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# Ambiguous Union: Madison, Jefferson and the Principles of '98, 1798-1834

Jeffrey E. Morrison

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AMBIGUOUS UNION: MADISON, JEFFERSON AND THE “PRINCIPLES OF ‘98,” 1798-1834

by

JEFFREY E. MORRISON

Under the Direction of H. Robert Baker, PhD

ABSTRACT

The Constitution of the United State has never been a document with a fixed and determinable meaning, and demanded continual reinterpretation. During the early republic, legal and political battles over constitutional meaning were commonplace, leading to claims of disloyalty as well as threats of violence. When those battles occurred, challenges to actions of the federal government often were done in the name of the Virginia and Kentucky Resolutions, and the “Principles of ‘98.” Reflecting one important strand of mainstream political thought in the early republic, the Virginia and Kentucky Resolutions were later employed by Pennsylvanians, who militarily resisted federal efforts to enforce a Supreme Court decision, to New Englanders, who effectively nullified certain federal laws

during the War of 1812, and to South Carolinians, who nullified a federal tariff and threatened secession.

Authored by James Madison and Thomas Jefferson, respectively, in 1798, the Virginia and Kentucky Resolutions set forth differing visions of the nation's founding. The extent of these differences was misunderstood by many contemporaries and has been largely ignored or misunderstood by subsequent legal scholars. Jefferson interpreted the Constitution as a contract between the sovereign state governments, akin to a treaty between independent nations. Thus, unconstitutional actions by the federal government were a breach of the constitutional compact, in response to which each state had a right to nullify the offending action. For Madison, the thirteen *peoples* of the several states, acting collectively in their highest sovereign capacity, were the parties to the constitutional compact. Madison did not interpret the Constitution by application of strict rules applicable to contracts or treaties and did not deem every breach of the compact as justifying nullification by the *people*. He rejected the notion that a single state or even the sovereign *people* of a single state could nullify actions of the federal government. Only a majority of the *people* of the several states could nullify actions of the federal government, and such right should only be exercised when the act "deeply and essentially" affected the "vital principles of their political system."

INDEX WORDS: Virginia and Kentucky Resolutions, James Madison, Thomas Jefferson, Nullification, Interposition, Alien and Sedition Acts, Hartford Convention, John Marshall, Nullification Crisis, States' Rights, Andrew Jackson.

AMBIGUOUS UNION: MADISON, JEFFERSON AND THE "PRINCIPLES OF '98," 1798-1834

by

JEFFREY E. MORRISON

A Dissertation Submitted in Partial Fulfillment of the Requirements for the Degree of

Doctor of Philosophy

in the College of Arts and Sciences

Georgia State University

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AMBIGUOUS UNION: MADISON, JEFFERSON AND THE "PRINCIPLES OF '98," 1798-1834

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August 2015

## DEDICATION

This dissertation is dedicated to many of the people I have loved most in my life.

First, this dissertation is dedicated to my mother, Susan Hoffman Morrison, and to her father Earl “Pop Pop” Hoffman, who first taught me a love of history. As a child, my mom took me to Valley Forge, Mount Vernon, countless wax museums and to the great monuments in Washington, D.C., Philadelphia and Stone Mountain, Georgia. My grandfather tutored me on the great battles of the Civil War and Custer’s Last Stand. No childhood memories give me greater joy. My mom encourages my love of history to this day, and other than myself, may be the happiest that my dissertation is now completed.

Second, this dissertation is dedicated to my wife, Sarah Anne (Schuster) Morrison, and to our two children, Michael Morrison and Susan Morrison. I began this journey as a frustrated lawyer entering graduate school almost twenty years ago with a goal of earning my Masters and Ph.D., and teaching history some day. Through years of balancing work demands as an attorney with the demands of earning two degrees, while ensuring that I fulfilled my most important and rewarding role as husband and father, their love, encouragement and support for my goal never waived.

Although none of them will likely read its entirety, this dissertation never would have been finished without them in my life.

## ACKNOWLEDGEMENTS

My interest in the Virginia and Kentucky Resolutions began during my Master thesis on Lincoln's record on freedom of expression during the Civil War and during the completion of a seminar paper analyzing Andrew Jackson's response to efforts of South Carolina to suppress abolitionist literature in 1835. My interest in freedom of expression took me back to the Alien and Sedition Acts, which is where I found Madison, Jefferson and the Principles of '98. To the extent this work offers any new insight into the constitutional history of the early republic, much of the credit should go to the History Department at Georgia State University. I attended Georgia State off and on for almost fifteen years and enjoyed every single class, largely due to the efforts and dedication of my teachers and to the diverse group of students who added so much to each seminar.

Many thanks to Richard Mannion for his continued encouragement, prodding and support. Rich and I were part of the "senior" brigade that regularly populated the nighttime history seminars during our early years at Georgia State. Most have come and gone but Rich and I became good friends during the process. Other than my wife and mother, no one did a better job of kicking me in the rump to finish this project.

Thanks to my dissertation committee members, David Sehat and Wendy Venet. David arrived at Georgia State after I had completed all of my coursework but readily agreed to jump in and help me bring this project to a satisfactory conclusion. I regret that I never had the opportunity to be a student in one of his seminars. As for Wendy, she has had a recurring role during my long journey at Georgia State, beginning with multiple seminars on 19<sup>th</sup> century U.S. history and as my advisor for my Master Thesis on Lincoln. She

tolerated many a long-winded critique of Lincoln and Jackson with grace and skillfully calmed me down when my hyperbole reached dangerous levels.

Finally, I thank my dissertation director, Rob Baker. Since his arrival at Georgia State, he has been a constant and enthusiastic supporter of this project and of my dreams of someday being a history professor. Intelligent, creative, probing, and forever optimistic, Rob always had an encouraging word to get me back on track after a few periods when I felt like I would never finish. I look forward to the day when I will have my own students and will try to mirror Rob's ability to be a valued mentor who consistently inspires.

## TABLE OF CONTENTS

<b>ACKNOWLEDGEMENTS.....</b>	<b>v</b>
<b>1 INTRODUCTION .....</b>	<b>1</b>
<b>2 HISTORIOGRAPHY .....</b>	<b>24</b>
<b>3 THE ALIEN AND SEDITION ACTS AND POPULAR RESPONSE .....</b>	<b>48</b>
<b>4 THE VIRGINIA AND KENTUCKY RESOLUTIONS .....</b>	<b>77</b>
<b>5 MADISON'S AND JEFFERSON'S PRINCIPLES OF '98 .....</b>	<b>119</b>
<b>6 FEDERALISTS EMBRACE THE PRINCIPLES OF '98 .....</b>	<b>176</b>
<b>7 JOHN MARSHALL CONFRONTS THE PRINCIPLES OF '98.....</b>	<b>218</b>
<b>8 ANDREW JACKSON CONFRONTS THE PRINCIPLES OF '98 .....</b>	<b>271</b>
<b>9 CONCLUSION .....</b>	<b>364</b>
<b>BIBLIOGRAPHY .....</b>	<b>372</b>

## 1 INTRODUCTION

The Constitution of the United State has never been, and most likely never was intended to be, a document with a fixed and determinable meaning. As a result, the Constitution required and demanded continual reinterpretation. That was no more evident than during the first decades of its existence. The charter contained inherent contradictions, some fundamental and painfully apparent (i.e., liberty and slavery), but others were unrevealed at the time of ratification and only became apparent with the passage of time as various political actors attempted to promote their own preferred understanding. Ambiguities in constitutional understanding and meaning led to continuous disagreements throughout the period 1798-1834. While disagreements over constitutional interpretation commonly took the form of peaceful invocations of various intellectual and political arguments, with supporting slogans and symbols, the threat of violence lurked nearby, and when the threat was not clearly invoked by participants, these veterans of the American War of Independence and their succeeding generation knew that potential military force was never far away.

Other than the amendment process in Article V, neither the U.S. Constitution nor the various state constitutions created in the late eighteenth century even suggested what constitutional remedies might be available to the *people* or to the states in response to unconstitutional actions of the newly created national government. Following ratification of the Constitution, despite sometimes vehement opposition to ratification and specific concerns with the powers of the new national government, not a single state attempted to clarify, in its own constitution or otherwise, what power and authority had just been

granted to the national Congress or retained by the states or the *people*. The Tenth Amendment to the Constitution, ratified in December of 1791, stated that the powers not granted to the new national government were reserved to the states or the *people* in language very similar to that set forth in the Articles of Confederation. No other specific guidance was provided.<sup>1</sup> What was clear, however, was that on a whole host of issues, the actions of the state governments as well as the federal government evidenced a common understanding that the states and the *people* retained significant power under the Constitution. Thus, the determination by political actors in the early republic as to what remedies might be employed by the states or the *people* in response to unconstitutional actions of the federal government led to uncertainty and, during perceived political crises, threats of violence and claims of disloyalty and treason.

Today most Americans readily accept the notion that when the United States Supreme Court rules that a particular action by the government did or did not violate the United States Constitution, the issue is resolved. In December of 2000, when a 7-2 majority of the Supreme Court ruled that Florida's method for recounting ballots in the presidential election was a violation of the Equal Protection Clause of the Fourteenth Amendment, and a 5-4 majority ruled that no reasonable alternative method could be established on a timely basis in accordance with federal law,<sup>2</sup> critics of the decision claimed that the Court had effectively chosen Texas Governor George W. Bush as the next President

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<sup>1</sup>The Articles of Confederation provided that "Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled." "Articles of Confederation," Yale University, *The Avalon Project: Documents in Law, History and Diplomacy* (New Haven: Lillian Goldman Law Library), [http://avalon.law.yale.edu/18th\\_century/artconf.asp](http://avalon.law.yale.edu/18th_century/artconf.asp).

<sup>2</sup>*Bush v. Gore*, 531 U.S. 98 (2000).

of the United States. Of course, that need not have been the case, but due to the ascendancy of the Supreme Court since the 1930s, Vice President Albert Gore and his supporters gave little serious consideration to continuing the legal fight in the Florida courts, or conducting a political fight in the Florida's state house of representatives (when choosing Florida's presidential electors), or in Congress (when Florida's electoral votes would be cast for President and Vice President). Correctly or not, the Supreme Court had spoken and the country quickly moved on.

But as scholars Larry Kramer and Christian Fritz have effectively argued over the last twenty years, that was not always the case. In fact, there is a rich and complex history from the ratification of the national Constitution through the Jacksonian era when the true meaning of the Constitution was largely up for grabs, and legal and political battles over Constitutional meaning was commonplace. For Kramer, a law professor and former dean at Stanford Law School, this rich history supported his principal thesis in *The People Themselves* that judicial supremacy was neither intended nor inevitable and that the legislative and executive branches of the federal government, along with the *people* themselves, had an equal right and duty to determine the meaning of the Constitution. For Fritz, this same history supported his principal thesis in *American Sovereigns* that a complex constitutional tradition existed prior to the Civil War based on the revolutionary notion that the collective *people* of the several states were the true sovereigns of the more perfect union and, therefore, had a fundamental role in constitutional creation, modification and interpretation.<sup>3</sup>

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<sup>3</sup>Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (New York: Oxford University Press, 2004); Larry D. Kramer, "The Interest of Man': James Madison, Popular Constitutionalism, and the Theory of Deliberative Democracy," 41

Although Kramer's and Fritz's descriptions of the more vitriolic legal and political battles over the meaning of the Constitution emphasized the role of the *people*, more often these battles centered on the power and authority of the new federal government vis-à-vis the state governments. In fact, the real story of *popular constitutionalism* during the early republic is largely a story over the meaning of federalism. And when those legal and political battles occurred, challenges to actions of the new federal government often were done in the name of the Virginia and Kentucky Resolutions and the "Principles of '98." And when challengers of the federal government did not explicitly invoke the Virginia and Kentucky Resolutions or the "Principles of '98," they borrowed liberally from their principles as well as their rhetoric.<sup>4</sup>

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*Valparaiso University Law Review* (Winter 2006): 697-754; Christian G. Fritz, *American Sovereigns: The People and America's Constitutional Tradition before the Civil War*, Cambridge Studies on the Constitution (New York: Cambridge University Press, 2009); Christian G. Fritz, "A Constitutional Middle-Ground Between Revision and Revolution: A Reevaluation of the Nullification Crisis and the Virginia and Kentucky Resolutions through the Lens of Popular Sovereignty," in *Law as Culture and Culture as Law: Essays in Honor of John Phillip Reid*, ed. Hendrik Hartog and William E. Nelson (Madison, WI: Madison House Publishers, Inc. 2000).

<sup>4</sup>Because the phrase "Virginia and Kentucky Resolutions" refers to more than one document produced during the summer of 1798 through January of 1800, for clarity's sake, a note on various terms and the usage of those terms is helpful. When I generally refer to the "Virginia Resolutions," I am referring to the Virginia Resolutions of 1798, as passed by the Virginia House of Delegates on December 21, 1798," Yale Law School, *The Avalon Project: Documents in Law, History and Diplomacy*, [http://avalon.law.yale.edu/18th\\_century/virres.asp](http://avalon.law.yale.edu/18th_century/virres.asp) (hereinafter referred to as the "Virginia Resolutions of 1798") and the "Report of the Committee to whom were referred the Communications of various States, relative to the Resolutions of the last General Assembly of this State, concerning the Alien and Sedition Laws," Online Library of Liberty, <http://oll.libertyfund.org/titles/1908> (hereinafter, the "Report of 1800"). The changes made to Madison's drafts of the resolutions and the report he drafted for the Virginia House of Delegates in December of 1799 were not material and, therefore, references to the *Virginia Resolutions of 1798*, or to the *Report of 1800*, whether referred to collectively as the "Virginia Resolutions" or "Madison's Virginia Resolutions," are references to those two documents.

When generally referring to the "Kentucky Resolutions," I am referring to (1) the two surviving drafts of the Kentucky Resolutions authored by Thomas Jefferson, Jefferson's

The original drafts of what would become the *Virginia Resolutions of 1798* and the *Kentucky Resolutions of 1798* were anonymously written by James Madison and Thomas Jefferson, respectively, during the summer of that year in the immediate aftermath of the passage of the Alien and Sedition Acts by the Federalist-controlled Congress, and signed into law by President John Adams in June and July of 1798. The resolutions, adopted by Republican<sup>5</sup> majorities in the state legislatures of Virginia and Kentucky, condemned the Alien and Sedition Acts as being an unconstitutional exercise of powers and authorities not authorized by the Constitution and called on the states to take remedial action to ensure the Acts would not be enforced within their respective territories. Federalist-controlled state legislatures responded to the Virginia and Kentucky Resolutions with their own set of resolutions, each of which rejected the idea that the states could judge the constitutionality of actions of the federal government. In response to these rebukes, the Commonwealth of

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*Draft* and Jefferson's *Fair Copy* of the Kentucky Resolutions, consistent with the definitions used by Princeton University Press' on-line presentation of *The Papers of Thomas Jefferson*, 41 vols., ed., Barbara B. Oberg (Princeton: Princeton University Press, 2003), at <https://jeffersonpapers.princeton.edu/selected-documents/kentucky-resolutions-1798>), (2) the "Kentucky Resolutions of 1798, passed by the Kentucky General Assembly on November 10, 1798," Princeton University, *The Papers of Thomas Jefferson*, Vol. 30, <https://jeffersonpapers.princeton.edu/selected-documents/resolutions-adopted-kentucky-general-assembly>)(hereinafter the "*Kentucky Resolutions of 1798*"); and (3) "The Kentucky Resolutions of 1799, passed by the Kentucky General Assembly on December 3, 1799," Constitution Society, <http://www.constitution.org/cons/kent1799.htm> (hereinafter the "*Kentucky Resolutions of 1799*"). Because of the material changes made by the Kentucky legislature to Jefferson's *Fair Copy*, I distinguish Jefferson's *Draft* and *Fair Copy* of the Kentucky Resolutions from the actual resolutions passed by the Kentucky General Assembly in October of 1798 and in December of 1799, the latter being referred to as the *Kentucky Resolutions of 1798* and the *Kentucky Resolutions of 1799*, respectively. A general reference in my analysis to either the "Virginia and Kentucky Resolutions" or the "Resolves," collectively refers to all six documents.

<sup>5</sup>"Republicans" were sometimes referred to as "Democratic-Republicans" or "Jeffersonian Republicans," all of which refer to the political party formed by Jefferson and Madison during the 1790s in opposition to the "Federalist Party" of Alexander Hamilton and John Adams.

Kentucky passed additional resolutions in December of 1799 while the Commonwealth of Virginia issued its *Report of 1800*.

During the four decades following ratification the Constitution and the Bill of Rights, Federalists and Republicans constantly argued over the related concepts of popular sovereignty and federalism explicit and implicit in the new federal Constitution, and for those concerned with the growing power of the national government, the Virginia and Kentucky Resolutions became, according to H. Jefferson Powell, “canonical statements of the Constitution’s true meaning,” akin to a “constitutional *lingua franca*.”<sup>6</sup> Whenever political or legal events highlighted the Constitution’s ambiguities in the allocation of power between and among the new national government, the state governments and the *people*, the Virginia and Kentucky Resolutions were consistently invoked as the “Principles of ‘98.” Although more commonly associated by historians with the South Carolina nullifiers of the 1830s and Southern secessionists on the eve of the Civil War, even before Madison and Jefferson’s respective authorships of the Virginia and Kentucky Resolutions became widely known, the “Principles of ‘98” were embraced by political leaders by Republicans and Federalists alike when debating the proper division of sovereignty among and between the national government, the states and the *people*. Simply, the “Principles of ‘98” embodied one of the more dominant political and constitutional philosophies of the antebellum era.<sup>7</sup>

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<sup>6</sup>H. Jefferson Powell, “The Principles of ‘98: An Essay in Historical Retrieval,” 80 *Virginia Law Review*, Issue 3 (1994): 689-743, 694-95.

