Dwight (Feb. 3, 1795), in II WFA, *supra* note 99, at 1101 (describing article in Dwight's SPY newspaper criticizing the societies, and noting that Ames asked Fenno to republish the piece); *From the Baltimore Daily Advertiser*, GREENLEAF'S N.Y. J. & PATRIOTIC REG., Jan. 11, 1795 (reprinting an essay discussing the House debate and defending the right of the societies to assemble and criticize the government); *Of Civil Liberty and the Principles of Government*, FED. INTELLIGENCER & BALTIMORE DAILY ADVERTISER, Jan. 6, 1795 (reprinting without attribution Richard Price's 1776 essay of a similar name which discussed the role of a free government in suppressing licentiousness).

212. See, e.g., *Arbiter No. III*, INDEP. GAZETTEER (Philadelphia), Jan. 28, 1795 (arguing that Federalists had attempted to "burlesque the Constitution" and insisting that the denunciation of the societies mattered notwithstanding its lack of direct legal effect); "Rosgius," INDEP. GAZETTEER (Philadelphia), Jan. 31, 1795 (asking "[w]hat good purpose can it answer to claim the existence of a right which you deem it criminal to exercise"); "Z.," VA. HERALD FREDERICKSBURG ADVERTISER, Jan. 15, 1795 (warning that "the principle in this question" would extend as well to freedom of the press and individual expression).

213. GREENLEAF'S N.Y. J. & PATRIOTIC REG., Dec. 3, 1794 (emphasis in original); see also "Another of the People," FED. INTELLIGENCER & BALTIMORE DAILY ADVERTISER, Jan. 12, 1795 (asserting that "every individual, and consequently a number of individuals[,] have a right of enquiring into public measures, and standing as 'Watchmen on the Political Tower,' and when necessary, sounding the alarm to their fellow-citizens").

214. "C.," *For the Independent Gazetteer*, INDEP. GAZETTEER (Philadelphia), Jan. 17, 1795. Eleazer Oswald, the GAZETTEER's publisher, was a member of the Democratic Society of Pennsylvania. See STEWART, *supra* note 25, at 12.

declaring, 'That Congress shall make no law abridging the freedom of speech or the press.'"²¹⁵ And the "mother society" in Philadelphia added that if its rights of association and expression could be denied, the same rationale could be used against others, including the press.²¹⁶ "Democritus" expressed shock that an attack upon such "*fundamental rights*" could occur so soon after the establishment of the government and warned "if the mind is enchained, personal security cannot be safe."²¹⁷

The societies did not limit their objections to the slippery slope argument. They argued also that the Federalists were employing guilt by association, insofar as they held up the excesses of the Jacobin clubs as a reason to suppress the societies in America.²¹⁸

[I]t is indeed a hard case that because a few clubs have done amiss, that therefore the people of the United States must be abridged in, or deprived of, the exercise of the censorial power over the conduct of their own servants. It is a maxim as absurd as novel, that the abuse of a right by A. shall work the extinction of the right in B.²¹⁹

215. Democratic Society of the County of Chittenden, Vermont, Resolutions (Jan. 8, 1795), in FONER, *supra* note 1, at 311, 317. The Massachusetts Constitutional Society added that if legislative censure could in effect deny their right of assembly for political purposes, the spirit of the Constitution was departed. INDEP. CHRONICLE (Boston), Jan. 5, 1795, in FONER, *supra* note 1, at 264. In the same vein, a New York society asked:

[Was] it for *assembling* that we are accused? what law FORBIDS it? for *deliberating*, for *thinking*, for *exercising the faculties of the mind*. What statute has DEPRIVED us of the RIGHT? For the *publication of our sentiments*, where is the constitution that is prohibitory? . . . [A]ny part of the people have the right to express their opinions on the government.

Democratic Society of New York, Address to "Fellow Freemen," (Jan. 26, 1795) [hereinafter Address to Fellow Freemen], in FONER, *supra* note 1, at 192, 194.