<sup>7</sup>John Taylor of Caroline publically disclosed Madison’s authorship of the Virginia Resolutions in 1809. Adrienne Koch and Harry Ammon, “The Virginia and Kentucky Resolutions: An Episode in Jefferson’s and Madison’s Defense of Liberties,” *William and Mary Quarterly*, Vol. 5, Issue 2 (1948): 145-76, 159. Jefferson’s role in drafting of the Kentucky Resolutions became generally known by the public in 1814 when John Taylor of

After victory in the War of Independence and only a few years under the Articles of Confederation, many observers concluded the national government under the Articles was inadequate to solve the new nation's fiscal crisis and create a nation worthy of competing with and being protected from the major European powers. This impetus to replace the Articles of Confederation and forge a stronger national government was the simple and natural extension of centralizing necessities that had become apparent from the outset of the War for Independence.<sup>8</sup>

As the new nation began its existence under the Constitution, the lessons learned during British colonial rule were still fresh in the minds of the participants. These lessons, imperfectly and inconsistently understood, would be the tools employed by political actors in the early republic as they commenced a truly revolutionary experiment to determine, as

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Caroline named Jefferson as the author of the resolutions in his *An Inquiry into the Principles and Policy of the Government of the United States* (Fredericksburg, VA: Green and Cady, 1814), 174, 649, <http://oll.libertyfund.org/titles/1308>. In 1821, Thomas Ritchie, the editor of the *Richmond Enquirer*, claimed that Jefferson was the author of the Kentucky Resolutions (*Richmond Enquirer*, 3 Aug., 4 Sep. 1821; Malone, *Jefferson*, 6:357-9). In response, Joseph Cabell Breckinridge, the son of John Breckinridge, the speaker of the Kentucky House of Representatives who introduced what would become the Kentucky Resolutions in the November of 1798, wrote Jefferson to confirm whether Ritchie's claims were true. On December 11, 1821, Jefferson admitted to the younger Breckinridge that he was the author. Despite these confirmations, Jefferson's role in the creation of the Kentucky Resolutions remained largely ignored until 1832, when nullification and states' rights became central issues. Amidst the furor over nullification, Thomas Jefferson Randolph, Jefferson's grandson, confirmed his grandfather's authorship and produced a copy of Jefferson's original draft for publication. Koch and Ammon, "The Virginia and Kentucky Resolutions," 147-49, and the Editorial Note accompanying *The Papers of Thomas Jefferson* (Princeton University Press, 2003), 529-56.

<sup>8</sup>Larry D. Kramer, "'The Interest of Man': James Madison, Popular Constitutionalism, and the Theory of Deliberative Democracy," *Valparaiso University Law Review*, 697. Willi Paul Adams, *The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era*, Translated by Rita and Robert Kimber (Lanham, MD: Rowman & Littlefield Publishers, Inc., 2006), 288-89. For an opposing point of view, see Woody Holton, *Unruly Americans and the Origins of the Constitution* (New York: Wang and Hill, 2007).

historian Willi Paul Adams described, whether the *people* could form a government that could effectively govern an economically and cultural diverse population, while successfully combining the *democratic* principle of majority rule, the *liberal* protection of minority and individual rights, with the *republican* principle of popular sovereignty.<sup>9</sup> Just how radical and threatening the idea of popular sovereignty was not lost on a London pamphleteer in 1778:

If the [British] constitution be only a delegation of the people, liable to their control and censure, and that the people are born with an inherent, inalienable supremacy, all governments that pretend to be absolute and uncontrollable are tyrannous, unjust encroachments on the natural right of mankind, and may justly be extirpated off the face of the earth when the sons of sedition think proper to set out on the meritorious crusade.<sup>10</sup>

The American version of the republican theory of popular sovereignty was stated in constitutionally binding form for the first time in the *Virginia Declaration of Rights* of rights of June 1776: “All power is vested in, and consequently derived from, the people.”<sup>11</sup> Delaware’s state constitution, the first to be adopted after independence from Great Britain had been declared, was particularly concise: “All Government of Right originates from the people, is founded in Compact only, and instituted solely for the Good of the Whole.” Therefore, “Persons entrusted with the legislative and executive Powers are the Trustees

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<sup>9</sup>Adams, *The First American Constitutions*, 301-14.

<sup>10</sup>Ibid, 127, citing G. Usher’s, *Republican Letters: An Essay, showing the Evil Tendency of the Popular Principle; Proving that a Republic is more dangerous to the Liberties of the People than a Monarch; and that it is our interest to support our present free Constitution* (London, 1778).

<sup>11</sup>Francis Newton Thorpe, ed., *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America*, 7 Volumes (Washington, D.C.: Government Printing Office, 1909), VII, 3813.

and Servants of the Public, and as such accountable for their Conduct.”<sup>12</sup> Pennsylvania, North Carolina, Georgia and New York each adopted language similar to either Virginia’s or Delaware’s definition.<sup>13</sup>

Whig social contract theory specified that popular sovereignty resided in the will of the majority of the participants in the contract, limited only by the individual’s right to life, liberty, and property. Applied to the colonies, the question was who were the legitimate participants in the new political social order? Was there one, great American “people” or maybe thirteen “peoples,” the largest number of whom could claim the sovereignty to decide questions of life, liberty and property?<sup>14</sup> And what of the colonies or states themselves? The Massachusetts Bill of Rights of 1780, drafted by John Adams, explained *state* sovereignty as the collective authority of the people of the states unless “expressly delegated” to the United States government:

The people of this Commonwealth have the sole and exclusive right of governing themselves as a free, sovereign, and independent state; and do, and forever hereafter shall exercise and enjoy every power, jurisdiction, and right, which is not, or may not thereafter, be by them expressly delegated to the United States, in Congress assembled.<sup>15</sup>

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The principal theme of this dissertation is the constitutional relationship between *popular sovereignty* and *federalism* during the early republic as explicated by the colorful

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<sup>12</sup>*Proceedings of the Convention of the Delaware State Held at New-Castle On Tuesday the Twenty-seventh of August 1776* (Wilmington, DE: James Adams, 1776, repr., Wilmington, DE: The Star Publishing Co., 1927), 17-18.

<sup>13</sup>Thorpe, ed., *The Federal and State Constitutions*, V, 3082-3083; III, 1686-1687; V, 2787; II, 788; V, 2628.

<sup>14</sup>Adams, *The First American Constitutions*, 131.

<sup>15</sup>Robert J. Taylor, ed., *Massachusetts, Colony to Commonwealth: Documents on the Formation of Its Constitution, 1775-1780* (Chapel Hill: University of North Carolina Press, 1961), 129.

and largely ignored history of Virginia and Kentucky Resolutions and the Principles of '98. In certain dramatic instances, arguments over the true meaning of the Virginia and Kentucky Resolutions became inseparable from the arguments over the meaning of the Constitution. These arguments not only illuminated the evolving understanding of the proper relationship between the federal and state governments under the new Constitution, but also the true meaning of the revolutionary idea that the *people* were the ultimate sovereigns of the United States. The rhetorical deployment of the Virginia and Kentucky Resolutions and the Principles of '98 in constitutional disputes demanded that the participants define whether the notion of popular sovereignty was simply mystical and symbolic or whether it imbued the *people* with certain fundamental rights, including the right to interpret the Constitution and resist unconstitutional actions of the federal government, not by invoking a natural law right to revolution outside of the boundaries of the Constitution, but within the legitimate confines of the Constitution. The deployment of the Virginia and Kentucky Resolutions also required participants in constitutional disputes to debate the nature and origin of the Union. Was the Union created by one, great American "People," the "people of the several states," or was it created by the state governments? If the "people" were the ultimate sovereigns of the nation and the creators of the Union, what role did they have in constitutional interpretation and what remedies, if any, did the popular sovereign have in response to unconstitutional actions of the federal government? Answers to these questions had significant implications for interpreters of the Constitution, including the Supreme Court of the United States. As law professor Martin Flaherty observed:

Common sense and intuition indicate that although a sovereign may not be compelled to create a regime in its own image, chances are it will. It would be

odd for a nationally oriented lawgiver not to create a nationally oriented government, or a state-oriented counterpart not to guard state authority, or an inter-mediate sovereign not to settle for some set of compromises. These presumptions might well be rebutted in specific instances . . . [but] such departures, however, would do nothing to refute an overall supposition that the states readily gave away authority to a rival center of power without a compelling reason. The popular sovereignty question can never replace further analysis of a particular issue, yet it remains a vital foundational inquiry nonetheless.<sup>16</sup>

The meaning of popular sovereignty, federalism and the division of power between the national and state governments has enormous contemporary significance. As Chief Justice John G. Roberts noted in the his majority opinion upholding the Affordable Care Act, “Nearly two centuries ago, Chief Justice Marshall observed that ‘the question respecting the extent of the powers actually granted’ to the Federal Government ‘is perpetually arising, and will probably continue to arise, as long as our system shall exist.’”<sup>17</sup> Amidst the recent political furor and legal battles in response to comprehensive health insurance legislation, immigration reform, legalization and decriminalization of marijuana and same-sex marriage, issues of federalism, states’ rights and the meaning of Madison’s and Jefferson’s Virginia and Kentucky Resolutions and the “Principles of ‘98” have gained political

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<sup>16</sup>Martin S. Flaherty, “John Marshall, *McCulloch v. Maryland* and ‘We the People’: Revisions in Need of Revising,” 43 *William & Mary Law Review* (2002): 1339-1397, 1354. For recent monographs exploring the role of the *people* as ultimate sovereigns under the Constitution, see, for example, Fritz, *American Sovereigns*; Kramer, *The People Themselves*; Bruce Ackerman, *We the People: Volume 1, Foundations*. (Cambridge: Belknap Press of Harvard University Press, 2005); and Akhil Reed Amar, *America’s Constitution: A Biography* (New York: Random House, 2005).

<sup>17</sup>*National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566, 2577 (2012), quoting Marshall’s opinion in *McCulloch v. Maryland*, 4 Wheat 316, 405 (1819). In 2010, Congress enacted the Patient Protection and Affordable Care Act of 2010 with the stated goal of increasing the number of Americans covered by health insurance and decreasing the cost of health care. Two of the more controversial provisions of the Act—the individual mandate, which requires individuals to purchase health insurance providing a minimum level of coverage, and Medicaid expansion—were upheld by a 5-4 decision of the Supreme Court.

currency. Theories of “nullification,” “interposition” and even murmurs of “secession” reentered what constitutes mainstream political discourse in a manner not seen since the 1950s and 1960s when white supremacists attempted to defeat federal efforts to racially integrate public schools, public accommodations, housing, employment and voting. Perceived by adherents as sufficiently untethered from the legacy of white supremacy, racism, slavery and Southern secession, Madison’s and Jefferson’s Virginia and Kentucky Resolutions are being cited once again to legitimize renewed arguments over federalism and states’ rights and imbue them with an “ancient and honorable ancestry.”<sup>18</sup>

While social liberals historically supported increasing the power of the federal government and the Supreme Court in support of their agenda, the combination of relative Republican success in presidential elections since the 1970s, a conservative majority on the Supreme Court since 1991, and an intermittent stream of Republican Congresses since 1994, forced social liberals to seek refuge in selective state legislatures and state courts to promote their agenda on issues such as same-sex marriage, assisted suicide and the

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<sup>18</sup>James Morton Smith, “The Grass Roots Origins of the Kentucky Resolutions,” 27 *William and Mary Quarterly*, No. 2 (1970): 221-45, 222. In response to the Obama Administration’s stimulus bill and the passage of the Affordable Care Act, many state legislatures considered some form of “state sovereignty resolution,” and even nullification bills, which would mandate state action against what the state legislature perceives as unconstitutional federal legislation. See “10<sup>th</sup> Amendment Bills—Tenth Amendment Center.” *Tenthamendmentcenter.com*. For example, South Carolina’s Nullification Bill that passed the state house on May 1, 2013, contained the following summary: “ A BILL TO AMEND THE CODE OF LAWS OF SOUTH CAROLINA, 1976, SO AS TO ENACT THE “SOUTH CAROLINA FREEDOM OF HEALTH CARE PROTECTION ACT” BY ADDING ARTICLE 21 TO CHAPTER 71, TITLE 38 SO AS TO RENDER NULL AND VOID CERTAIN UNCONSTITUTIONAL LAWS ENACTED BY THE CONGRESS OF THE UNITED STATES TAKING CONTROL OVER THE HEALTH INSURANCE INDUSTRY AND MANDATING THAT INDIVIDUALS PURCHASE HEALTH INSURANCE UNDER THREAT OF PENALTY; TO PROHIBIT CERTAIN INDIVIDUALS FROM ENFORCING OR ATTEMPTING TO ENFORCE SUCH UNCONSTITUTIONAL LAWS; AND TO ESTABLISH CRIMINAL PENALTIES AND CIVIL LIABILITY FOR VIOLATING THIS ARTICLE.

medicinal use of marijuana. Likewise, social conservatives, frustrated by the Supreme Court's failure to "adequately" restrict abortion rights, and frustrated by the repeated failures of Republican and Democratic Congresses to effectively address illegal immigration, used selective state legislatures and state courts to force a federal response on these issues and challenge the limits of federal power.

To the extent the original meaning, intention and understanding of federalism in the early republic is a legitimate guide for judges and policymakers, such political actors must appreciate the extent to which, in response to intense political and cultural pressure, the legal distribution of power between the *people*, the states and the federal government constantly shifted during the early republic, as well as the justifications for their distribution.

Events during the four decades after ratification of the Constitution starkly illustrated that the supremacy of the federal government over the states and the *people* was far from settled and consistently challenged. Rather, when a strong federal government was the best mechanism to deliver immediate and tangible results, Republicans and Federalists alike, along with their political successors, discarded any modicum of constitutional purity and forged ahead. When, however, the *people* or a particular state legitimately feared that ceding permanent supremacy to the national government on a particular issue might not inure to its short- or long-term benefit, or might be used as precedent to support permanent supremacy in another area of concern, the states and the *people* often pushed back.

My dissertation disagrees with the dominant historical interpretation of Madison and Jefferson's respective Virginia and Kentucky Resolutions in at least three significant

respects. First, I argue that the Principles of '98, even if imperfectly understood by both adherents and opponents, were far from radical for their time, and reflected mainstream political thought and understanding for much of the Republican Party during the period 1798-1834. My dissertation assesses the Virginia and Kentucky Resolutions on their own terms, in their own time, and illustrates that the arguments made by Madison and Jefferson were not the exclusive domain of Calhoun and his nullifiers or southern secessionists. For many of Madison and Jefferson's contemporaries, the issue of who were the proper parties to the constitutional compact and what implicit rights and remedies such contracting parties held were fundamental. At one end of the spectrum, contemporaries argued that the phrase "United States" was two distinct words, the first, an adjective, and the second, the sole noun, and the nation constituted a confederated system of "nation" states. This was Jefferson's view, and his *Draft and Fair Copy* reflected his determination that with respect to those powers not delegated to the federal government, the country still remained a confederation of states. At the other end of spectrum was the belief, championed by James Wilson at the founding, and in 1830 by Daniel Webster, that the "United States" was a one proper noun, one country formed by one, great national people, who ratified a unified federal system dominated by a national government that was intended to speak for, and reflect the desires of, all Americans. Between these two positions sat James Madison, who argued that it was neither. On the one hand, the states were longer separate nations and distinct sovereignties as under the Articles of Confederation, but on the other hand, the *people*, as one great mass of American citizens, did not create the Constitution. Rather, thirteen distinct groups of *people*, acting in their highest sovereign capacity, collectively came together during the ratification process to create a more perfect union. Judged in the

context of the last decades of the eighteenth century, neither theory was truly radical but rather natural extensions of applying existing legal principles and theories to the burgeoning American experiment in republican and constitutional government.

Second, my dissertation argues that Madison and Jefferson's respective compact theories of the Constitution differed significantly more than previously recognized and appreciated by scholars. An overwhelming number of scholars devoting any meaningful analysis to the Virginia and Kentucky Resolutions almost unanimously interpreted Madison and Jefferson as advocating, with a few subtle differences, a fairly consistent and unified theory of state resistance to unconstitutional actions of the federal government. After all, each founder described the Constitution as a *compact* between "the states" and each deployed a state legislature to declare an act of Congress as unconstitutional. These scholars inevitably interpreted Madison's remedy of interposition and Jefferson's remedy of nullification as having little meaningful difference. The few scholars contrasting Madison's compact theory with Jefferson's do so largely based on their interpretation that Madison's theory of interposition was materially different than Jefferson's theory of nullification, i.e., Madison's compact theory of the Constitution was less radical because his remedy of interposition was less threatening to the Union than the Jefferson's remedy of nullification. I argue that Madison and Jefferson's respective visions of such constitutional compact differ significantly more than previously identified, reflecting Madison's and Jefferson's fundamentally differing views of the parties to the constitutional compact and the remedies available to such parties in response to alleged unconstitutional actions of the national government.

I also conclude that, despite the use of similar language in their respective resolutions and private correspondences, Madison and Jefferson approached the presumed unconstitutionality of the Alien and Seditions Acts from very different perspectives. While Madison's emphasized the rights and authorities of the *people* as sovereigns, Jefferson emphasized the rights and authorities of the states, as represented by its state government. Jefferson interpreted the Constitution as a legal contract by, between and among the original thirteen states, akin to a treaty between thirteen independent nation states, and applied legal concepts drawn from the law of nations and customary law applicable to treaties between independent sovereigns. For Jefferson, the principle issue during the Alien and Sedition Act crisis was whether the co-states, through the people's representatives in House and the states' representatives in the Senate, had violated the compact between the states by enacting legislation that granted power to the federal government that had not been delegated by the states. Madison, while similarly describing the Constitution as a "compact between the states," never embraced Jefferson's legalistic view of the founding document and saw the Constitution as creating a very different relationship between the *people*, states and the federal government. For Madison, the principle issue at stake during the Alien and Sedition Act crisis was whether the *people* could be prevented from fulfilling their role as ultimate sovereigns of the nation.