216. Democratic Society of Pennsylvania, Address to Their Fellow Citizens Throughout the United States (Dec. 18, 1794) [hereinafter Address to Their Fellow Citizens], in FONER, *supra* note 1, at 100; cf. *Address of the German Republican Society of Philadelphia, to the Free and Independent Citizens of the United States*, FED. INTELLIGENCER AND BALTIMORE DAILY GAZETTE, Jan. 2, 1795 (calling for all to rally in defense of freedom of speech, and arguing that if the society has no "right to associate" then that right could be denied to any group, and individuals would suffer as well); *Miscellany: German Republican Society*, GREENLEAF'S N.Y. J. & PATRIOTIC REG., Dec. 31, 1794 (printing the same address).

217. "Democritus," GREENLEAF'S N.Y. J. & PATRIOTIC REG., Jan. 31, 1795.

218. See Address to Their Fellow Citizens, *supra* note 216; cf. *Agis, No. I*, GREENLEAF'S N.Y. J. & PATRIOTIC REG., Jan. 28, 1795 (distinguishing American societies from political clubs in France); *Agis, No. II*, GREENLEAF'S N.Y. J. & PATRIOTIC REG., Jan. 31, 1795 (arguing that the French societies' role in that country's revolution made them more likely to "interfere with and thwart" the government than the American societies).

219. Circular Letter from Patriotic Society of New-Castle County, Delaware, to

The societies also emphasized the valuable checking function that they provided.²²⁰ Without associations, one group warned, citizens could only express their opinions on an individual basis—and the government dismissed individual opinions easily.²²¹ Another insisted that America's independence from Britain and its Constitution were products of the right of "free investigation" into the affairs of government, and that such "FREE INVESTIGATION . . . must ever form *the only sure support* of that constitution, and constitute the only permanent basis for the preservation of the liberties of the people."²²² Thus, a society in New York argued that it had "exercised a right" which was "invaluable to freemen" and "dangerous to TYRANTS ONLY."²²³

Federalists were equally vocal, however, in support of Washington's censure.²²⁴ A series of letters in Fenno's *Gazette of the United States* and other pro-Federalist papers condemned the societies as a threat to the government that had to be eliminated.²²⁵

Patriotic Societies throughout the United States, in FONER, *supra* note 1, at 327.

220. See Address to Their Fellow Citizens, *supra* note 216. In this respect, the societies tapped into Whig tradition of political philosophy exemplified by John Trenchard and Thomas Gordon's CATO'S LETTERS. See, e.g., John Trenchard & Thomas Gordon, 1 CATO'S LETTERS 114 (Ronald Hamowy ed., Liberty Fund 1995) (1721) (describing freedom of speech as "the great bulwark of liberty," and specifically defending the right to criticize the government). CATO'S LETTERS were widely read and deeply influential in Colonial America. See BAILY, *supra* note 60, at 54–56; CURTIS, FREE SPEECH, *supra* note 60, at 37–40; MORGAN, *supra* note 60, at 167–68.

221. German Republican Society at Philadelphia, Address to the Free and Independent Citizens of the United States (Dec. 29, 1794), in FONER, *supra* note 1, at 59, 61–62.

222. Address to Fellow Freemen, *supra* note 215; see also "Arbiter No. IV," INDEP. GAZETEER (Philadelphia), Jan. 31, 1795 (expressing similar sentiments).

223. FONER, *supra* note 1, at 193; see also "A Republican," GREENLEAF'S N.Y. J. & PATRIOTIC REG., Jan. 7, 1795 (reprinting a letter from the BOSTON CHRONICLE, arguing that restraints on speech and association are inappropriate in a free government, and warning prophetically that if "Mr. Sedgwick's principles had prevailed" then America might have witnessed overt repression along the lines currently occurring in Britain).