My third significant disagreement with many historians and scholars is my rejection of the standard historical notion of "two Madisons," one who advocated a strong national government in the 1780s and 1830s while the other primarily defended states' rights in the 1790s. Whether based on the conclusion that Madison was a typical political actor hypocritically pursuing his own political best interests or the more complementary

interpretation that he sometimes advocated inconsistent positions regarding federalism in some mythic quest to maintain “equilibrium” between federal and state power, advocates of the “two Madisons” largely miss the consistency of his political thought in both the Virginia Resolves and his debate with nullifiers in the 1830s. Recent scholars have successfully challenged the correctness of the “two Madisons” theory and effectively shown that Madison’s support of a stronger national government under the newly ratified Constitution did not materially waiver during this period. I build on this scholarship and explain that his Virginia Resolutions were not an attempt to limit the Constitutional power and authority of the national government, but simply a demand that the national government respect the constitutional limits imposed on it. His Virginia Resolutions, while taking the government to task for exceeding its constitutional authority, says less about his concerns with issues of federalism and more about his unwavering commitment to empowering and challenging the *people* to effectively fulfill their role as ultimate sovereigns. Madison especially abhorred the Sedition Act because it so fundamentally attacked and undermined the *people’s* ability to fulfill this obligation.<sup>19</sup>

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<sup>19</sup>Even recent scholarship that rejects the “two Madisons” theory interpreted Madison’s remedy of interposition and Jefferson’s remedy of state nullification as synonymous, each of which reflected a new consensus among Republicans in 1798. See Robert H. Churchill, “Popular Nullification, Fries’ Rebellion, and the Waning of Radical Republicanism, 67 *Pennsylvania History* (2000): 105-140. For a discussion of Madison’s philosophy during this era, see Robert W. T. Martin, *Government by Dissent: Protest, Resistance, and Radical Democratic Thought in the Early American Republic* (New York: New York University Press, 2013), Kindle edition; Colleen A. Sheehan, *James Madison and the Spirit of Republican Self-Government* (New York: Cambridge University Press, 2009); Kramer, “‘The Interest of Man’;” Colleen A. Sheehan, “Public Opinion and the Formation of Civic Character in Madison’s Republican Theory,” 67 *Review of Politics* (2005): 37-48; Colleen A. Sheehan, “Madison and the French Enlightenment: The Authority of Public Opinion,” 59 *William and Mary Quarterly*, Issue 4 (2002): 925-956; Alan Gibson, “Madison on Democracy, Property and Civic Education: A Reply to Matthews and Sheehan,” *Review of*

During the course of my research on the legacy of the Virginia and Kentucky Resolutions during the antebellum era, I found two recurring themes not normally associated with discussions of federalism, states' rights and alleged encroachments by the national government on the prerogatives of the *people* and the states. First, the actions that politicians, newspaper editors and judges took or did not take in response to unconstitutional actions of the national government were materially impacted by the more parochial political considerations existing within their respective states.<sup>20</sup> Thus, even when agreeing with the substantive merits of a particular challenge to the constitutionality of a particular action of the federal government, whether or not political actors in a particular state would aggressively challenge actions of the federal government often was dictated by whether a state was in the midst of procuring certain benefits from the federal government or had its own separate grievance with the federal government. Not surprising, local politicians sometimes were heavily influenced by a desire to enhance their own political fortunes in an upcoming state or local election. After all, many of the actors in this narrative were practical politicians of ambition who behaved similarly to our current bumper crop of politicians—positions often were taken based not on pure principle but on what might be beneficial to their own state or popular among their electorate, and they were not shy in seizing on the perceived blunders committed by their political opponents. After all, the

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*Politics* 67 (2005): 69–76; Alan Gibson, “Veneration and Vigilance: James Madison and Public Opinion, 1785–1800,” *Review of Politics* 67 (2005): 5–36.

<sup>20</sup>Depending on the issue, we tend to think of politicians as either being significantly better or significantly worse than politicians of our own time. On the one hand, the political leaders of the past were racist, misogynistic, violent, venal and corrupt. On the other hand, they were brighter, better educated, and often able to rise above the venality and corruption of their times and act in the best interests of the country. This schizophrenic view of historical political actors is well portrayed in Steven Spielberg’s recent motion picture, *Lincoln*.

prestige derived from state political office, and the spoils that could be derived therefrom, often were much greater than that which might be derived from federal political office. Specific actions taken or not taken, therefore, by Federalists in Massachusetts in protest of the national government's actions during the War of 1812, often reflected how such actions might affect their political fortunes within Massachusetts regardless of how such actions might affect the Federalist Party in upcoming national elections. Thus, the failure of other states to join arms with a sister state's battle with the national government often had little to do the legitimacy of that sister state's particular grievance and adherence to the Principles of '98, but more to do with such states own set of issues with the national government. Consider for instance, the actions of Daniel Webster of Massachusetts during the Nullification Crisis. Usually cast in popular lore as the champion of the Union in advance of the Civil War, he is generally praised and admired for his principled defense of the Union during the Webster-Hayne debates in 1830 when he exhorted "Liberty and Union, now and for ever, one and inseparable!" According to historian Harlow Sheidley, Webster's principal motive for his support of the Tariff of 1828 (despite opposing similar tariffs in 1816 and 1824), and his stirring defense of the Union, was in furtherance of Massachusetts conservatives who were seeking to regain national leadership and erase the treasonous stain left by the Hartford Convention seventeen years earlier.<sup>21</sup> Likewise, Georgia's decision not to actively support South Carolina's protest of the exorbitant protective tariffs was heavily influenced by internal political rivalries and its on-going wrestling match with the federal government over Indian rights and Indian removal. Georgia was counting on

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<sup>21</sup>Harlow W. Sheidley, "The Webster-Hayne Debate: Recasting New England's Sectionalism," *New England Quarterly*, Vol. 67, No. 1 (1994): 5-29.

President Jackson's support of its desires to be rid of the Cherokees and hesitated to do anything that would antagonize Old Hickory.<sup>22</sup>

Second, while many of the well-known disputes between the *people*, the states and the national government involved southern states, many challenges to the power of the federal government during this era involved northern and western states. Because these examples do not fit the narrative leading to the Civil War, these challenges to the federal government are marginalized as obscure and isolated examples of the unsophisticated rough-and-tumble of early American politics. Consequently, instances of popular resistance such as the "Whiskey" and "Fries" rebellions, and the protests in response to the Alien and Sedition Acts, are treated as unrelated events. Likewise, Pennsylvanians, including its governor and state legislature, who later attempted to effectively nullify a federal court decision and called out its state militia to resist the federal government's efforts to enforce its decision in *United States v. Peters* (1809),<sup>23</sup> and the citizens and government of Ohio who defied the Supreme Court's decision in *McCulloch v. Maryland*<sup>24</sup> for almost five years are but footnotes in the narrative of the John Marshall's "heroic" effort to forge a great nation.<sup>25</sup>

Modern sensibilities largely reject any notion that the *people* or the states should have the power to nullify a federal law. Would not such a right create a political gridlock that would render today's hapless version of national politics child's play? While we are largely comfortable with individual citizens using their First Amendment rights to protest

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<sup>22</sup>See discussion in Chapter 8.

<sup>23</sup>*United States v. Peters*, 9 U.S. 115 (1809).

<sup>24</sup>*McCulloch v. Maryland*, 17 U.S. 316 (1819).

<sup>25</sup>For a discussion of *Peters*, see Chapter 7. For an example of scholarship extolling John Marshall's jurisprudence and the grand nationalist narrative, see R. Kent Newmyer, *John Marshall and the Heroic Age of the Supreme Court* (Baton Rouge: Louisiana State University, 2001), 267-321.

American involvement in the war in Vietnam, racial segregation in the United States, apartheid in South Africa, military involvement in Central America, the spread of nuclear weapons, rights for the homeless, for and against reproductive rights, excessive government spending, and Wall Street corruption, we remain highly uncomfortable with the *people* exercising any real constitutional authority as ultimate sovereigns outside of election day. Once elections are decided, we want the *people* to quickly retreat into the role of simple consumers of political decisions produced in Congress and in state legislatures. While some individual and collective action of the *people* is clearly acceptable to modern sensibilities, somehow the prospect that the *people* might choose to constitutionally challenge or frustrate efforts of the national government through their respective state governments is deemed less legitimate and even a chilling thought, invoking black and white images of the open-mouth dead at Antietam or the bodies of four black school girls being pulled out of a bombed-out Sunday school class in the basement of a Birmingham church.

Like most analysis of historical events, the greatest challenge to the historian is to reconstruct the context in which historical events takes place, divorced from subsequent events that too often are deemed inexorable. Few subjects in U.S. history carry greater challenges than that of federalism, states' rights and its philosophical first cousins, the Virginia and Kentucky Resolutions. Hobbled by its historical linkage to slavery, southern secession and white supremacy, it is difficult to assess the principles embodied in the Resolves on their own terms and in their own time. Admittedly, historical respect for the Principles of '98 also suffered from the ambiguity surrounding its express and implied remedies—interposition, nullification, and secession—in response to unconstitutional

actions of the national government. To modern sensibilities and memory, none of these remedies have any meaningful precedent in American history outside of the Nullification Crisis, the Civil War and state resistance to public school integration during the 1950s and 1960s. Thus, any historical understanding with respect to the Principles of '98 and issue of remedies available to the *people* or the states in the face of unconstitutional actions of the federal government is often, if not always, blurred by this largely shameful history.

Even now, taking place during the second term of the country's first black President, the invocation of states' rights, nullification and interposition during a highly partisan and contentious period in American political history, it is difficult or practically impossible to assess issues of federal versus state power without detecting from certain tea party advocates and certain anti-immigration zealots the whiff of racism while their political opponents use the "bloody shirt" of historical states' rights theory, slavery and white supremacy to muzzle substantive discussions on issues containing elements of states' rights theory. Lost amidst the equally vitriolic cries of protest expressed by advocates for or against health care reform and controversial state measures impacting on illegal and legal immigrants, are the efforts of certain state governments to legalize same-sex marriage and assisted suicide or legalize or decriminalize the possession and use of marijuana. Each of these issues has been a vibrant part of the current national debate on the meaning of personal liberty only because, even now, the Constitution continues to recognize some residual and respected role for "states' rights" in our current constitutional system.

The history of the Virginia and Kentucky Resolutions during the early republic may appear to be anecdotal or episodic in nature but I reject the notion that the Resolves appeared or reappeared only occasionally. The major clashes between the national

government and the states were necessarily sporadic simply due to the fact that the national government did not routinely flex its ever-growing muscles over issues strongly disfavored by the states. In addition, while strict adherents to the “Principles of ‘98” may have been troubled by Jefferson’s unprecedented use of executive power in effectuating a dramatic westward expansion of the United States via the Louisiana Purchase, unconstitutional actions of the federal government rarely raised the hackles among adherents of the Principles of ‘98 if such actions served the self-interest of a particular state or was not perceived as a material threat to state sovereignty or the ultimate sovereignty of the *people*.

## 2 HISTORIOGRAPHY

Historical interpretations of the Virginia and Kentucky Resolutions focusing on popular and state resistance to unconstitutional actions of the federal government, including Madison's and Jefferson's flirtations with interposition, nullification and secession, often are painted with one of two broad interpretive brushes. On the one hand, certain scholars dismissed the Virginia and Kentucky Resolutions as political rhetoric cloaked as constitutional theory, and driven by Madison and Jefferson's practical need to combat Federalist measures in advance of the 1800 elections. Under this interpretation, the Resolutions had little long-term constitutional or historical significance. On the other hand, other scholars who interpret the Virginia and Kentucky Resolutions as the birth of an aggressive states' rights constitutionalism in defense of personal liberty that later would be coopted by Southern slaveholders and their supporters who feared that Northern domination of the federal government eventually would lead to a direct assault on chattel slavery and the Southern way of life.<sup>1</sup> Under both interpretations, when the immediate exigencies faded away with Jefferson's election in 1800, the Resolutions and the Principles

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<sup>1</sup>Historical accounts that focus on immediate practical political necessity of the Resolutions, see Lance Banning, *The Jeffersonian Persuasion: Evolving a Party Ideology* (Ithaca: Cornell University Press, 1978); Richard Buel, Jr., *Securing the Revolution: Ideology in American Politics, 1789-1815* (Ithaca: Cornell University Press, 1972); Stanley Elkins and Eric McKittrick, *The Age of Federalism: The Early American Republic, 1788-1800* (New York: Oxford University Press, 1993); Dumas Malone, *Jefferson and the Ordeal of Liberty* (Boston: Little, Brown, and Company, 1962) and Smith, "The Grass Roots Origins of the Kentucky Resolutions." Interpretations stressing the libertarian aspects of the Resolves and the Principles of '98 include Richard R. Beeman, *The Old Dominion and the New Nation, 1788-1801* (Lexington: University Press of Kentucky, 1972); Koch and Ammon, "The Virginia and Kentucky Resolutions;" and James Rogers Sharp, *American Politics in the Early Republic: The New Nation of Crisis* (New Haven: Yale University Press, 1993).

of '98 largely disappeared from the national political stage until pulled out of the rhetorical mothballs by John C. Calhoun and his radical nullifiers in the 1830s.

Likewise, historical biographers of Madison and Jefferson, or scholars focusing on their respective political philosophies, largely explain away the Virginia and Kentucky Resolutions as inconsistent with Madison and Jefferson's more general political and constitutional philosophies or claim their successors misconstrued their meaning. On the one hand, the Resolves regrettably reflected Madison and Jefferson at their political worst, irresponsibly advocating a theory of states' rights that ultimately posed a greater threat to the Union and to liberty than the Alien and Sedition Acts themselves.<sup>2</sup> On the other hand, the Resolves were a provocative but reasonable statement of protest that later was pilfered by radical pro-slavery Southern nullifiers in a failed attempt to raise the Principles of '98 to the level of legitimate constitutional doctrine. While Jefferson was not around to weigh in on Calhoun's theory of nullification, they implied, if Jefferson had been, surely he would have joined with Madison in scolding Calhoun for his dangerous bastardization of the Principles of '98.<sup>3</sup>

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<sup>2</sup>James Morton Smith, *Freedom's Fetters: The Alien and Sedition Laws and American Civil Liberties*; Merrill D. Peterson, *Thomas Jefferson and the New Nation: A Biography* (New York: Oxford University Press, 1970); Gary Wills, *James Madison*, The American Presidents Series (New York: Henry Holt and Company, LLC, 2002); Ron Chernow, *Alexander Hamilton* (New York: Penguin Press, 2004); Stephen F. Knott, *Alexander Hamilton and the Persistence of Myth*, American Political Thought (Lawrence: University Press of Kansas, 2002); Kevin R. Gutzman, "A Troublesome Legacy: James Madison and the Principles of '98," *Journal of the Early Republic*, XV (1995): 569-589.

<sup>3</sup>See, for example, Koch and Ammon, "The Virginia and Kentucky Resolutions," 145-76; Richard E. Ellis, *The Union at Risk: Jacksonian Democracy, States' Rights, and the Nullification Crisis* (New York: Oxford University Press, 1987); Brian Steele, "Thomas Jefferson, Coercion, and the Limits of Harmonious Union," *Journal of Southern History*, Vol. 66, No. 4 (2008): 823-54.

Ironically, Madison's actual verbal jousting with Calhounites during the 1830s has often been interpreted less favorably than Jefferson's theoretical one. Whereas Jefferson's *Draft and Fair Copy* often have been characterized as unsupportive of Calhoun's theory of state nullification, Madison's rhetorical tussle with Calhoun and his disciples often has been cited as evidence of Madison's inconsistency, even hypocrisy, on issues related to federalism. According to this fairly dominant narrative, Madison, frightened by popular politics during the 1780s, came to believe that majority rule threatened to ruin the new nation. Having witnessed first-hand the unsavory rough and tumble of politics in the Virginia legislature during the critical years just after the Revolution, Madison viewed "democracy" as something that needed to be controlled, a view that would be one of his principle impetuses for proposing a strengthening of the national government, an impulse ultimately leading to the ratification of the new constitution. Then, with the passage of just a few years, in the face of a perceived train of abuses by the federal government, instigated by an ambitious Alexander Hamilton and a monarchical and elitist John Adams, Madison rallied behind the banner of states' rights in order to ward off the forces of consolidation and restore a proper balance among the *people*, the states and the national government. Thirty years later, when Calhoun and his disciples effectively threatened the Union, Madison, fearing disunion, flip-flopped and betrayed his Principles of '98 by once again championing the prerogatives of the federal government.<sup>4</sup>

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<sup>4</sup>See Larry D. Kramer, "The Interest of Man': James Madison, Popular Constitutionalism, and the Theory of Deliberative Democracy," 41 *Valparaiso University Law Review* 697 (Winter 2006): 697-754, 704, n8, citing Geoffrey R. Stone et al, *Constitutional Law*, 5th Ed., Aspen Casebook Series (New York: Aspen Publishers (5th ed. 2005), 12-26; Larry D. Kramer, "Madison's Audience," 112 *Harvard Law Review* (2001): 611-679, 612-14; Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (New York: Random House, Inc., 1996), 35-56; Gordon S. Wood, "Interests and

Despite the renown of its authors and the invocation of the Virginia and Kentucky Resolutions and the Principles of '98 throughout the early decades of the republic, surprisingly few full-length monographs have been principally devoted to the Resolves and their impact on the legal and political discourse of the early republic. Ethelbert Dudley Warfield's book-length history of Kentucky Resolutions, published in 1887, undoubtedly was inspired by his ancestral link to one of the major players in the drama of 1798.<sup>5</sup> Born in Lexington, Kentucky, just months before the end of the Civil War and buried there in 1936, Warfield was the great grandson of John Breckinridge, the speaker of the Kentucky House of Representatives who sponsored the *Kentucky Resolutions of 1798* and *of 1799*. Inspired "by a sense of the inadequacy of the historical accounts of the Kentucky Resolutions of 1798" by writers he concluded competed "with each other in reiterating the mistakes of all those who preceded them," Warfield's primary goals were to pay tribute to his great grandfather, set forth the case that his grandfather, and not Thomas Jefferson, should be

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Disinterestedness in the Making of the Constitution," in Richard Beeman, Stephen Botein and Edward C. Carter, eds., *Beyond Confederation: Origins of the Constitution and American Identity*, The Omobundro Institute of Early American History and Culture (Chapel Hill: The University of North Carolina Press, 1987), 69-93. For an interpretation that Madison's "flip-flopping" reflected Madison's life-long desire to maintain a proper balance of power among the federal government, the States and the *people*, see Donald Burke, "James Madison's Dystopian Vision: The Failure of Equilibrium," 43 *American Journal of Legal History* (1999): 254-279.