224. See HOFSTADTER, *supra* note 26, at 95. "Washington, in voicing alarm at the idea of 'self-created' societies[,] was expressing a view of political organization that was widely accepted as an integral part of the anti-party creed, and even of republicanism itself." See *id.* New York's Tammany Society, at the time inclined toward the administration, gave its "heartly and entire approbation" to the censure, arguing that associations to criticize the government were appropriate only for purposes of overturning the government. *Tammany Society to the People of the United States*, GREENLEAF'S N.Y. J. & PATRIOTIC REG., Jan. 21, 1795.

225. See, e.g., "A.Z.," *supra* note 91 (arguing that the societies "have sown sedition and planted anarchy"); "An Old Printer," FED. INTELLIGENCER & BALTIMORE DAILY ADVERTISER, Jan. 10, 1795 (suggesting that in order "to shake government to its foundation, no more is necessary . . . than to put in motion *a part of the people*, by means of societies, intrigues and newspapers); "C.," GAZETTE U.S. (Philadelphia), Dec. 8, 1794

Significantly, the Federalist message also reached the public through the medium of the clergy, with the assistance of well-known ministers such as the Reverend David Osgood.²²⁶ An Osgood sermon insisting the societies were “copies of Paris Jacobin clubs, fomenters of the Whiskey Rebellion, and tools of French ministers” circulated widely as a pamphlet, with financial assistance from Federalist sources.²²⁷ And the polemicist William Cobbett added to the foreign taint cast upon the societies with his sharply distorted account of their allegedly revolutionary aims and French origins in his pamphlet “History of the American Jacobins, Commonly Denominated Democrats.”²²⁸

It was Secretary of State Randolph, however, who produced the most extensive defense of the censure.²²⁹ Writing under the pseudonym “Germanicus,” Randolph was brutally candid about the purpose of, and justification for, the censure. He explained that Washington had meant to condemn as illegitimate and dangerous the societies generally, along with any other self-constituted group that would undertake to “condemn” laws or otherwise to stir up

(arguing that the societies’ agitations had produced one insurrection already, and would produce more); *GAZETTE U.S.* (Philadelphia), Nov. 15, 1794 (publishing an unsigned letter urging the public to turn against the societies, but disclaiming desire to see the press restrained); “One of the People,” *FED. INTELLIGENCER AND BALTIMORE DAILY GAZETTE*, Jan. 1, 1795 (criticizing the society in Baltimore as unelected and suggesting that it might be complicit with other societies in promoting the Whiskey Rebellion); “One of the People,” *GAZETTE U.S.* (Philadelphia), Jan. 3, 1795 (denouncing the societies); “To the Vigil,” *GAZETTE U.S.* (Philadelphia), Dec. 6, 1794 (discussing the societies’ dangerous tendencies and “levelling principles”).

226. See *LINK*, *supra* note 5, at 197–98. For a discussion of the tension between clergy and republicans, see *STEWART*, *supra* note 25, at 395–418.

227. *STEWART*, *supra* note 25, at 399; see also *LINK*, *supra* note 5, at 197–98 (describing David Osgood’s fiery sermons against the societies); *WELCH*, *supra* note 81, at 133 (noting that prominent Sedgwick requested a dozen copies of Osgood’s sermon). Osgood’s sermon was reprinted by the *AMERICAN MINERVA* on January 6, 1795. *Extract From the Rev. Mr. Osgood’s Thanksgiving Sermon, Delivered at Medford, AM. MINERVA* (New York), Jan. 6, 1795.

228. Cobbett, *supra* note 106, at 184–216.

229. See Letter from Minister to France James Monroe to Rep. James Madison (Feb. 18, 1795), in *XV PJM*, *supra* note 19, at 478 n.1 (describing the publication of the Germanicus letters between January 19 and April 1, 1795 in the *AMERICAN DAILY ADVERTISER*). Randolph had promised Washington in early November 1794 that “cost what labor it may,” he would “follow with answers” the criticisms that inevitably would be lodged against the speech. Letter from Secretary of State Edmund Randolph to President George Washington (Nov. 6, 1794), in *GWP*, *supra* note 3, at Series 4, Reel 106; see also *MONCURE D. CONWAY, OMITTED CHAPTERS OF HISTORY DISCLOSED IN THE LIFE AND PAPERS OF EDMUND RANDOLPH 230–31* (1889) (linking this promise to the subsequent Germanicus letters). At least one Federalist thought Randolph’s defense was a “d—d bad one.” *REARDON*, *supra* note 39, at 280 (quoting Letter from William Eustis to David Cobb (Dec. 10, 1794), in *David Cobb Papers*, Massachusetts Historical Society).

“suspicions, jealousies, and accusations” against the government.²³⁰ Washington had refrained from proposing legislation to outlaw the societies not because this could not be done, moreover, but only because it was better to reserve that measure for the last exigency.²³¹ And although the government thus reserved the right to resort to prosecution to eliminate the societies if necessary—Washington in effect kept the prospect of prosecution in his back pocket even as he relied on more informal measures—Randolph put the best face on the matter by asserting that it was “an epoch in the annals of liberty[] that opinion can vanquish a public mischief, without the assistance of legal penalties.”²³²

On the issue of legitimacy, Randolph adhered to the well-established Federalist argument. He asserted that only the representative institutions established by the Constitution had any plausible claim to speak for the people as a whole; political societies necessarily spoke only for self-interested minority factions.²³³ Thus, their intrusion into the political sphere inherently undermined, rather than enhanced, popular sovereignty.²³⁴ Worse, the particular design of the societies magnified this improper intrusion in two ways. Small numbers of men could take on the appearance of a larger group by proceeding under a collective banner, and their voices could be further magnified by “correspondence and communication” with the other societies in the network.²³⁵ The anonymity afforded by the societies, Randolph added, ruined accountability: one would not know whom to sue for a personal libel, for example.²³⁶ He might well have added that one also would not know whom to prosecute for a *sedition* libel.

Randolph also played up the specter of foreign subversion in his attack on the societies, much more so than had the Federalists in Congress. How easy it would be, he wrote, for “the emissary or partisan of foreign princes” to take control of a society through

230. EDMUND RANDOLPH, *GERMANICUS* 11, 13, 15–16 (1795) (illustrating that the illegitimacy charge did not apply to voluntary associations generally, or to political groups that supported the government) (on file with the North Carolina Law Review).

231. *See id.* at 43–45.

232. *Id.* at 44.

233. *See id.* at 19, 61–62.

234. *See id.*

235. *See id.* at 20–21, 26, 37, 44, 64–66. The societies no doubt would agree with Randolph’s pithy explanation that “solitary opinions have little weight” but “opinions united, strike.” *Id.* at 64.

236. *See id.* at 23–24, 71–72.

“eloquence” behind a society’s closed doors.²³⁷ Randolph thus tapped into concerns lingering from 1793 about Genet’s alleged role in founding the societies and their supposed allegiance to Revolutionary France.

Whether subject to a foreign power or not, the societies were “powerful engines of a revolution.”²³⁸ Randolph dwelt at length on the parallels with the Jacobin clubs of France, emphasizing that even the French at last had recognized the need to outlaw the groups.²³⁹ And while it was true that the societies had done little in America to compare with the actions of the Jacobins in France, Randolph pointed out that in France, the people had been unhappy with their government to begin with, while in America, there was the need first to stir up that discontent—precisely the activity for which they were now censured.²⁴⁰

What of constitutional rights? Randolph asserted that they were in no way threatened by the attack on the societies, which had to do not with the use, but only the abuse, of rights. Randolph thus could argue that the “liberty of the press . . . will never be shackled,” just *limited* by the need to prevent “injustice to individuals” and, especially, to preserve “the peace of the community.”²⁴¹ This last principle would prove to be the lasting legacy of the censure debates of 1794 and 1795.

IV. LESSONS FROM THE ROAD TO SEDITION

Assessing the course of the censure debates from the perspective of early 1795, a society in Delaware concluded that their legitimacy had been vindicated. “[T]o the honor of the age,” the society wrote, “a virtuous Republican majority[] in the House of Representatives . . . disdained to subscribe to and finally rejected the unjust and illiberal proposition . . . this first attack on the freedom of opinion in the

237. *Id.* at 23; *see also id.* at 62 (warning of capture by “foreign powers”).