<sup>5</sup>Ethelbert Dudley Warfield, *The Kentucky Resolutions of 1798: An Historical Study* (New York: G. P. Putnam & Sons, 1887, repr., Laverne, TN: BiblioLife, LLC, 2012). Warfield, an American professor of history and president of Miami University, is likely less remembered for his take on the Kentucky Resolves than for bringing collegiate football to Oxford, Ohio in 1888. To modern college and professional football enthusiasts, Miami of Ohio is known as the "Cradle of [Football] Coaches," producing an impressive list of college coaches, including Army's legendary Earl "Red" Blaik, Ohio State's Woody Hayes, Notre Dame's Ara Parseghian, and Michigan's Bo Schembechler. Its list of former coaches who made their mark in professional football is equally impressive—Cleveland's Paul Brown, New York Jet's Week Ewbank, San Diego's Sid Gillman along with recent Super Bowl-winning coaches Sean Payton of the New Orleans Saints and John Harbaugh of the Baltimore Ravens.

credited as the primary author of the *Kentucky Resolutions of 1798*, and remind readers of the importance of the Kentucky Resolves to the history of the early republic.<sup>6</sup>

Warfield focused most of his attention on the process by which the Virginia and Kentucky Resolves were crafted during the fall of 1798 and put forth a passionate but biased brief for the conclusion that John Breckinridge, and not Thomas Jefferson, should receive the lion's share of credit for authorship of the *Kentucky Resolutions of 1798* despite Breckinridge's somewhat limited changes to Jefferson's draft text. Warfield ended his book with a brief discussion of the Nullification Crisis and a summary of Madison's objections to South Carolina's reliance on the Kentucky Resolves. Warfield concluded that the Nullifiers fairly interpreted the Principles of '98, as expressed in the Kentucky Resolutions, and that their reliance on the Resolves was done in good faith, with "all candor and with the highest confidence."<sup>7</sup> Despite crediting his grandfather as the principle author of the *Kentucky Resolutions of 1798*, Warfield readily acknowledged that the Kentucky Resolves could be interpreted as the basis for secession in 1860:

If [the Kentucky Resolutions] are to be taken as meaning that upon any grievance, real or fancied, against the general government, or against any individual State, a State has the indefeasible right to proceed to act in a sovereign capacity as it shall see fit, or that instantly upon the assumption this right to judge it may remain, or cease to be, a member of the federation as it shall elect, then here is the fully-fledged doctrine of States' rights. Each State has the "right to judge" "of infractions," and also "of the mode and measure of redress." [The Kentucky Resolutions] would seem to give the Union no firmer tie than that of any league of States for whatever purposes

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<sup>6</sup>Warfield may have been one of the first historians to summarize the "two Madisons": "In his early life his position leaned rather towards the conservative and centralizing party, and in the last years of his life he returned to the same position, but under the influence of his great chief and the irresistible current of opinion in Virginia he assumed from the time of the first Congress forth a position not to be distinguished from that of Mr. Jefferson so long as the latter lived." Warfield, *The Kentucky Resolutions of 1798*, 5.

<sup>7</sup>Warfield, *The Kentucky Resolutions of 1798*, 195-96.

united, and to depend for permanence solely on the forbearance of the individual States.<sup>8</sup>

Warfield rejected this interpretation, however, because the spirit of the entire Kentucky Resolutions “indicates a tendency to depend, not on the will of any one State in such an issue as was then before the country, but upon the determination of the States.”<sup>9</sup>

Caleb William Loring followed Warfield’s shortly thereafter with a slighter volume that is less an antebellum history of the Principles of ‘98 than a regurgitation of the Senate debates between nationalist Daniel Webster of Massachusetts and nullification supporter Robert Y. Hayne of South Carolina in January of 1830.<sup>10</sup> Loring sided squarely with Webster’s argument that “a national union was established by the States” rather than a “confederacy of independent nations formed with the right of each to decide upon the validity of the acts of the General Government and leave at its pleasure.”<sup>11</sup> Loring was inspired to write his book after reading a life of Webster by Henry Cabot Lodge wherein Lodge argued that “Hayne had the right of the argument in the renowned debate on

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<sup>8</sup>Ibid, 180.

<sup>9</sup>Ibid.

<sup>10</sup>Caleb William Loring, *Nullification, Secession, Webster’s Argument and The Kentucky Resolutions: Considered In Reference To the Constitution And Historically* (New York: G. P. Putnam & Sons, 1893, repr., Kessinger Publishing, n.d.). At the time he authored *Nullification, Secession, . . .* Loring was a partner in the Boston law firm of Ropes, Gray, after serving three years as Assistant Attorney General for Massachusetts. On September 7, 1899, Loring was sworn in as an associate justice of the Supreme Judicial Court of Massachusetts, filling the vacancy created when Oliver Wendell Holmes was appointed Chief Justice of the United States.

<sup>11</sup>Loring, *Nullification, Secession, Webster’s Argument and the Kentucky Resolutions*, iii. Although commenced as part of an otherwise innocuous debate on temporary suspension of land surveys of federal lands in the West, Webster’s “Second Reply to Hayne” contained the strongest arguments in favor of a strong national government at the expense of State sovereignty and has been generally regarded as one of “the most eloquent speech ever delivered in Congress.” Allan Nevins, *Ordeal of the Union*, 2 vols. (New York: Scribner, 1947), 288. For an interpretation of Webster’s motives largely ignored by historians, see Sheidley, “The Webster-Hayne Debate.”

nullification,” and in response to a “recent fad” among certain Northern writers and commentators who believed that the “nationality of our government was in question from its inception.”<sup>12</sup> Unfortunately, Loring added little to our understanding of the issues and the history of the early republic. Creating a straw man by posing the “vital question” whether a national, indissoluble union was created in 1787 or simply another confederacy of independent nations that could leave the union at its pleasure, Loring thought it preposterous that any serious observer could conclude that the new United States, embodied under its new Constitution, lacked the “sovereign authority necessary for its existence and the power to enforce its rule.” Noting Joseph Story’s three-volume treatment of the Constitution, published amidst the Nullification Crisis, “there was no debate, no question of its nationality.” Loring also erroneously argued the Kentucky resolutions had been “largely forgotten” since 1800 until re-discovered by South Carolina in the 1830s. As for Madison’s Virginia Resolutions, with little explication, Loring concluded they did “not in the least countenance the doctrine of secession and nullification”<sup>13</sup>

As for the remedies that the *people* or the states may have in response to an unconstitutional action of the federal government, Loring agreed with Webster that the only proper constitutional recourse for the *people* and the states was the U.S. Supreme Court, apparently relying on a broad construction of Article III of the Constitution’s grant of authority to the federal judiciary to try cases arising under the Constitution, combined with

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<sup>12</sup>Ibid, *iv*.

<sup>13</sup>Ibid, *v*. Loring later lumps the Virginia Resolution with the Kentucky Resolutions and the Hartford Convention, characterizing them as “a few disloyal, some might say treasonable, acts and declarations.” Ibid, 6.

Article VI's Supremacy Clause.<sup>14</sup> Loring listed no possible remedies for the states or the *people* if the issue of constitutionality was not readily justiciable or if the remedies available to the states or the *people* if the Supreme Court exceeded its own constitutional authority or acquiesced in the executive or legislative branches clearly exceeding theirs.

Although absolving the Kentucky Resolves of any suggestion of the right of secession, Loring bitterly chastised them for granting each individual state a right of nullification, a doctrine he deemed containing “extreme viciousness.” In contrast to his sentiments on the Kentucky Resolves, Loring interpreted Madison’s Virginia Resolutions as “fundamentally” different than the Kentucky Resolves and Madison’s doctrine of interposition ultimately as much ado about nothing and contrary to any notion of state nullification. For Loring, Madison’s right of *interposition* was a right held by the *people*, only to be exercised in circumstances justifying the *people*’s natural right of the revolution—that same right of the *people* to throw off the yoke of tyranny that colonists claimed against Great Britain during the Revolution.<sup>15</sup>

The only book-length look at either the Virginia and Kentucky Resolutions since Loring’s has been William Watkins’s *Reclaiming the American Revolution* (2004),<sup>16</sup> and is completely opposite in many respects. Refuting the notions that the Principles of ‘98 were an irrelevant footnote to the antebellum history of the United States, Watkins, a practicing

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<sup>14</sup>Ibid, 19-20. The Supremacy Clause set forth in Article VI of the Constitution provides that (1) the laws of the United States shall be the “supreme Law of the Land,” (2) the federal government, in exercising powers enumerated in the Constitution must prevail over any conflicting or inconsistent state exercise of power, and (3) the judicial department of the United States is granted the authority to determine whether a state law contravenes federal law. The Supremacy Clause, however, is silent whether the federal judiciary has the sole authority to determine the extent of the federal government’s enumerated powers.

<sup>15</sup>Loring, *Nullification*, 105-06.

<sup>16</sup>William Watkins, Jr., *Reclaiming the American Revolution: The Kentucky and Virginia Resolutions and Their Legacy* (New York: Palgrave Macmillan, 2004).

attorney specializing in constitutional law, argued the Resolves had a vibrant heritage prior the Civil War, represented an integral part of America's revolutionary tradition and conception of self-government, and deserved a special place among the great charters of the United States alongside the Declaration of Independence, the Constitution and the Bill of Rights. Written in aftermath of the Reagan-era rebirth of federalism as a relevant topic in political debates and judicial decisions, Watkins's *Reclaiming the American Revolution* was a legal brief contending that popular resistance to "consolidation" was a principal part of revolutionary heritage and advocated a return to a national government with limited powers.

Watkins skillfully detailed the Principles of '98, as well as Madison and Jefferson's reliance on the compact theory of the Constitution. Watkins agreed with most scholars that Madison's and Jefferson's specific practical goal was repeal of the Alien and Sedition Acts but he rejected the claim of some historians that the threatening content of the Resolves was only a rhetorical tool to further a specific political purpose. Rather, the Virginia and Kentucky Resolutions were a sincere exposition on the meaning of the new Constitution and the proper balance to be struck between the federal government, the state governments and the *people*.

Refuting Loring's dismissive interpretation, Watkins detailed how the Principles of '98 became the ideological underpinnings of numerous disputes between the *people* or the states and the federal government throughout the period between the controversy over the Alien and Sedition Acts and the Nullification Crisis. He identified certain differences between Madison and Jefferson's compact theories, especially when their resolves addressed the issue of remedies. Watkins concluded that Madison's theory of interposition

was more moderate than Jefferson's declaration that a state legislature could nullify an act of Congress. Watkins did not express an opinion as to why Madison and Jefferson advocated materially different remedies for unconstitutional acts of the federal government. Thus, we were left to speculate as to how Madison's and Jefferson's seemingly similar or identical compact theories of the Constitution might lead to such divergent, and historically significant, remedies.<sup>17</sup>

In between the one hundred and eleven years separating Warfield's, Loring's and Watkins's treatments of the Resolves and the Principles of '98, historical accounts of the relevance or influence of the Virginia and Kentucky Resolutions overwhelmingly constituted tangential parts of Jefferson and Madison biographies or monographs and articles discussing the Alien and Sedition Acts. The two most authoritative and oft-cited books on the Alien and Sedition Acts—John C. Miller's *Crisis in Freedom* (1952) and James Morton Smith's *Freedom's Fetters* (1956)—were written, respectively, in the aftermath of the defeat of totalitarianism in World War II and amidst the red scare of the McCarthy era. Miller and Smith largely ignored the significance of, and the historical basis for, the

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<sup>17</sup>Watson concluded his book by proposing changes to the Constitution that would restore, he contended, the proper balance of power between and among, the federal government, the state governments and the *people*—one fairly minor, making it easier for a majority of the states to propose and adopt Constitutional amendments, and one fairly major, the creation of a “Constitutional Commission,” comprised of commissioners chosen by the state legislatures, who would rule on the constitutionality of an action of the national government. If three-fourths of the commissioners present voted against the constitutionality of an action of the national government, such action would be “void and of no force.” *Ibid*, 152-57.

federalism arguments in Virginia and Kentucky Resolutions and focused, rather, on the practical, political necessity of defending freedom of expression.<sup>18</sup>

Miller judged the compact theory of the Constitution, and its claim that “states,” and not the federal government, ultimately had the right to judge the constitutionality of acts of Congress, as the novel creation of both men. Like Watson, Miller judged Madison as more moderate than Jefferson, concluding that Madison’s Virginia Resolutions did not support the doctrine of nullification by a single state. Miller also concluded Jefferson was willing to consider the final and irreparable step of disunion.<sup>19</sup>

James Morton Smith first became interested in the Alien and Sedition Acts, and Madison and Jefferson’s response to them, as a Masters student at the University of Oklahoma, during the course of completing his dissertation on a state sedition act passed in the aftermath of World War I. *Freedom Fetters* was intended to be the first of two volumes on the Alien and Sedition Act, the second volume having the stated intent of focusing on “the significance of the [Virginia and Kentucky Resolutions] as an exposition upon the nature of the American constitutional system.”<sup>20</sup> As a result, *Freedom Fetters* largely ignored the substance of the Virginia and Kentucky Resolutions. While no such second volume was ever published, Smith did pen an excellent article that appeared in the *William and Mary Quarterly* in 1970, entitled “The Grass Roots Origins of the Kentucky Resolutions.”<sup>21</sup> While the article did not assess the merits of Jefferson’s or Breckinridge’s

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<sup>18</sup>John C. Miller, *Crisis in Freedom: The Alien and Sedition Acts* (Boston: Little, Brown and Company, 1952); James Morton Smith, *Freedom’s Fetters: The Alien and Sedition Laws and American Civil Liberties* (Ithaca: Cornell University Press, 1956, repr., 1966).

<sup>19</sup>Miller, 173.

<sup>20</sup>James Morton Smith, *Freedom’s Fetters: The Alien and Sedition Laws and American Civil Liberties* (Ithaca: Cornell University Press, 1956, repr., 1966), xviii.

<sup>21</sup>Smith, “The Grass Roots Origins of the Kentucky Resolutions.”

arguments with respect to the compact theory of the Constitution and the remedies available to the *people* or the states in response to unconstitutional actions of the federal government, it skillfully demonstrated that many of the arguments employed by Madison and Jefferson in the Resolves were generally well-known and accepted, at least to the inhabitants of the Commonwealth of Kentucky. Ultimately, Smith's judgment of the Kentucky Resolves was rather harsh:

This sweeping claim in the name of states' rights, had it been implemented, would have placed Kentucky in open defiance of federal law; it was an extreme argument that was potentially as dangerous to the Union as the oppressive laws were to individual liberty.<sup>22</sup>

Among biographers of the founders, judgments concerning Jefferson often have been harsher than scholars devoted to histories of the period. Jefferson biographer Dumas Malone strained to be fair and sympathetic but was brutal in his assessment, describing Jefferson as going beyond "the most responsible leaders of his party" and taking the "most extreme state-rights position of his entire life." Likely affected by the racially-charged political and social events swirling around the country as he finalized his third volume of Jefferson's life, Malone, writing in 1962, lamented that "[t]he episode of the Kentucky and Virginia Resolutions was perhaps the most difficult of any that I have attempted to describe in this volume, and I sincerely trust that I got the nuances right."<sup>23</sup>

Likewise, Jefferson biographer Merrill Peterson characterized the Resolves as "dangerous" and the product of "hysteria." Peterson described their negative long-term legacy without mercy:

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<sup>22</sup>James Morton Smith, ed., *The Republic of Letters: The Correspondence Between Thomas Jefferson and James Madison, 1776-1826*, Vol. 2 (New York: Norton, 1995), 1070.

<sup>23</sup>Dumas Malone, *Jefferson and His Time*, vol. 3, *Jefferson and the Ordeal of Liberty* (Boston: Little, Brown and Company, 1962), xix and 399-409.

Called forth by oppressive legislation of the national government, notably the Alien and Sedition Laws, they represented a vigorous defense of the principles of freedom and self-government under the United States Constitution. But since the defense involved an appeal to principles of state rights, the resolutions struck a line of argument potentially as dangerous to the Union as were the odious laws to the freedom with which it was identified. One hysteria tended to produce another. A crisis of freedom threatened to become a crisis of Union. The latter was deferred in 1798-1800, but it would return, and when it did the principles Jefferson had invoked against the Alien and Sedition Laws would sustain delusions of state sovereignty fully as violent as the Federalist delusions he had combated.<sup>24</sup>

Perhaps granted license by otherwise sympathetic Jefferson biographers, Alexander Hamilton biographer Ron Chernow posited that Madison and Jefferson may not have realized that they had developed such a doctrine “as inimical as the Alien and Sedition Acts themselves,” and that Jefferson was deserving of special opprobrium because his Kentucky Resolutions not only called “for peaceful protests or civil disobedience” but also “outright rebellion, if needed, against the federal government of which he was vice president.”<sup>25</sup>

Madison biographer, Ralph Ketchum, rendered a verdict more sympathetic to his subject. Madison’s Virginia Resolutions, “due largely to Madison’s astute understanding of constitutional pitfalls,” Ketchum concluded, “were a moderate statement shunning the centrifugal tendencies of the more categorical resolves Jefferson had sent to Kentucky.” Ketchum portrayed Madison as the surer and more level headed founder who kept Jefferson’s more ominous threats of nullification and secession at bay. Madison rejected Jefferson’s dire remedies of nullification and secession, Ketchum claimed, as legitimate remedies under the Constitution. As Madison stated in a letter to Jefferson, such remedies

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<sup>24</sup>Merrill D. Peterson, *Thomas Jefferson and the New Nation: A Biography* (New York: Oxford University Press, 1975), 606-16.

<sup>25</sup>Chernow, *Alexander Hamilton*, 587.

should be considered only for “repeated and enormous violations” that placed the *people* in a natural state of revolution.<sup>26</sup>

Drew R. McCoy’s analysis of Madison’s Resolves attempted to highlight the crucial difference between, on the one hand, Madison and Jefferson’s compact theories of the Constitution and, on the other hand, Madison and Calhoun’s:

A recurrence to history revealed that the Constitution had not been formed, as the Articles of Confederation had, by the sovereign authority of state governments, but rather by “the people in each of the States, acting in their highest sovereign capacity” through means of popularly constituted ratifying conventions. The distinction might appear subtle, but the implications were momentous.<sup>27</sup>

McCoy interpreted Madison’s compact theory of the Constitution as being based, at its core, on the assumption that the parties to the Constitution were the *people*, the same popular sovereigns who formed the individual state constitutions. McCoy, however, largely ignored the events of 1798-1800 and regurgitated the arguments Madison himself made during the period 1830-1833, in response to threats of state nullification and disunion.