238. *Id.* at 9.

239. *See id.* at 25–26, 42, 62 (unsettling readers with the image of Americans being subjected to “the persecution of a blood-thirsty leader in the Societies”); *id.* at 73–77 (attaching Monroe’s dispatches from Paris to support Randolph’s analogy). Randolph noted also that the British had taken steps to suppress their own pro-French reform societies. *See id.* at 70–71.

240. *See id.* at 42, 70. Shifting the burden to the societies and demanding that they prove a negative, Randolph asked if they could “prove that the tendency of the societies is not to create a revolution[.]” *Id.* at 70. For good measure, Randolph also demanded proof that the societies were not “guided by foreign influence.” *Id.*

241. *Id.* at 53. But in any event, such liberties simply did not extend past individuals and ad hoc assemblies to institutionalized dissenters such as the societies. *See id.* at 53–54.

United States.”²⁴² With great optimism, the group made the bold assertion that “in all probability, [the Republicans had] fixed an eternal barrier, that will forever prevent another [attack] being made, and have erected a great sea mark by which our state pilots may avoid in future, the rock upon which they lately lay nearly ship-wrecked.”²⁴³

Would that it were so. The leader of the “virtuous” band that established this “eternal barrier,” however, had a sense of foreboding. In a letter to Jefferson shortly after the House debate concluded, James Madison warned that “[i]f the people of America are so far degenerated . . . as not to see or to see with indifference, that the Citadel of their liberties is menaced by the precedent before their eyes, they require abler advocates than they now have, to save them from the consequences.”²⁴⁴ Astute politician that he was, Madison grasped that not everyone appreciated the implications of the attack on the societies. Writing to Monroe a few days later, Madison expanded on his view of the principle the Federalists sought to establish.²⁴⁵ The Federalists, he explained, asserted that the government had the power to determine which political criticisms were permitted.²⁴⁶ And if they succeeded in asserting this principle against the societies, it could just as well be turned against the press and individuals later.²⁴⁷

Ultimately, it appears that the Federalists did succeed—to a limited extent—in asserting their narrow understanding of political liberties against the societies. By the end of 1795, with a few notable

242. Patriotic Society of Newcastle, Delaware, Address to the People of the United States (Jan. 8, 1795), in FONER, *supra* note 1, at 332.

243. *Id.*

244. Letter from Madison to Jefferson, *supra* note 183, in XV PJM, *supra* note 19, at 396–98. Madison understood the electoral ramifications of the Federalist effort, insisting that the Federalist gambit was to link the societies to insurrection and then, by compelling the Republicans to defend the societies’ political freedoms, to link the Republicans to the societies. *See id.* at 397; *see also* Letter from Rep. Fisher Ames to Mass. State Rep. Thomas Dwight (Dec. 12, 1794), in II WFA, *supra* note 99, at 1083 (explaining the private history of the debate in similar terms). Jefferson wrote back in agreement, noting his surprise that Washington “permitted himself to be the organ of such an attack on” expressive rights. Letter from Thomas Jefferson to Rep. James Madison (Dec. 28, 1794), in XV PJM, *supra* note 19, at 426–27. In a strange historical footnote, decades later Jefferson would articulate a view of political societies that very much echoed the Federalist position of the 1790s. *See* Letter from Thomas Jefferson to Jedidiah Morse (Mar. 6, 1822), in VII THE WRITINGS OF THOMAS JEFFERSON 233–37 (H.A. Washington ed., 1855).

245. *See* Letter from Madison to Monroe, *supra* note 50, in XV PJM, *supra* note 19, at 407.