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<sup>26</sup>Ralph Ketchum, *James Madison: A Biography* (New York: Macmillan, 1971, repr., Charlottesville: The University Press of Virginia, 1990), 397, 399. Ketchum correctly highlighted a significant difference between Madison and Jefferson’s compact theories of the Constitution, namely that Madison’s Virginia Resolutions invoked the remedy of interposition in response to the federal government’s “deliberate, palpable, and dangerous exercise of other powers, not granted by” the Constitution, whereas Jefferson’s Kentucky Resolutions argued that a state had a right to nullify federal law in event the federal government exercise power not delegate to it under the Constitution. Madison’s standard for invoking interposition did not, however, rise to level of revolutionary action. The best example was the Constitution itself. Madison was the prime mover in convening what would turn out to be a “Constitutional” convention, which ultimately cast aside the Articles of Confederation, despite any apparent legal authority to do so. At no time did the delegates in Philadelphia argue, before or after, that the new Constitution was being created due to the *people* being in a natural state of revolution.

<sup>27</sup>Drew R. McCoy, *The Last of the Fathers: James Madison and the Republican Legacy* (New York: Cambridge University Press, 1989), 134-35.

In sharp contrast to McCoy, historian and Madison biographer Garry Wills did not distinguish Madison's Virginia Resolutions from Jefferson's Kentucky Resolves. Without explication, he concluded that Madison's and Jefferson's "nullification effort, if others had picked it up, would have been a greater threat to freedom than the misguided laws, which were soon rendered feckless by ridicule and electoral pressure."<sup>28</sup> Wills also seconded James Morton Smith's judgment that the Kentucky Resolutions, if fully implemented, would have threatened the Union. While a robust theory of nullification certainly could have threatened the Union, Wills left unexplained how such a theory threatened "freedom."<sup>29</sup>

Wills's critical judgment on Madison and Jefferson's compact theory of the Constitution may have been skewed by his previous book on the history of anti-government sentiment in America, *A Necessary Evil*.<sup>30</sup> There, Wills viewed the events of 1798-1800 solely in the context of supporting his thesis that the American tradition of distrusting the federal government was based on "Constitutional Myths" and a fundamental misunderstanding of our history. Madison and Jefferson were discussed amidst a rogue's gallery of alleged anti-governmental historical figures. Thus, Jefferson was labeled the "Prophet of Nullification" while Madison, Jefferson's dark accomplice, was branded the "Abettor of Nullification." Although devoting more analysis to the meaning and import of Madison's Resolves than he did in his short biography, Wills agreed with scholars who saw little to distinguish Madison's view of interposition from Jefferson's remedy of nullification and reiterated the old trope of that the Madison of 1798-1800 was a flip-flopping

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<sup>28</sup>Garry Wills, *James Madison*, The American President Series (New York: Times Books, 2002), 49.

<sup>29</sup>Wills, *James Madison*, 49-50.

<sup>30</sup>Garry Wills, *A Necessary Evil: A History of American Mistrust of Government* (New York: Simon & Schuster, 1999).

aberration that did not exist prior to the Jay Treaty and, afterward, was largely never heard from again.<sup>31</sup>

The most influential and oft-cited scholarly article on the Virginia and Kentucky Resolutions—Adrienne Koch’s and Harry Ammon’s “The Virginia and Kentucky Resolutions: An Episode in Jefferson’s and Madison’s Defense of Liberties” (1948)<sup>32</sup>—was equally influenced by contemporary social and political events, and given the impetus for the article, the author’s could not shy away from addressing, head-on, the states’ rights and federalism arguments that are the foundation of the Resolves. Written at the commencement of the post-World War II civil rights debates, and in response to white supremacists who evoked the legacy of Madison’s and Jefferson’s defense of state sovereignty, Koch and Ammon rejected any meaningful constitutional significance to the federalism arguments in the Resolves, and like Miller and Smith, claimed that the Resolves were, first and foremost, a practical political defense of civil rights with the paramount goal of ensuring a free and fair popular presidential election in 1800.

One of the more astute historians to re-look at the Virginia and the Kentucky Resolutions over the last twenty years has been Kevin Gutzman. Gutzman penned no less than five articles principally focused on the Resolves, in which he persuasively argued that the Virginia and Kentucky Resolutions were less about civil liberties and more about challenging the federal government’s consistent pattern of consolidation during the 1790s.<sup>33</sup> Gutzman concluded that the Resolves were far more than just a piece of practical

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<sup>31</sup>Wills, *A Necessary Evil*, 145-52.

<sup>32</sup> Koch and Ammon, “The Virginia and Kentucky Resolutions, 145-76.

<sup>33</sup>Kevin R. C. Gutzman, “From Interposition to Nullification: Peripheries and Center in the Thought of James Madison,” *Essays in History*, Vol. 36 (1994): 89-113; “A Troublesome Legacy: James Madison and the Principles of ‘98,” *Journal of the Early*

political propaganda created to produce temporary political results, but rather reflected the dominant understanding of *proponents* of the Constitution in the Virginia ratification convention. Moreover, the principles laid out in the Resolves, Gutzman asserted, reflected the dominant philosophy of the antebellum political and social leaders who feared the ill effects of an increasingly powerful national government. The Alien and Sedition Acts were only the final straw, and if the Adams administration was able to squash political speech challenging the perceived consolidation, Madison and Jefferson legitimately feared, the damage to the legacy of the recent revolution might be irretrievable.

Gutzman argued there was little meaningful difference between Madison and Jefferson's respective compact theories of the Constitution. Each supported the principal that each individual "state" had the right to judge the constitutionality of federal laws and had the right, if not the affirmative obligation, to hinder enforcement of such laws within their territorial jurisdiction. Madison's attempt to clarify the meaning of the term "state" in the *Report of 1800* failed to persuade Gutzman that Madison's remedy of interposition did not advocate the constitutional right of individual states to nullify federal law and, thus, it was no less threatening to the Union than Jefferson's explicit invocation of nullification. Madison's head butting with South Carolina nullifiers during the 1830s, Gutzman concluded, represented a recantation of the Principles of '98 and historians who later distinguished Madison's moderation from Jefferson's radicalism were doing so through the prism of Madison's nationalist arguments during the Nullification Crisis:

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*Republic*, XV (1995): 569-589; "O, What a Tangled Web We Weave . . . : James Madison and the Compound Republic," *Continuity* 22 (1998): 19-29; "Edmund Randolph and Virginia Constitutionalism," *Review of Politics*, Vol. 66 Issue 3 (Summer, 2004): 469-97; and "The Virginia and Kentucky Resolutions Reconsidered: 'An Appeal to the *Real Laws* of Our Country,'" *Journal of Southern History*, Vol. 66, No. 3 (August, 2000): 473-96.

[W]hatever Jefferson's and Madison's intentions, the compact theory of the Constitution enunciated in the Virginia and Kentucky Resolutions had this in common with the tree of knowledge: the forbidden fruit (nullification or secession) likely would be eaten sometime.<sup>34</sup>

Gutzman confidently reached his conclusions because he found the principles articulated in the Virginia and Kentucky Resolutions "present in [Virginia's] political tradition for decades."<sup>35</sup> For instance, Madison's description of the Constitution as a compact between the states in *Federalist*, No. 39 was very similar to the language Madison would later use in Virginia's ratifying convention: "Each State in ratifying the Constitution is considered as a sovereign body independent of all others, and only to be bound by its own voluntary act." The elements of the compact theory espoused by Jefferson in his draft of the Kentucky Resolutions "can be found in his earliest political writings."<sup>36</sup>

While Madison's and Jefferson's compact theory of the Constitution might be the "tree of knowledge" that produced the "fruit" of nullification and secession, Gutzman did not explain how the remedies of interposition, nullification and secession might naturally or logically flow from Madison's or Jefferson's respective compact theories. Gutzman did

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<sup>34</sup>Gutzman, "A Troublesome Legacy," 581. While Gutzman noted the English tradition of abiding by laws acknowledged to be "legal" though not "constitutional;" he concluded that Madison's writings during the Alien and Sedition Act crisis, especially the invocation of "interposition" in Virginia's third resolution, "does not leave the impression that Virginia would willingly have submitted to continued enforcement of the acts even in the event that no other state agreed with it." Gutzman, "A Troublesome Legacy," 580, n22 and 581, n24.

<sup>35</sup>Gutzman, "The Virginia and Kentucky Resolutions Reconsidered," 475. For a contrary view, see Saul Cornell, *The Other Founders: Anti-Federalism and the Dissenting Tradition in America, 1776-1828* (Chapel Hill: University of North Carolina Press, 1999), 242-43, who credits John Taylor, in his letter to Thomas Jefferson on June 25, 1798, as largely responsible for Madison's and Jefferson's use of the "the core doctrine of the compact theory of states' rights" in their Virginia and Kentucky Resolutions.

<sup>36</sup>"*Federalist No. 39*," Yale Law School, *The Avalon Project: Documents in Law, History and Diplomacy*, [http://avalon.law.yale.edu/18th\\_century/fed39.asp](http://avalon.law.yale.edu/18th_century/fed39.asp); Gutzman, "The Virginia and Kentucky Resolutions Reconsidered," 475.

interpret Madison's *Report of 1800* as more moderate in tone, but he attributed the shift in tone as being a tactical retreat in response to criticisms by the northern and middle states, and that he and Jefferson were in the midst of presidential and congressional campaigns.<sup>37</sup> This moderation, however, did not discourage Gutzman from rendering a succinct verdict on both Madison and Jefferson and the Principles of '98, "[T]he radical southern states' rights tradition is firmly based on [Madison's] and Jefferson's writings, especially those of 1798."<sup>38</sup>

In his political biography of Madison, Gutzman did not dwell on the Virginia and Kentucky Resolutions. He pointed out a few of the rhetorical differences between Madison's compact theory and Jefferson's but ultimately reiterated his earlier judgments that while Madison's rhetoric was "less stark or strident" in tone, there was little substantive difference between the two. Regardless of Madison's intended meaning, Gutzman claimed that the Virginia House of Delegates certainly understood the *Virginia Resolutions of 1798* as effectively judging the Alien and Sedition Acts as "utterly null, void and of no force or effect." As for Madison's later verbal battle with South Carolina nullifiers, Gutzman repeated his conclusion that Madison mischaracterized his Principles of '98, specifically Madison's contention that his Resolves did not support the claim that a single state had an individual right to interpose or a constitutional right to hinder the enforcement of federal law while remaining in the Union. Gutzman credited Madison's alleged flip-flopping to the founder's increasing desire to squash threats of disunion, a fear that occupied Madison during the final months of his life, "The advice dearest to my heart, and dearest in my convictions is that the Union of the States be cherished and perpetuated.

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<sup>37</sup>Gutzman, "A Troublesome Legacy," 583.

<sup>38</sup>*Ibid*, 571.

Let the open enemy to it be regarded as a Pandora with her box opened; and the disguised one, as the serpent creeping with his deadly wiles into Paradise.”<sup>39</sup>

Unlike Gutzman, historian Christian Fritz attempted to reconcile Madison’s Virginia Resolutions with Madison’s attacks on South Carolina’s theory of nullification during the 1830s. Generally treated by other historians as a synonym for nullification, Fritz defined interposition rather meekly as simply seeking “the reversal of national laws that some people thought unconstitutional”:

Public opinion, petitions, and protests as well as instructions to political representatives were some of the ways interposition could facilitate faithful execution of the constitution. Interposition could also involve resolving a constitutional controversy by seeking the revision of the constitution itself. James Madison described each of these options as “the several constitutional modes of interposition by the States against the abuses of powers.”<sup>40</sup>

Fritz noted the modern tendency to equate Madison’s theory of interposition with a states’ alleged right to nullify federal law, which only came into use during the sectional debates preceding the Civil War. According to Fritz, interposition was not a term loaded with special meaning by political or legal theorists. As applied to the unconstitutionality of the Alien and Sedition Acts, Fritz argued, interposition by a state involved a state government acting in the capacity of an intermediary between the *people* and the federal government. Thus, unlike Jefferson’s theory of nullification, Madison’s theory of interposition should not be interpreted as in any way countenancing breaking the ties

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<sup>39</sup>Kevin R. C. Gutzman, *James Madison and the Making of America* (New York: St. Martin’s Press, 2012), 274-75, 351, 362. The Madison quote came from his “Advice to My Country” to Dolly Madison. Gutzman placed it “several months prior to his death,” which occurred on June 28, 1836. The University of Virginia Press dates the “Advice” as being dictated in December of 1830, <http://rotunda.upress.virginia.edu/founders/default.xqy?keys=FOEA-print-02-02-02-2231>), whereas the Constitution Society assigned the year 1834, [www.constitution.org/jm/jm.htm](http://www.constitution.org/jm/jm.htm).

<sup>40</sup>Fritz, *American Sovereigns*, 193.

between the *people*, as the collective sovereign, and the federal government. Interposition could take the form of public opinion, protests and remonstrances, and petitions and even involve using state legislatures as an instrument of protest, including seeking an amendment to the Constitution. Interposition would be successful, Fritz argued, if the federal government acknowledged that it had exceeded its authority, and presumably, repealed the offending legislation. Because interposition by the state legislature did not involve the sovereign act of the *people*, unlike nullification, the actions of the “interposer” would not have any actual legal or constitutional effect on the laws of the federal government.<sup>41</sup>

In contrast to the lack of constitutional power held by the states outside the confines of Constitution, according to Fritz, Madison also believed that the *people*, as collective sovereigns of the Union, were the parties to the Constitution, and as such, had the right to take aggressive action that could have actual legal and constitutional effect. Fritz defined his concept of collective sovereignty of the *people* this way:

For Madison, . . . the constitution was a “compact” reflecting an agreement by the people of the individual states acting not as the sovereign of their own states. Rather, by acting in concert with the people of other states, formed the collective sovereign of the nation government they were creating. The collective people of the nation—while still identified in terms of the individual states in which they acted—was a different sovereign collectively than when those people acted as the sovereign of their respective states. This collective sovereign was the sovereign that created the federal Constitution and only a majority of that collective sovereign could alter or abolish the constitution.<sup>42</sup>

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<sup>41</sup>Fritz, *American Sovereigns*, 193-94.

<sup>42</sup>Ibid, 196. Fritz did not explain the basis on which he concluded that only a majority of the *people* was needed in order for the collective sovereign to take constitutional action against the federal government outside the confines of the Constitution or how such majority would be determined. Fritz likely was influenced by the *Virginia Declaration of Rights*, which claimed, in part, that “whenever any government shall be found inadequate or contrary” to the purposes for which government is instituted, “a

Despite this fairly tame definition of state interposition and fairly subtle definition of Madison's concept of collective sovereignty, Fritz concluded that there was little difference between Madison and Jefferson's compact theories of the Constitution. Neither theory, Fritz argued, supported the constitutional right of a state legislature to nullify federal law. Neither founder, he continued, supported a remedy that approached Calhoun's theory of *nullification*, which not only claimed that an individual state could nullify a federal law within the territory of such state, but also that the offending law was void throughout the nation unless and until three-fourths of the other states overrode such state's veto.<sup>43</sup> Whether Fritz's vision of the majority taking action was something tangible—for example, the affirmative vote of a majority of "states" meeting in state conventions—or something less tangible, such as public opinion, was unclear.

The two recent "grand" histories that collectively covered the period 1798-1834, Daniel Walker Howe's *What Hath God Wrought* (2007) and Gordon S. Wood's *Empire of Liberty* (2009) gave scant attention to the historical or constitutional significance of the

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majority of the community hath an indubitable, unalienable, and indefeasible right to reform, alter or abolish it, in such manner as shall be judged most conducive to the public weal." When you consider that Article V of the Constitution requires the affirmative vote of three-fourths of the state legislatures or an affirmative vote in state ratifying conventions in three-fourths of the states to amend the Constitution, Fritz's theory that a simple majority of the *people* can act constitutionally against actions of the federal government seems problematic.

<sup>43</sup>Ibid, 199-200, 222. Fritz's analysis of Jefferson's compact theory of the Constitution was hampered by his failure to adequately distinguish between Jefferson's draft Kentucky Resolutions and those resolutions ultimately adopted by the Kentucky legislature in 1798 and 1799. When clearly discussing the *Kentucky Resolutions of 1798*, Fritz was correct that it does not countenance the individual right of a state legislature to nullify federal law. I argue, however, that Jefferson's draft resolutions clearly did support the right of a single state legislature to nullify federal law when the federal government was exercising powers not delegated under the Constitution, and Jefferson's private correspondence during this period clearly supports such interpretation. See detailed discussions in Chapter 5.

Resolves and the Principles of '98. Wood, in over 750 pages covering the period 1789-1815, dismissed the import and influence of the Resolves other than its standard association with Southern slavery and secession:

Although Madison and Jefferson were not primarily thinking about protecting slavery in 1798, their ideas—"the spirit of '98"—certainly laid the basis for the nullification and states' rights doctrines later used to defend slavery and Southern distinctiveness in the period leading up the Civil War.<sup>44</sup>

Wood did credit Madison's *Report of 1800* for making a "powerful case for a strict construction of the Constitution, particularly the Necessary and Proper clause, and for offering a "brilliant defense of the freedoms described in the First Amendment, especially freedom of the press." Interestingly, one of Wood's few references to the Resolves was in the context of his discussion of the development of judicial review and judicial supremacy in the 1790s. During the early republic, the now well-accepted doctrine that the judiciary could strike down a federal law was considered an "extraordinary and solemn political action, akin to the interposition of the states suggested by Jefferson and Madison in the Kentucky and Virginia Resolutions of 1798-1799—something to be invoked only on the rare occasions of flagrant and unequivocal violations of the Constitution."<sup>45</sup>

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<sup>44</sup>Gordon Wood, *Empire of Liberty: A History of the Early Republic, 1789-1815*, Oxford History of the United States (New York: Oxford University Press, 2009), 269.

<sup>45</sup>Wood, *Empire of Liberty*, 447. The doctrines of judicial review and judicial supremacy would not be fully realized until the last half of the 20<sup>th</sup> century. For the political and legal players of the early republic, however, the relative power and authority of the states vis-à-vis the Supreme Court and the federal government remained an open bone of contention, and a source of vehement disagreement. If one accepts the notion that the Constitution was a "compact" formed or created by the "parties" to the compact, it rationally follows, consistent with general legal principles, that the parties to such compact would retain the right to judge the extent to which the compact had been complied with. The principle, while controversial, was well within accepted legal and constitutional principles of the early republic and would dominate the constitutional battles that would later define the tenure of Chief Justice John Marshall.

Daniel Walker Howe argued, without elaboration, that the Kentucky and Virginia Resolutions of 1798 “championed state nullification of federal laws” and judged them more harshly than the resolutions of New England Federalists at the Hartford Convention in 1815, the latter being “in the end less of a long-term danger to the federal Union.”<sup>46</sup> Howe also noted John C. Calhoun’s reliance on the Virginia and Kentucky Resolutions for his *Exposition* and Fort Hill Address during the Nullification Crisis, concluding, “Calhoun was fairly entitled to cite the Jefferson and Madison of 1798 in defense of his position on the Constitution as a compact among sovereign states.” Regarding Madison’s objections to Calhoun’s theory of nullification and their stated reliance on the Virginia and Kentucky Resolutions, Howe largely dismissed Madison’s attempt to distinguish the Resolves from Calhoun’s theory of state nullification and echoed other historians by simply noting that, like most politicians, “Madison did not like to admit that he ever changed his mind.”<sup>47</sup>

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<sup>46</sup>Daniel Walker Howe, *What Hath God Wrought: The Transformation of America, 1815-1848*, The Oxford History of the United States (New York: Oxford University Press, 2007), 69.

<sup>47</sup>Howe, *What Hath God Wrought*, 400.

### 3 THE ALIEN AND SEDITION ACTS AND POPULAR RESPONSE

The passage of the Alien and Sedition Acts by the Federalist administration and the Republican response was only the latest in a series of political and constitutional controversies defining the first decade after the adoption of the Constitution. Almost from the outset of the American experiment in republican government, deep schisms developed between members of the founding generation over the power and authority of the new national government created by the recently ratified Constitution. These issues crystallized into the formation of the first two major political parties in the United States: the Federalists of John Adams and Alexander Hamilton and the Republicans of Thomas Jefferson and James Madison.

The series of events precipitating the passage of the Alien and Sedition Acts, and the adoption of the Virginia and Kentucky Resolutions in response, began when France, a crucial ally of the American colonies during the Revolution, objected to the favorable terms the newly-created United States granted to Great Britain under the Jay Treaty of 1796, which addressed lingering issues unresolved at the end of the American Revolution. Jefferson, Madison, and many of their supporters objected to the Jay Treaty, out of fear that the treaty fostered increased diplomatic and economic ties with Great Britain to the detriment of America's relationship with France and further empowered Alexander Hamilton, the chief architect of the treaty, who they saw as hell-bent on instituting a

program of national consolidation that had begun with the chartering of the first national bank of the United States in 1791.<sup>1</sup>

Gradually increasing tensions between the United States and France reached ominous levels after President Adams's diplomatic delegation to France, which included future Chief Justice of the United States, John Marshall, was rebuffed by French representatives, later identified simply as "X, Y and Z," whose insulting demands included a £50,000 bribe to the French Foreign Minister Charles Maurice de Talleyrand and a large loan to the French government. In response, Adams requested that Congress authorize military measures in preparation for war. Congress responded by increasing the size of the navy and authorizing construction of additional coastal fortifications. After public disclosure of the "XYZ Affair," a clamor for war naturally erupted. While Adams resisted the popular demand to seek a declaration of war, in early July of 1798, Congress annulled the 1778 Treaty of Alliance with France, authorized military action against French warships, quadrupled the size of the army to 13,000 and initiated efforts to create a provisional army of 50,000 troops.<sup>2</sup>

In addition to these military measures, fueled by Republican sympathies with France and possibly disloyalty to the United States, Congress passed, and President Adams signed, a series of bills during the summer of 1798 that would be thereafter referred to as the "Alien and Sedition Acts." In addition to empowering Adams to detain and deport aliens deemed disloyal to the United States and tramping down seditious and disloyal speech, the Acts clearly had a political component aimed at neutralizing the growing political power of

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<sup>1</sup>Elkins and McKittrick, *The Age of Federalism*, 406-449, 537-38, 647-48; Sharp, *American Politics in the Early Republic*, 113-37.

<sup>2</sup>Elkins and McKittrick, *The Age of Federalism*, 581-618; Sharp, *American Politics in the Early Republic*, 171-76.

Jefferson, Madison and their fellow Republicans. The first bill, the Naturalization Act, enacted June 18, 1798, increased the residence requirement for aliens to become citizens (and eligible to otherwise vote) from 5 to 14 years. Since the Republicans enjoyed support among recent immigrants from France and other European countries, the law was interpreted as a direct assault on the Jefferson, Madison and their political supporters. The second, the Act Concerning Aliens, commonly known as the “Alien Friends Act,” became effective June 25, 1798, with a two-year expiration date, authorized the president to deport any resident alien considered “dangerous to the peace and safety of the United States” regardless of home country. The third, the Alien Enemies Act, enacted July 6, 1798, and still in effect, authorized the president to apprehend and deport resident aliens if their home countries were at war with the United States. The final bill, the Sedition Act, enacted July 14, 1798, made it a crime to oppose “any measure or measures of the United States,” publish “false, scandalous, and malicious writing” or speak, write, or print any statement critical of the government or its officials, which brought the government or its officials “into contempt or disrepute.”<sup>3</sup>

Republicans immediately objected, interpreting the laws as a direct assault on the most fundamental right of the *people* to criticize the government. Historian Douglas Bradburn, who recently completed a study of the remonstrances and petition campaigns

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<sup>3</sup>“An Act to Establish a Uniform Rule of Naturalization,” 5<sup>th</sup> Congress, 2<sup>nd</sup> session, Chapter 54, June 18, 1798 (“Naturalization Act”); “An Act concerning Aliens,” 5<sup>th</sup> Congress, 2<sup>nd</sup> session, Chapter 58, June 25, 1798 (“Alien Friends Act”); “An Act Respecting Alien Enemies,” 5<sup>th</sup> Congress, 2<sup>nd</sup> session, Chapter 66, July 6, 1798 (“Alien Enemies Act”); and “An Act for the Punishment of Certain Crimes against the United States,” 5<sup>th</sup> Congress, 2<sup>nd</sup> session, Chapter 74, July 14, 1798 (“Sedition Act”). See Michael Kent Curtis, “Alien and Sedition Acts,” in *Milestone Documents in American History: Exploring the Primary Sources That Shaped America*, Paul Finkelman and Bruce A. Lesh, eds. (Dallas, TX: Schlager Group Inc., 2008), 357.

that followed in wake of the Alien and Sedition Acts, discovered a significant protest movement largely ignored by historians:

The clamor against the Alien and Sedition Acts was broad, important, and deeply consequential. Neither a top-down nor a bottom-up story, the clamor was a movement composed of many local polities—distinct local polities—whose differences are reflected by the diverse origins of resistance in particular localities. And yet these distinct communities shared a common language, touching on the importance of individuals’ natural rights and the role of the states in defending those rights, which reflected widely held attitudes dating to the 1770s. . . . [S]uch sympathies were given added direction, amplification, and force by a growing network of partisan newspapers that played a creative role in framing the distinct local mobilizations, instigating more protests, and finally coordinating a national petitioning drive. By the spring of 1799, . . . the clamor had effectively stopped any hopeful Federalist attempt to mobilize the country for war with France. Ultimately, the protesting, mobilization, petitioning, and remonstrating against the Federalists during 1798-99 supplied the original momentum, organization, and ideology that would strip Adams of the presidency, overturn the Federalist majorities in Congress and numerous states, and move the United States off a trajectory of consolidation and centralization inaugurated and designed by the Federalists in power.<sup>4</sup>

Historian James Morton Smith was one historian who recognized the importance of this protest movement and skillfully summarized the grass roots response in Kentucky.

Before most of the proposed legislation had been even enacted, the *Lexington Kentucky*

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<sup>4</sup>Douglas Bradburn, “A Clamor in the Public Mind: Opposition to the Alien and Sedition Acts,” *William and Mary Quarterly*, Third Series, Vol. 65, No. 3 (Jul., 2008): 565-600, 567. Even scholars focused on this period of history largely ignore the importance of the protest and petitioning movement began in the summer of 1798 and focus solely on the Virginia and Kentucky Resolutions, the negative response from the legislatures of the Federalist states and the silence from the legislatures of states previously thought sympathetic. In this standard account, Madison and Jefferson appear fairly isolated and ineffective. Smith’s “Grass Roots Origins” was the first scholarly attempt to fill in the historical narrative by describing the vigorous grass roots movement in Kentucky that developed independently of any actions by Jefferson or Madison, but years went by without any follow-on scholarship until Robert Churchill’s article in 2000, which discussed, in part, the direct role the Sedition Act protests played in the events leading up to Fries’s Rebellion in 1799. Robert H. Churchill, “Popular Nullification, Fries’ Rebellion, and the Waning of Radical Republicanism, 1798-1801,” *Pennsylvania History*, Vol. 67, No. 1 (Winter 2000): 105-40.

*Gazette* printed the text of the House's proposed bills that would become known as the Alien and Sedition Acts. The following week, its Fourth of July issue solicited the residents of Fayette County and surrounding counties to attend a mass meeting in Lexington to consider "the present critical situation of public affairs and to express to their representatives [in Congress] their opinion of the measures which have already been adopted, and those which ought now to be pursued" and the arguments regarding federalism to be mustered consistent therewith.<sup>5</sup> In what soon became a pattern of protest in Kentucky, and throughout much of the country, thousands of local citizens flooded into Lexington, Kentucky on July 4th and passed a series of resolutions and declared the Alien and Sedition Acts as void and recent Federalist measures "unconstitutional, impolitic, unjust, and a disgrace to the American name."<sup>6</sup>

Months before Jefferson's draft resolutions would make their way from Monticello to the Kentucky legislature in Frankfurt, beginning with the Lexington meeting, Kentuckians would meet throughout the summer in county meetings to vent their outrage, consider resolutions and articulate their understanding of the new Constitution. The summer of protest in Kentucky and throughout the nation dramatically illustrated that local politicians and rank-and-file citizens were well versed in the Constitution, the allocation of powers between the state and federal governments, and the critical role the *people* played in monitoring the actions of the emboldened federal government. Bradburn well summarized the thinking of many Republicans in the early republic:

These arguments reveal an important aspect of early Republican political culture: many citizens insisted that the Constitution could be read and interpreted without any special legal training. And when they read the

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<sup>5</sup>Smith, "The Grass Roots Origins of the Kentucky Resolutions," 222-23.

<sup>6</sup>Bradburn, "A Clamor in the Public Mind," 566.

Constitution, they interpreted it literally. . . . The shared vision of union articulated by the petitions, memorials, and remonstrances against the Alien and Sedition Acts represented a widely held understanding of the proper relationship between national power, the rights of individuals, and the rights and sovereignty of the states. The rights of trial by jury, freedom of assembly, and freedom of speech—and many more besides—were not granted by the Constitution but protected by it; the rights themselves were the rights of nature. States preserved the power to regulate the municipal relationships of their own citizens, and any attempt by the federal government to encroach on the power of the states would inevitably work against the distinct interests of the sovereign people of the states. A strict construction therefore was essential for the maintenance of the fruits of the Revolution, the natural rights of man, and republican government.<sup>7</sup>

Although only becoming a state just seven years earlier, the citizens of the Commonwealth of Kentucky did not need a civics lesson from Thomas Jefferson or James Madison to either recognize the threat posed by the new legislation or articulate their outrage. Their arguments were culled from recent memory and ordinary grass roots political experience and did not require the legal sophistication or skills of a Madison or Jefferson.

The alarm initially signaled in the *Kentucky Gazette* was the work of John Breckinridge and George Nicholas. As with many Kentuckians, Breckinridge had been a Virginian, and experienced his first serious taste of politics at the age of nineteen as a representative in the Virginia House of Delegates during the Revolution. In 1792, he was elected to Congress but resigned before Congress convened and moved to Kentucky in 1793, where he served as state attorney general before being elected to the state legislature in 1797. Nicholas, also a transplanted Virginian, served in the Revolutionary army before being elected to the Virginia House of Delegates, where he successfully worked with James Madison to pass the Virginia Statute for Religious Freedom, almost six years

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<sup>7</sup>Ibid, 590.

after Jefferson first introduced it in the General Assembly. After supporting ratification of the Constitution at the Virginia ratification convention, he moved to Kentucky in 1790 where he became the principal architect of Kentucky's first state constitution in 1792.<sup>8</sup>

Breckinridge, who was plagued with poor health during the summer of 1798, stayed largely in the background during the initial phases of the protest movement, drafting resolutions for adoption by the county meetings. While Breckinridge would later become the protest's chief spokesman when the Kentucky legislature passed resolutions in protest of Alien and Sedition Acts in November, it was George Nicholas who constructed the most influential defense of the whole protest movement in a pamphlet published shortly after the first protest meeting in Lexington.<sup>9</sup>

"A Friend to Peace," through a series of essays in the *Kentucky Gazette* under the heading "THE FRIEND TO PEACE," joined Breckinridge and Nicholas in their assault on Federalist measures. In his fifth essay, "A Friend of Peace" declared, "no country can justly be considered as free, unless its constitution defines the powers which it grants, and reserves to the people, all power which is not necessary to delegate." Thus, "a good constitution" must declare, "all attempts to exercise powers not delegated, or forbidden to be exercised by the constitution, shall be illegal and void." If Congress exceeded its enumerated powers, what policy should the people follow in dealing with acts they considered "illegal and void"? As part of critique of the Congress' provisional army bill<sup>10</sup>

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<sup>8</sup>Smith, "The Grass Roots Origins of the Kentucky Resolutions," 233, Lowell H. Harrison, *John Breckinridge: Jeffersonian Republican* (Louisville, KY: The Filson Club, Incorporated, 1969), 1-21, 46-92.

<sup>9</sup>Nicholas's brother John, a Republican congressman from Virginia, was a leading opponent of the Alien and Sedition laws in the House of Representatives.

<sup>10</sup>During the quasi-war with France, Federalists advocated a vigorous military and naval build-up, which culminated with the Provisional Army bill, passed in May of 1798,

and the pending Alien and Sedition Acts, which had not yet taken effect, “A Friend to Peace” carefully outlined the proper manner by which the *people* should oppose an unconstitutional law. According to “A Friend,” even if a law was unquestionably void, it could only be declared so “by the judiciary, to whom the constitution has delegated that power.” While every individual had a right to challenge the law’s constitutionality before the federal courts, every individual should submit to the law as long as it was in force. But ultimate submission, “A Friend” continued, did not mean that every individual could not exercise his right, both as an individual and as part of a group of citizens, to remonstrate, to demand the repeal of the law, and to seek constitutional remedies to “remove the evil.” Temporary obedience, however, had its limits. Foreshadowing arguments that Madison would use in his Report of 1800, “A Friend” made clear that some rights—freedom of speech and liberty of the press—were so fundamental that without them liberty could not exist at all; if a law commanded citizens to abstain from exercising one of these rights, their preferred position would make it both “meritorious and necessary, instantly to oppose, and disobey any such law.”<sup>11</sup>

Breckinridge drafted resolutions consistent with the points outlined by “A Friend to Peace,” which he hoped would be considered at county protest meetings across the Commonwealth. Breckinridge’s resolves extolled the importance of free speech and a free

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which was to raise a provisional army of 20,000 men. Republicans in Congress, including John Nicholas, vigorously opposed the proposal, arguing that no provisional army was needed in light of the state militias and objected to the president being granted discretion as to when to raise such an army.

<sup>11</sup>*Kentucky Gazette*, July 11, 1798. According to Smith, “A Friend to Peace” may have been, in fact, either Breckinridge or Nicholas. Smith, “The Grass Roots Origins of the Kentucky Resolutions,” 224, *n5*. Copies of the *Kentucky Gazette* for 1798 and 1799 can be found at the Lexington Public Library, *Kentucky Digital Library*, <http://www.lexpublib.org/kentucky-gazette>.

press to a republican form of government and the duty of the people to monitor the conduct of public officials. The resolutions condemned all laws contrary to the Constitution as “void of themselves,” adding:

That the law reputed to [have been] read during the present Congress for punishing Sedition is a palpable and direct violation of the Constitution and an outrage against the most sound rights of the Citizen: That to speak, write, and censure freely, is a privilege of which a freeman cannot divest himself, much less be abridged in it by another.”<sup>12</sup>

Breckinridge’s draft resolutions soon became the blueprint for resolutions subsequently adopted throughout the state. Breckinridge added a dramatic pledge to the Winchester, Clark County resolves, echoing the pledge of the signers of the Declaration of Independence: the signers of the resolves would “at the hazard of our lives and fortunes” support the Union and the constitution of the United States.<sup>13</sup>

Between the time Breckinridge drafted his resolutions and Clarke County adopted them, the *Gazette* published the text of the Alien Friends Act, which denied jury trials for suspected aliens, which led the Winchester petitioners to add a specific resolution condemning that bill as “unconstitutional, impolitic, unjust and disgraceful to the American character.” The last resolution instructed the chairman of the Winchester county meeting to forward the resolutions to Congressman John Fowler or Thomas Davis to be presented to the House, the Senate, and President Adams.<sup>14</sup>

On August 2, a day after the Clarke County resolutions were published in the *Gazette*, the residents of Montgomery County adopted resolutions similar to Clarke County’s but added a dire warning that group resistance might be necessary if Congress did

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<sup>12</sup>Smith, “The Grass Roots Origins of the Kentucky Resolutions,” 226.