246. *See id.*

247. *See id.*

exceptions, most of the societies had either disbanded or at least had ceased to participate in political life as they had in the past; historians attribute this sudden silence to a number of factors, but there is at least a consensus that the censure played a significant role in it.²⁴⁸

And what of Madison's warnings? Within three years, events conspired to reproduce many of the same circumstances that contributed to the Federalist attack on the societies, only in a more intense form.²⁴⁹ Once more, America was threatened by the prospect of involvement in a war between Britain and France.²⁵⁰ This time, however, the threshold already had been crossed. America and France were fighting an undeclared naval war; the only question was whether it would expand or cease.²⁵¹ And like the period from 1793 to 1794, there once again were hints and allegations of a foreign hand behind domestic critics of the government.²⁵² And as before, such suspicions were tied up in the politics and prejudices of immigration, with Federalists blaming recent immigrants for importing radical political beliefs to America (and for swelling the ranks of the Republican Party).²⁵³ Finally, as in 1793 and 1794, the barbs and jabs of political criticism from the Republican press were becoming more than Federalists were willing to tolerate.²⁵⁴

The result in 1798, however, was no mere censure. Instead, the Federalists enacted a Sedition Act and embarked on a campaign of prosecutions to silence critics of the government.²⁵⁵ The period from

248. See DECONDE, *supra* note 28, at 263 (explaining that Washington's "shot-gun denunciation was a heavy if not mortal blow"); MICHAEL DUREY, *TRANSATLANTIC RADICALS AND THE EARLY AMERICAN REPUBLIC* 233 (1997) (asserting that the Democratic Society of Pennsylvania "collapsed under the weight of presidential disapproval and tactics over policy toward the whiskey rebels"); ELKINS & MCKITRICK, *supra* note 11, at 461 (arguing that the disbanding of the Democratic-Republican societies can be attributed to Washington and their pre-existing lack of popular support); LINK, *supra* note 5, at 200-02 (noting several outside factors in addition to Washington's condemnation had a "quieting effect" on the societies); STEWART, *supra* note 25, at 436 (asserting that Washington's censure and the rebellion itself damaged the strength of the societies); Koschnik, *supra* note 11, at 634 n.72 (detailing the apparent death of the Democratic-Republican societies); cf. FONER, *supra* note 1, at 35-39 (asserting that societies remained in full force even after Washington's attack).

249. See ELKINS & MCKITRICK, *supra* note 11, at 537-39, 581-90.

250. See *id.*

251. *Id.* at 589-90, 643-62.

252. See *id.* at 694-96.

253. See *id.*

254. See, e.g., CURTIS, *FREE SPEECH*, *supra* note 60, at 60-63 (describing mounting Federalist frustrations); JOHN C. MILLER, *CRISIS IN FREEDOM: THE ALIEN AND SEDITION ACTS 64-65* (1951) (describing Federalist frustration with Bache's *American Aurora*).

255. See *An Act for the Punishment of Certain Crimes Against the United States*, ch.

1798 to 1800 would see at least seventeen seditious libel prosecutions—fourteen under the Act, and three more under the rubric of federal common law.²⁵⁶ Although this number might seem small at first blush, the prosecutions were sweeping in the sense that they impacted all the most significant Republican newspapers.²⁵⁷ The worst fears of Madison, Giles, and others who defended the societies in 1794 were realized.

Michael Kent Curtis has written that the story of the Sedition Act of 1798 is important because it reminds us “that the power to suppress criticism of either public officials or government and the power to suppress advocacy of public policy must be tightly confined if democracy is to survive.”²⁵⁸ By the same token, there is value in studying the earlier debate over the censure of the societies, which was nothing so much as a dress rehearsal for the arguments and debates that followed during the sedition controversy.

There is additional value, moreover, in examining the road that took America from the censure of the societies to sedition prosecutions just a few years later. There was a dynamic at work in this progression which tells us something significant about the subtle dangers involved when government action challenges constitutional values in informal, non-legalistic ways, and in particular about the easily overlooked capacity of such actions to get the proverbial camel’s nose in under the tent.

Washington’s censure was in substance an attack on political liberties, but it was a non-legalistic one, far removed from the blunderbuss of a political prosecution. This was no accident. Attorney General Bradford had warned Washington that sedition prosecutions could produce a backlash against the government, and Jefferson earlier had advised that an open attempt to proscribe the

74, 1 Stat. 596 (expired 1801). See generally CURTIS, *FREE SPEECH*, *supra* note 60, at 52–112 (detailing the history of the Sedition Act); SMITH, *supra* note 35, *passim* (tracing the Sedition Act from its enactment through to its expiration). The Sedition Act also was influenced significantly by similar legislation in Britain near that time. See Rabban, *supra* note 11, at 841; see also ELKINS & MCKITRICK, *supra* note 11, at 900 n.50 (surveying scholarly writing on the British government’s response to radical societies); MILLER, *supra* note 254, at 68–69 (arguing that the British government’s enactment of laws against seditious meetings, censorship of press, and suspensions of the writ of habeas corpus served as models for the Federalists). For a contemporary criticism of that British legislation, see TWO ACTS, *supra* note 49.

256. SMITH, *supra* note 35, at 185.

257. Alfred Young, *The Federalist Attack on Civil Liberties*, 17 *SCI. & SOC’Y* 59, 63 (1953).

258. CURTIS, *FREE SPEECH*, *supra* note 60, at 53.

societies might backfire.²⁵⁹ Heeding this advice, Washington sought to silence organized political dissent by bringing to bear the full weight of his unique prestige and incomparable authority. From the bully pulpit of the Presidency, and with the assistance of a Federalist chorus both within Congress and without, Washington sent the message that institutionalized private political dissent was illegitimate in America, particularly when such dissent had a seditious tendency to undermine support for the government.

As Randolph had suggested, this approach surely was preferable to criminal prosecution from the perspective of the dissenting individual or group. But we should not dismiss the Federalist attempt to delegitimize the societies as unimportant simply because prosecutions did not ensue. On the contrary, as Madison understood, the relationship of the censure to the seditious libel prosecutions later in the decade suggests good reason to take such informal challenges to constitutional values quite seriously.²⁶⁰

The censure contributed to the subsequent prosecutions because it was reasonably successful at establishing an underlying principle favored by the Federalists: political dissent that tends to undermine public support for the incumbent officials of government, especially collective political dissent, is illegitimate. True, there was a strong opposition reaction to the censure, a spirited defense of political liberties put forward by a range of speakers and writers.²⁶¹ But that opposition never produced anything resembling a clear rebuke of the Federalist position on political dissent. The debate was simply too decentralized to produce that kind of result. It never reached a true focal point capable not only of concentrating the relevant arguments in a single forum, but also of producing a resolution clearly affirming or rebuking the Federalist view.

The debate came close to such a focal point in the House, but although the arguments were centralized there, the House proved to be too closely divided to produce a decision clearly favoring either position (notwithstanding the assertions of victory made by some societies at the time).²⁶² And in the Senate, which did adopt the Federalist position when it echoed Washington's censure, we have no indication that any significant debate on the subject even took place.²⁶³ This left the debate to occur in a decentralized fashion, with

259. See *supra* notes 126, 137–39 and accompanying text.

260. See *supra* notes 244–47 and accompanying text.

261. See *supra* notes 211–23 and accompanying text.

262. See *supra* notes 180–209 and accompanying text.

263. See 4 ANNALS OF CONG. 793–94 (1794) (describing passage of Senate Address

the dozens (if not hundreds) of letters, resolutions, and speeches contesting the issue in the media of the day speaking past one another and then, eventually, fading into the background. The possibility that a constitutional moment of sorts might be realized—that our shared understanding of the meaning of the constitutional values involved might be clarified—thus passed without being fully or even largely realized.²⁶⁴ And while it may not be quite accurate to say that the Federalists “won” the debate as a result, it clearly would be inaccurate to claim that the opposition had. In this sense, even a “draw” worked to the Federalists’ advantage: because it was not successfully rebuked, their position on the illegitimacy of political dissent gained a significant foothold in American political thought.