<sup>13</sup>Ibid, 227

<sup>14</sup>*Kentucky Gazette*, August 1, 1798.

not repeal the noxious acts. While stating the intentions to support the Union with their lives and fortunes, they added the condition precedent that such support was to be granted “so long as the government and this administration thereof shall be found to consistent with our rights as free and good citizens.”<sup>15</sup> The import of Montgomery County’s condition precedent was clearly understood by Breckinridge, who informed Virginian and Jefferson ally, James Monroe, that while encouraged by the overwhelming public outrage directed at the Federalist Congress, any enforcement of the Alien and Sedition Act in Kentucky might lead to group resistance, “God only knows how things may end, but I entertain the most gloomy apprehensions from the consequences and sincerely hope I may be mistaken in the Event.”<sup>16</sup>

Breckinridge subsequently drafted a set of resolutions for Woodford County, based on his draft Clarke County resolves and the additions adopted by the Winchester meeting. Breckinridge’s resolutions for Woodford County contained the standard pledge of support for the Constitution and called on citizens to “to guard as a faithful centinel his Constitutional rights and to repel all violations of them, from what quarter soever offered.” The resolutions attacked the Alien and Sedition Laws as violations of the Constitution and “outrages against our most valuable rights.” Woodford County resident approved the resolutions on August 6 with only minor revisions, and instructed the chairman of the

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<sup>15</sup>*Kentucky Gazette*, August 15, 1798.

<sup>16</sup>John Breckinridge to James Monroe, August 12, 1798, *James Monroe Papers*, Manuscripts and Archives Division, New York Pubic Library. Interestingly, Monroe had been Washington’s envoy to France before being dismissed by the president as ineffectual and after Federalists accused Monroe of siding with France against Great Britain. Monroe became Governor of Virginia in 1799 before serving as secretary of state and secretary of war under his long-time political rival, James Madison. Monroe became President of the United States in 1816.

county meeting to forward a copy to Congressman Fowler to be presented before both houses of the Congress and before the president.<sup>17</sup>

While Breckinridge continued work on his various county resolutions, Nicholas attempted to instigate a direct confrontation with the Adams administration by publishing a more provocative attack against the administration's policies in the *Kentucky Gazette*.

With the conscious goal of precipitating a Sedition Act indictment, Nicholas, writing under the name "Political Creed," declared the Sedition Act unconstitutional:

In vindication of my right as a free citizen of the United States, and as an exercise of the invaluable privilege of speaking and publishing my sentiments of the official conduct of those who have been appointed to administer the government of the United States; a privilege which is secured to me by the constitution of the state and guaranteed by the constitution of the United States; and which is in itself so inestimable, that the want of it must render all other earthly things of no value; I do solemnly declare that I do verily believe that the majority of the legislature of the United States, who voted for the [Sedition] act . . . have violated . . . [the First Amendment], and I do further solemnly declare, that I do verily believe, if the president of the United States hath approved the said act; and if any of the judges have, by any official transaction, endeavored to enforce it, that *they have also* violated that part of the constitution.<sup>18</sup>

Senator John Brown confirmed Nicholas's intent to "draw into question the constitutionality of the Sedition Law" directly to Thomas Jefferson.<sup>19</sup>

After firing his initial salvo, Nicholas continued his efforts to organize fresh rallies in Lexington and surrounding counties. Estimates of the mass meeting in Lexington were as high as four to five thousand; over three times the city's population. Not surprising, the resolutions for the Lexington rally closely resembled the resolves Breckinridge had drafted

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<sup>17</sup>Smith, "The Grass Roots Origins of the Kentucky Resolutions," 228.

<sup>18</sup>*Kentucky Gazette*, August 1, 1798.

<sup>19</sup>John Brown to Thomas Jefferson, September 15, 1798, *Founders Online*, National Archives, <http://founders.archives.gov/documents/Jefferson/01-30-02-0362>, *The Papers of Thomas Jefferson*, vol. 30, 1 January 1798–31 January 1799, ed. Barbara B. Oberg (Princeton: Princeton University Press, 2003).

for the citizens of Clarke and Woodford counties. The Lexington resolutions pledged support for “the union, the independence, the constitution, and the liberty of the United States,” and contained the usual litany of objections and injuries. Perhaps prompted by his earlier concerns that Sedition Act enforcement might precipitate group resistance, and in contradistinction to the actions of Nicholas who actively desired an indictment in response to his “Political Creed” polemics, Breckinridge added a new resolve to the Lexington resolutions that advocated obedience to all constitutional laws and a pledge of support to prevent violations of the law by others.<sup>20</sup>

Somewhat ironic, although he had been willing to precipitate a confrontation with the national government, Nicholas became the chief public spokesman on behalf of the Lexington resolves, including its pledge of obedience. Nicholas repeated his earlier critique that the Sedition Act was a direct assault on the First Amendment’s protections for freedom of speech and of the press and warned the Lexington assembled that even religious liberty might be threatened if these violations of the First Amendment were not successfully challenged. The oppressive acts, he railed, “are clearly unconstitutional; as such they are void and of no effect; and they may be declared to be so, by legal and constitutional means.” Nicholas advised that persons accused of offenses against the acts should test their constitutionality in court, not only in Kentucky but throughout the country, avowing confidence that citizen juries would render the Sedition Acts little more than “waste and dirty paper.” In response to such jury nullification, he argued, the Federalist Congress would have little choice but to either repeal the offending statutes or “acknowledge that

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<sup>20</sup>*Kentucky Gazette*, August 15, 1798.

they are of no force.”<sup>21</sup> Nicholas then called on the agitated citizens of Lexington and surrounding cities to issue an opinion that the laws were unconstitutional and void, that they may be opposed in “a constitutional manner,” and demand their repeal. Perhaps sensitive to Breckinridge’s fears that confrontation might foster group resistance, including violence, Nicholas implored the crowd to conduct itself within the rules of propriety, likely not because he opposed group resistance, but because any perceived misconduct by Republicans would damage the cause of liberty and “render useless all the exertions in favor of liberty” made by Republican leaders in Congress working for repeal.<sup>22</sup>

Federalists in Kentucky responded to the spat of county protests and resolutions by crafting their own petition, which praised President Adams and called on Kentuckians to reject “revolutionary measures.”<sup>23</sup> In response to the Federalist rebuke, and the offensive suggestion that organized protests and resolutions somehow constituted revolutionary activity, certain opponents of the Acts turned up the rhetoric. “A Citizen” ominously linked the freedom to challenge the national government with the right to bear arms, while denying Federalist accusations that remonstrances against the Sedition Act citizens were intended to instigate armed rebellion against the federal government. “The necessity of having the people armed,” “A Citizen” warned, “always increases with the prospect of danger either from without, as when a foreign power threatens the country, or from within,

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<sup>21</sup>Nicholas’s call for jury nullification harkened back to the famous seditious libel trial of publisher John Peter Zenger in 1736. Perhaps anticipating the unpopularity of the acts in certain parts of the country, Federalist judges did not permit juries to rule on the constitutionality of the Sedition Act but simply to decide whether the defendant had, in fact, uttered the offending words. On the right of juries to engage in constitutional interpretation, see Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (New Haven: Yale University Press, 1998), 81-118.

<sup>22</sup>Smith, “The Grass Roots Origins of the Kentucky Resolutions,” 230-32.

<sup>23</sup>*Kentucky Gazette*, August 22, 1798.

as when the privileges of the people are attacked; or when standing armies are introduced or greatly increased.”

A new voice of protest appeared in the newspapers. “An Old American” compared the current state affairs with the threat to liberty during the American Revolution, judging it in greater jeopardy because the threat to liberty came from internal enemies. In 1775, Great Britain exceeded its constitutional powers by levying taxes on the American colonists without representation, and now Congress had passed the army bill and the Alien and Seditions Acts, each unauthorized under the Constitution. Nonetheless, “An Old American” advised defenders of liberty to use the constitutional remedies of protest and petition to regain the *people’s* fundamental liberties.<sup>24</sup>

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<sup>24</sup>*Kentucky Gazette*, August 29, 1798 and September 5, 1798. The threat or actual deployment of (sometimes legalized) force and violence by the *people*, the states and the United States during this era is often overlooked when discussing the relative merits of constitutional understanding and meaning, as if the new republic enjoyed relative serenity between its first civil war for independence from Great Britain in 1776 and the Civil War. For example, the War of 1812 is more remembered for its slogans (“Don’t Give Up the Ship”), songs (the “Star Spangled Banner”) and superfluous victory at New Orleans than for the war atrocities systematically committed by both sides against civilians along the New York-Canadian border. Historian James Banner challenged the notion that political violence ended with the 1790s, “The violence continued after 1800 and, though often altered in style and content, has become a recurrent element of American politics since then. Moreover, like the violence itself, the ideological strains of American politics were continuous from the pre-Revolutionary years at least until 1815.” James M. Banner, Jr., author of *To the Hartford Convention: The Federalists and the Origins of Party Politics in Massachusetts, 1789-1815* (New York: Knopf, 1970), n6, 24-25. In addition to daily violence legally sanctioned or tolerated in support of chattel slavery, and the brutal efforts of the states and the national government to forcibly remove native Indians to the West, Americans rarely hesitated to use violence or the threat of violence to enforce their interpretation of its laws and policies. Constitutional disputes regarding federalism were no exception to this general rule. And, not surprisingly, government leaders and their supports often attempted to stifle criticism and dissent by accusing critics of fomenting violence and rebellion against the government. For a discussion of political violence during the 1790s, see John E. Howe’s “Republican Thought and the Political Violence of the 1790s,” 19 *American Quarterly* (1967): 147-65. For the provocative thesis that the War of 1812 should be interpreted as America’s second

As the summer of '98 progressed, Republican animus against the Alien and Sedition Acts spread from Kentucky to the more populated and politically powerful states of New Jersey, and New York, Pennsylvania and Virginia. Although the local protests lacked any national or regional organization, protesters shared a common vision that reflected a political philosophy forged during the 1770s, a philosophy that placed a premium on the importance of individual liberties and the proper role local and state governments should play in their preservation. Supplementing the passions of the people, local political leaders and editors sympathetic to their protests effectively used a growing network of partisan newspapers that ultimately led to a nationwide petitioning campaign against the Acts and much of the Federalist legislative agenda.<sup>25</sup>

Like protesters in Kentucky, citizens of Virginia participated in a broad movement of petitioning and remonstrance against the Act, which were now spreading from North Carolina to Vermont.<sup>26</sup> Numerous Virginia counties adopted their own resolutions against the Acts, a fairly common political practice in Virginia whenever groups of citizens gathered during county court days or conducted militia meetings. Specific resolutions and remonstrances against the Alien and Sedition Acts in Albemarle County during July of 1798 fueled rumors that Thomas Jefferson was actively involved in their drafting. Similar resolutions and petitions soon followed in counties throughout Virginia. Some sent their

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civil war, see Alan Taylor, *The Civil War of 1812: American Citizens, British Subjects, Irish Rebels, & Indian Allies* (New York: Alfred A. Knopf, 2010).

<sup>25</sup>Bradburn, "A Clamor in the Public Mind," 567. In contrast to the rather localized protests of Republicans, Federalists made concerted and organized efforts to mobilize support for the Adams administration, and were successful in creating what historian David Waldstreicher termed "reactionary nationalism." David Waldstreicher, *In the Midst of Perpetual Fetes: The Making of American Nationalism, 1776-1820* (Chapel Hill: The University of North Carolina Press, 1997), 172, 186.

<sup>26</sup>Bradburn, "A Clamor in the Public Mind," 566.

petitions directly to President Adams while others called on the state representatives to “use their utmost exertions” to effect a repeal of the laws.<sup>27</sup> A petition drafted by the citizens of Richmond, Virginia, was typical. Addressed to their elected representative in Congress, the petitioners noted that while elected legislative majorities usually can be trusted not to trample on individual liberties, the confidence placed in them should always be “qualified and restrained.” Moreover, the Richmond petitioners rejected any notion that judging the constitutionality of laws enacted by the federal government was within the sole purview of appointed judges or other political elites:

Acts that violate our chartered rights have no binding force, and are not entitled to the respect or obedience of the people; and where they must choose between an obedience to measures adopted by their own servants, and an adherence to the constitution, it must not be doubted, but that they will cling to the constitution as the rock of their political salvation:—Nor is the legislature to be the judge when that constitution is infringed. The people are the dread tribunal.<sup>28</sup>

While most Republicans who considered the Sedition Act as *null and void* resisted demands for open resistance to enforcement of the legislation, others were more public in their defiance. At a Richmond dinner for Congressman John Clopton of Virginia, an address to the opponents of Alien and Sedition Acts concluded with the claim that “acts that violate our chartered rights have no binding force, and are not entitled to the respect or obedience of the people.” The militia of Amelia County, Virginia, declared that they would not cooperate with any efforts to enforce the offending laws.<sup>29</sup>

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<sup>27</sup>*Winchester Gazette* [Winchester, VA], January 9, 1799; *Alexandria Advertiser*, September 25, 1798 and September 18, 1798.

<sup>28</sup>“Address of the Citizens of Richmond,” *Aurora General Advertiser*, August 20, 1798.

<sup>29</sup>*Ibid*; “Resolutions of a Company of the Militia of Amelia County, Virginia,” *Alexandria Times*, September 12, 1798; and Resolutions of the Seventh Regiment and Citizens of Madison County (Kentucky), *Aurora General Advertiser*, January 4, 1799;

Central to the protests in Kentucky, Virginia and elsewhere was the idea that the sovereign *people* had a right to resist unconstitutional actions of governments. Was this idea no more than a symbolic recognition that the *people* had a greater role to play in representative government or did this principle have real constitutional meaning?<sup>30</sup> Despite the experiences of the Revolution and the recent ratification of the Constitution in direct defiance of the provisions of the Articles of Confederation, to most Federalists, popular sovereignty was largely symbolic and the legal right of the *people* to “alter or abolish” their governments was largely limited to voting out incumbents via periodic elections. Even among many Republicans, although often employing revolutionary rhetoric, the discussion of actual remedies in the face of unconstitutional action was little more than the stuff of ordinary politics “by convening together in either township or county meetings, as convenience may dictate, and there request of your public agents, by way of remonstrance, to repeal the Alien and Sedition Law, which has been enacted in open violation of the Constitution.” Protesters in Dinwiddie County, Virginia sounded similar

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Churchill, “Popular Nullification, Fries’ Rebellion and the Waning of Radical Republicanism,” 113.

<sup>30</sup>See, for example, the *Virginia Declaration of Rights*, which provides that “government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation or community; of all the various modes and forms of government that is best, which is capable of producing the greatest degree of happiness and safety and is most effectually secured against the danger of maladministration; and that, whenever any government shall be found inadequate or contrary to these purposes, a majority of the community hath an indubitable, unalienable, and indefeasible right to reform, alter or abolish it, in such manner as shall be judged most conducive to the public weal” and the Massachusetts Constitution of 1780, which provided, in part, that the people “alone have an incontestable, unalienable, and indefeasible right to institute government; and to reform, alter, or totally change the same, when their protection, safety, prosperity and happiness require it.” “The Virginia Declaration of Rights of 1776,” Yale Law School, *The Avalon Project*, [http://avalon.law.yale.edu/18th\\_century/virginia.asp](http://avalon.law.yale.edu/18th_century/virginia.asp) (hereinafter referred to as the “*Virginia Declaration of Rights*”).

sentiments by claiming there was “one and only one way to prevent unconstitutional laws” and that was “an annual election of Representatives and Senators.”<sup>31</sup>

Competing with this rather limited notion of popular sovereignty for prominence among Republicans during the Sedition Act crisis were more muscular theories of popular sovereignty. The first was that actions of the federal government that rested on power and authority not granted to the federal government were automatically *null and void*. This principle of automatic nullify deviated from the English tradition that even unconstitutional laws are “legal” and must be followed by British subjects until corrected by Parliament.<sup>32</sup> Under English law, Parliament was sovereign and supreme and in some sense, “could do no wrong.” In America, however, the *people* were sovereign. Why should the ultimate sovereign await the remedial action of Congress or actions of a new federal judiciary to declare unconstitutional laws *null and void*? Even arch-Federalist Alexander Hamilton appeared to endorse a notion of automatic nullity in *Federalist 78*, in which he stated that, “There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void.” Not surprising, given that the principle topic of *Federalist 78* was the judicial branch of the United States, most Federalists and many scholars interpreted Hamilton as advocating for judicial review, meaning that a law of Congress, albeit unconstitutional, was still valid law until a federal court ruled that it was not. Certain Republicans disagreed with that interpretation, relying on the fact that Hamilton’s

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<sup>31</sup>*Centinel of Freedom* (Newark, NJ), December 18, 1798 and “Resolutions of the Freeholders of Dinwiddie County,” *Aurora General Advertiser*, December 18, 1798.

<sup>32</sup>See John Reid, *In Defiance of the Law: The Standing-Army Controversy, the Two Constitutions, and the Coming of the American Revolution* (Chapel Hill: University of North Carolina Press, 1981).

language on authority of the courts to declare unconstitutional laws of the legislature void was in furtherance of the court's role as an "intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority." Hamilton denied that this right of the judiciary to declare an act of Congress *void* meant that the judiciary was superior to the legislature. Rather, "it only supposes that the power of the people is superior to both." Thus, the argument goes, if the courts, exercising their assigned role as an intermediary check on legislative authority, can strike down a law enacted by Congress as being unconstitutional, based on the premise that the *people* are superior to both the courts and the legislature, it would be illogical for the *people* not to possess this same right.