This result was dangerous in two respects. One risk was that society would grow acclimated to the Federalist position, more willing to accept it as the position became more familiar. The other risk was that Federalists would construe the absence of a meaningful rebuke as an endorsement, a green light. Thus emboldened, would they not be tempted to extend the principle when the appropriate circumstances arose in the future?

If the censure debate had not been decentralized, a different dynamic might have unfolded. If Washington had pursued prosecutions instead of a censure, for example, the debate would have reached a “focal point” in the form of a judicial decision. Judges were cold comfort to seditious libel defendants later in the decade, of course, suggesting at first blush that no better result would have followed had judges been involved in the debate in 1794 and 1795. The differences between the two periods, however, were significant: the national security environment of the earlier period was less strained than that in the period from 1798 to 1800, and by the time of the seditious libel prosecutions the principle established during the censure debate had after all been germinating for several years. It is

over objection from Aaron Burr).

264. My use of “constitutional moment” in this passage is meant to be evocative of Bruce Ackerman’s use of that phrase, but no more. *See, e.g.*, BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 409 (1998) (explaining the “constitutional moment” concept as a rare confluence of events in which a movement for constitutional change may effect such change outside of the bounds of the Article V process). That is to say, I do not suggest that a more successful opposition campaign would have produced, through non-Article V mechanisms, something resembling an amendment to the Constitution. My claim instead is the narrower one that such opposition could have impacted developing understandings of the meaning of constitutional protections for political freedoms. *Cf.* CURTIS, *FREE SPEECH*, *supra* note 60, at 227–29 (discussing the powerful popular reaction in support of freedom of expression following the murder of the abolitionist Elijah Lovejoy).

at least conceivable that an attempt at similar prosecutions in 1794 and 1795 would have been rejected.

My goal, however, is not to demonstrate that judges would have “saved” the societies had they been given the chance in 1794 and 1795. Quite possibly—even probably—they would have declined to do so. The point instead is that a hypothetical judicial decision rejecting the Federalist view of the illegitimacy of collective dissent in 1794 and 1795 would have been more likely to prevent future applications or expansions of the principle than the decentralized discussions and debates which actually took place in that period.

Had the Federalists asserted their cramped understanding of political liberties through the vehicle of criminal prosecutions, the resulting debate would almost certainly have been channeled to a focal point in the form of a judicial decision. By electing to proceed informally instead, Washington caused less initial damage to political freedoms, but at the same time, he decreased the likelihood that the underlying constitutional debate would reach a focal point of any sort—and that in turn decreased the likelihood that the Federalist position on political dissent would be rebuked in a relatively conclusive manner.²⁶⁵ Put another way, the lack of a focal point increased the chances that the Federalist challenge to constitutional values would go unchecked. And left unchecked, what began as a marginal challenge evolved a few years later into something altogether more serious.

The lesson to be drawn is not that we are better off when the government challenges constitutional values by overt legal action instead of informal means. It is simply that we should not take such informal challenges lightly because they do have lasting effects. They tend to avoid concentrated debate, and thereby have a capacity to linger, grow familiar, and spread. Relatively unimportant at first glance, they can entrench and become dangerous precedents.

CONCLUSION

A few years before he signed the Sedition Act into law, we find Vice President John Adams writing that the “[s]elf-created societies must be circumspect” because it “is very easy for them to tran[s]gress the boundaries of law, and as soon as they do, they become unlawful assemblies, seditious societies . . . and as many such hard appellations

265. It is not impossible for indirect infringements to reach a focal point—consider the formation of the Church Committee to review abusive FBI investigative practices in the 1950s and '60s—but as suggested above, it is less likely.

as you choose to give them.”²⁶⁶ It was just a small step from that belief to the further conclusion that political dissent from any source could be seditious.

266. Letter from Vice President John Adams to Abigail Adams (Dec. 14, 1794), *in* II LETTERS OF JOHN ADAMS ADDRESSED TO HIS WIFE 171 (C.F. Adams ed., 1841).