Regardless of what Hamilton meant, and regardless of whether Hamilton truly meant it, many Republicans believed that the *people*, as ultimate sovereigns of the new nation, possessed the independent legal and constitutional right to declare an unconstitutional law of the legislature as void.<sup>33</sup> While Republicans fully expected their

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<sup>33</sup>Interestingly, political scientist Robert W. T. Martin concluded that Jefferson's advocacy of state nullification in his draft of the Kentucky Resolutions reflected his rejection of "popular nullification," i.e., the right of the *people* to declare an act of Congress as void. Martin agreed with historian Robert Churchill that both Madison's and Jefferson's Virginia and Kentucky Resolutions advocated "state nullification," as Martin termed it, as a "middle way between federal supremacy and the more radical option of popular nullification." Martin, *Government by Dissent*, Kindle location 1081; Churchill, "Popular Nullification, Fries' Rebellion, and the Waning of Radical Republicanism," 105-40. I disagree with both Martin and Churchill, whose examples of "popular nullification" were often the actions of a relatively small, discrete group of citizens. As discussed in greater detail in Chapter 5, Jefferson advocated state nullification because he believed that the states governments, and not the *people* of the several states, were the parties to the Constitution, and empowered to render a final verdict of constitutionality under the compact. Thus, under Jefferson's compact theory, popular nullification was unnecessary. Madison clearly believed in a theory of "popular nullification" that contemplated a majority of the *people* of the several states acting in their highest sovereign capacity in the event of "deliberate, palpable and dangerous exercise" of powers not delegated to the federal government. But

state legislatures to “sound the alarm” and protest the Alien and Sedition Acts, they were not solely dependent on the state legislatures to protect their fundamental rights. Recent experience during the Revolution illustrated that legislative majorities sometimes surrendered or consciously abridged individual liberties:

Acts that violate our chartered rights have no binding force, and are not entitled to the respect or obedience of the people, and where they must choose between an obedience to measures adopted by their own servants, and an adherence to the constitution, it must not be doubted, but that they will cling to the construction as the *rock* of their political salvation:—Nor is the legislature to be the judge when that constitution is infringed. The *people* are the dread *tribunal*.<sup>34</sup>

An anti-Federalist article that appeared in the *Albany Register* during the spring of 1799 succinctly described the ideological gulf that existed between Federalists and certain Republicans. A Federalist, the author charged, believed “that if the legislature of the Union pass any law, however *destructive and unconstitutional*, (provided the *judges* do not pronounce it such) that the people must suffer the violation tamely and silently, as *they have no right to redress their own wrongs*.” This principle, the author continued, was tantamount to “removing the cornerstone on which our federal compact rests; it is taking from the people the ultimate sovereignty.”<sup>35</sup> A Republican, he countered, believed:

a constitution of government is a solemn pact between the governors and the people, and that whenever it is clearly and openly outraged by the *former*, it is no longer binding on the *latter*; that this ever was the basis of our revolution, and that the doctrine that *the people have no right to redress their own wrongs*, is under every shape and colouring which may be given to it, the old and damnable heresy of *passive obedience and non-resistance*.<sup>36</sup>

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just as clear, Madison did not grant such authority to discrete groups of citizens such as was the case in Shays Rebellion, the Whiskey Rebellion or Fries’s Rebellion.

<sup>34</sup>“Address of the Citizens of Richmond,” *Aurora General Advertiser*, August 20, 1798; Martin, *Government by Dissent*, Kindle location 1099].

<sup>35</sup>“Editorial,” *Albany Register*, reprinted in the *Boston Independent Chronicle*, February 25, 1799.

<sup>36</sup> *Albany Register*, April 18, 1799.

This doctrine of popular nullification articulated during the Sedition Act crisis was not a theory untethered to political and social reality, to be employed upon every disagreement with the federal government (or state government, for that matter). Even the most committed democrats realized that any form of nullification by the *people*, acting in their highest sovereign capacity, was a solemn occasion and should be rarely invoked. As the *Virginia Declaration of Rights* expressly acknowledged, this brand of popular nullification was majoritarian in nature and was not the actions of discrete groups of citizens but intended to reflect the actions of the majority of the sovereign *people*. As one petition from Essex County, Virginia, implored, citizens should obey unconstitutional laws until “the general voice of the nation shall concur in requiring its repeal.” When, however, “laws are made contrary, both to the spirit and letter of the Constitution,” such laws “encroach on the sovereignty of the people and are in their nature void.” This is especially the case when the federal government attempts to deny the *people* the fundamental right to judge government officials:

By our federal and state constitutions, our public servants are amenable to us. We ought, therefore, to know everything respecting their conduct. Every man ought to state his opinion, whether that opinion be right or wrong. Every man ought to be the judge of the truth or falsehood of what he himself writes or speaks. But will not a man hesitate in delivering his opinion, when he does not know but that a state of prosecution is hanging over his head?<sup>37</sup>

Outside of Virginia and Kentucky, meaningful protests emerged first in the backcountry of Pennsylvania, where Federalist measures often elicited negative responses. While Federalist tax policies and laws favoring creditors would lead to Fries’s Rebellion the following spring, during the summer of 1798, resistance to the Alien and Sedition Acts

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<sup>37</sup>“Memorial of the People of Essex County,” *Aurora General Advertiser*, December 7, 1798.

resembled protests in Virginia and Kentucky. Parlaying political meetings amidst local, state and federal elections, citizens drafted and signed petitions and passed resolutions declaring the Alien and Sedition Acts as “impolitic, unjust, and unconstitutional,” while condemning taxes and the establishment of an expanded army.<sup>38</sup>

Protestors in Western Pennsylvania erected liberty poles, a symbol harkening back to colonial protests during the Revolution and protests in Pennsylvania, New Jersey, and Maryland during the Whiskey Rebellion. Liberty poles had remained a popular symbol of protest against government measures deemed inconsistent with liberty. As liberty poles became more visible and spread to other northern towns, Federalists organized groups of counter-protesters to destroy the “sedition poles.”<sup>39</sup>

In December 1798, as copies of Kentucky’s resolutions were printed and circulated across the nation, and while the Virginia House of Delegates finalized its own set of resolutions, Republican congressman in Philadelphia expressed their intention to constitutionally challenge the Alien and Sedition Acts. These pronouncements, together with formal actions of the state legislatures in Virginia and Kentucky, inspired a new series of petitions in January and February of 1799. Petitions originated in Philadelphia and

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<sup>38</sup>*Herald Liberty* [Washington, PA], October 1, 1798. Churchill argued that while many Federalists and moderate Republicans mistakenly feared armed resistance to the Sedition Act, Fries and his neighbors logically took up arms to resist the execution of the house tax, collected by tax commissioners visiting every home and business. By contrast, only six individuals were prosecuted under the Sedition Act prior to Fries’ Rebellion, and only one prosecution took place outside the Federalist-dominated New England states. Churchill concluded that given “the Republican arguments that the tax laws, the standing army, and the Alien and Sedition Acts were all part of a concerted program to deprive the people of liberty, it is not surprising that Fries and his neighbors chose to resist the part of this program that brought Federalist commissioners to their doors.” Churchill, “Popular Nullification,” 117. Also not surprising was the government’s significant delay in collecting the house tax in the state of Kentucky. *Kentucky Gazette*, March 7, 1799.

<sup>39</sup>*Federal Gazette and Baltimore Daily Advertiser*, January 31, 1799 and February 6, 1799; Bradburn, “A Clamor in the Public Mind,” 573-74.

surrounding areas generated more than eighteen thousand signatures. By late February 1799, Congress had received petitions from Kentucky, Virginia, New Jersey, Pennsylvania, New York and Vermont.<sup>40</sup>

In Newark, New Jersey, the *Centinel of Freedom* printed the entirety of the Kentucky Resolutions adopted by the Kentucky legislature and its editors called on the “real Republicans of New Jersey to act in a similar fashion by “by convening together in either township or county meetings, as convenience may dictate, and there request of your public agents, by way of remonstrance, to repeal the Alien and Sedition Laws, which have been enacted in open violation of the Constitution.” After congratulating the Kentucky legislature, the editors expressed their hope that “the Legislatures of other States will follow their example, and thereby obtain a repeal of those obnoxious acts, which evidently violate the Constitution.”<sup>41</sup>

Like their ideological brethren in Kentucky, New York Republicans, led by Congressman Edward Livingston, expressed outrage from the moment the Acts went into effect and commenced a campaign of petitioning for the Acts’ repeal. Livingston, during a speech in the House that later would be circulated in pamphlet form, railed against the arbitrary power placed in the executive to define violations of the statutes and called on “the people” to resist enforcement of the law:

If these things are so, and remedy exists for the evil, one ought speedily to be provided; but even then it must be a remedy that is consistent with the constitution under which we act. For by that instrument, all powers not expressly given by it to the Union, are reserved to the States. It follows that unless an *express* authority can be found, vesting us with the power, be the evil ever so great, it can *only be remedied by the several States, who have never delegated the authority to Congress.*

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<sup>40</sup>*Annals of Congress*, House of Representatives, 5th Congress, 3d session, 2985.

<sup>41</sup>*Centinel of Freedom*, December 18, 1798.

If we are ready to violate the constitution we have sworn to defend—will the people submit to our unauthorized acts” Will the States sanction our usurped powers? Sir, they ought not to submit. They would deserve the chains which these measures are forging for them if they did not resist.<sup>42</sup>

Livingston relied on the central tenants of Republican thought that the invalidity of a federal law did not require judicial intervention and the *people* had the constitutional right to judge the constitutionality of the laws for themselves. If popular sovereignty meant anything resembling true sovereignty, surely it meant that the *people* had the right to nullify unconstitutional laws and resist their enforcement.<sup>43</sup>

Petitioners from Suffolk County, New York, railed against the federal government’s failure to limit its powers to those enumerated in the Constitution and for ignoring the First Amendment’s explicit limitations on Congress. If the “necessary and proper” clause could be used to create an implied power that would trump even specific prohibitions in the Constitution, “it would defeat the object which the constitution has in view of establishing a general government with limited powers.<sup>44</sup> In December 1798, the petition movements

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<sup>42</sup>“Speech of Edward Livingston to the House of Representatives,” July 2, 1798, as quoted in the *Herald of Liberty*, August 16, 1798. The entire speech is reprinted in *The Examiner and Journal of Political Economy; Devoted to the Advancement of the Cause of State Rights and Free Trade*, Vol. II (Philadelphia, 1835). In addition to Madison and Jefferson, Edward Livingston was one of the recurring actors in the on-going debate over the meaning of the Virginia and Kentucky Resolutions and the debate over the rights of the states and the *people* in response to the unconstitutional actions of the federal government. On these issues, Livingston appeared in a supporting role at almost each critical junction. At this particular moment, Livingston was a U.S. Representative from the state of New York. After serving a stint as Mayor of New York City, Livingston moved to Louisiana where he served as a U.S. Senator, playing a prominent role in the Webster-Hayne Debate in 1830. A few years later, he became secretary of state under Andrew Jackson, and wrote Jackson’s “Proclamation Regarding Nullification” in response to South Carolina’s “Ordinance of Nullification.”

<sup>43</sup>“Speech of Edward Livingston to the House of Representatives, July 2, 1798,” as quoted in the *Herald of Liberty*, August 16, 1798; Churchill, “Popular Nullification,” 113.

<sup>44</sup>*Aurora General Advertiser*, December 6, 1798 and January 30, 1799.

across the state led to the arrest of Jedediah Peck, a member of the New York Assembly and admired Revolutionary War veteran, who was charged under the Sedition Act for circulating petitions against the Acts. Peck's actions were in direct defiance of a public threat made by Federalist judge and Congressman, William Cooper. Judge Cooper, the father of James Fennimore Cooper, publicly threatened anyone circulating a petition against the Alien and Sedition Acts with two years imprisonment and a two-thousand-dollar fine. Cooper had Peck arrested by a United States Marshall and taken in irons to be tried in New York City. Peck's arrest backfired as onlookers observed an aging and hunched over Revolutionary War hero being transported in chains for two hundred miles. Peck was released without a trial when witnesses proved unwilling to travel the two hundred miles from Otsego to New York City during "mud season" and to end to the public relations disaster precipitated by Peck's arrest.<sup>45</sup>

Republican protests in the New England states, although sparse and often frustrated by Federalist majorities, were memorable. In Massachusetts, two editors of a Republican-Democratic newspaper that published an anonymous indictment of the state government for not publically supporting the Virginia and Kentucky Resolutions were charged and convicted for criminal libel under Massachusetts law and sentenced to thirty days. Vermont organized petitioning drives protesting the unconstitutionality of the Sedition Act on the heels of the arrest and indictment of Vermont Congressman Matthew Lyon in October of 1798 for publishing attacks with the "intent and design" to defame the federal government and the president. Lyon had ridiculed President Adams for his "continual grasp for power,

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<sup>45</sup>Alan Taylor, *William Cooper's Town: Power and Persuasion on the Frontier of the Early American Republic* (New York: Alfred A. Knopf, 1995), 277-78. The Peck episode would be a major factor in William Cooper's subsequent political demise.

in an unbounded thirst for ridiculous pomp, foolish adulation, or selfish avarice.” Lyon, who presented his own defense at trial, became a darling of the protest movement when he queried Supreme Court Justice and residing U.S. Circuit Court Judge, William Paterson, as to whether Paterson had personally observed President Adams’s penchant for “ridiculous pomp and parade” when the Justice dined at Adams’s personal residence in Philadelphia.<sup>46</sup>

Later, after the Federalist majority in the Vermont legislature joined its fellow New England legislatures in attacking the Kentucky Resolutions, the minority in the Vermont legislature circulated one of the most aggressive defenses of the Kentucky Resolves. The Vermont minority began by seconding the sentiments of the “deservedly respected statesman,” John Marshall, that the Sedition Act “was calculated to create *unnecessarily*, discontents and jealousies, at a time, when our very existence as a nation may depend on our union.” The minority characterized the majority’s conclusion that a state did not have the right for deliberate “on the constitutionality of the laws made by the general government” as “radically erroneous and inconsistent” and, later, “palpably preposterous.” How could such a principle be correct, the minority asked, when the Tenth Amendment to the Constitution confirmed “the states individually, compose one of the parties to the federal compact or constitution”? Each state, therefore, “must have an interest in that constitution being pure and inviolate.” The Vermont minority concluded its defense of the Resolves by citing “the most pressing of our social duties, as citizens of the union,” to

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<sup>46</sup>Bruce A. Ragsdale, “The Sedition Act Trials,” *Federal Trials and Great Debates in United States History*, Federal Judicial Center, 2005, <http://www.fjc.gov/history/docs/seditionacts.pdf>, 3-4.

“guard with a watchful scrupulosity, against the smallest breach of our federal constitution.”<sup>47</sup>

Among other southern states, where populations were less concentrated, the ability to organize popular protests often depended on the existence of Republican-Democratic newspapers to provide a version of events to counter the Federalist-dominated press. In North Carolina, where no such newspaper existed, popular protest was muted. The North Carolina General Assembly quickly passed a resolution declaring the laws unconstitutional, but the resolution failed to pass the Federalist controlled state senate.<sup>48</sup>

In Tennessee, Knoxville’s *Rights of Man*, known as a radical anti-Adams newspaper, published a song in 1799 calling for a new revolution, spurring a few protests. Given its widespread and consistent hostility to Federalist policies and the Adams administration, opposition in the Volunteer State was expected to be similar to Kentucky’s; however, no meaningful public opposition ever formed. While one of the two grand juries, representing the most populous eastern region of the state, passed a series of resolutions declaring the Alien and Sedition Acts “unconstitutional, oppressive, and derogatory to our general compact,” and called on its state legislature to seek a repeal, no evidence suggests that the Tennessee legislature seriously considered taking any action. Douglas Bradburn attributed the muted response by Tennessee to unique local factors that led to inaction. First, Tennessee traditionally held extremely short legislative sessions. Second, an emergency

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<sup>47</sup>“Protest of the Vermont Minority,” November, 5, 1799, in Frank Maloy Anderson, “Contemporary Opinion of the Virginia and Kentucky Resolutions II,” *American Historical Review*, No. 5, (December 1899): 225-52, 249-52; “John Marshall to a Freeholder,” September 20, 1798, *The Founders’ Constitution*, Philip B. Kurland and Ralph Lerner, eds. (Chicago: The University of Chicago Press, 2000), [http://press-pubs.uchicago.edu/founders/documents/amendI\\_speeches17.html](http://press-pubs.uchicago.edu/founders/documents/amendI_speeches17.html).

<sup>48</sup>Bradburn, “A Clamor in the Public Mind,” 581.

session was called in December 1798, but likely was dominated by the replacement of Senator William Blount, who had just been expelled by the United States Senate and impeached by the House of Representatives for his prominent role in the Spanish Conspiracy.<sup>49</sup> Finally, Tennessee governor John Sevier allegedly coveted a senior military commission in the newly created national army and likely used his influence to discourage any dramatic legislative action against the Alien and Sedition Acts. Despite the inaction, Republican-Democratic newspapers erroneously reported that Tennessee had, in fact, taken action similar to Virginia and Kentucky.<sup>50</sup>

Although each of these protest and petition campaigns exhibited elements of a libertarian notion of individual rights against all levels of government, Bradburn noted that protesters more often identified themselves in a collective sense, both as part of the new nation as well as a part their respective sovereign states. For Republicans, the Tenth Amendment was no truism but a critical and well-known political and legal maxim reflecting a careful balancing act between and among the constituent members of society. Thus, Essex County, New Jersey, petitioners declared “any assumption of power or authority that transcends” the delegated authority of the federal government “is an invasion of the rights and sovereignty of the states, and can produce no law of any binding force.” Likewise, petitioners from Suffolk County, New York, agreed that the federal government had only “defined and limited powers” and that it was inconsistent “with their political happiness, and the preservation of their liberties, that this general government

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<sup>49</sup>Ibid, 581-82. Ironically, it was during Blount’s House impeachment hearings in January of 1798 that a brawl erupted between Matthew Lyon, who would later be convicted under the Sedition Act, and Connecticut Representative Roger Griswold after Lyon spit on Griswold in response Griswold accusing Lyon of being a “scoundrel.”

<sup>50</sup>Ibid, 582.

should legislate in every possible case.” And finally, petitioners from Spotsylvania County, Virginia, independently concurred that “the constitution of the United States contains a limitation of power, to be exercised in the form and manner therein preferred; and never can authorize the use of any powers but what are expressly enumerated in it—that the people of America, in framing their own constitution intended to establish a confederation, and not a consolidated government.”<sup>51</sup>

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<sup>51</sup>*Aurora General Advertiser*, November 20, 1798 and January 30, 1799; *Centinel of Freedom*, January 22, 1799; Bradburn, “A Clamor in the Public Mind,” 587.

#### 4 THE VIRGINIA AND KENTUCKY RESOLUTIONS

Throughout most of the summer of 1798, none of the various county meetings, rallies and remonstrances in Kentucky suggested that the Kentucky state legislature might be an appropriate venue for further protest. But on August 22, “Philo-Agis” proposed that county petitions should be supplemented by a “united and official action” of the state legislature, the “most perfect mirror for probing” the sentiments of the *people*.<sup>1</sup> Soon thereafter, Madison County officers of the Seventh Regiment of Kentucky militia included in their resolutions of protest a directive for their state representatives to bring the matter before the legislature. In Washington, Kentucky, resolutions adopted by citizens of the town of Mason and adjacent counties authorized a committee to draft a letter to Governor Garrard requesting a special session of the legislature.<sup>2</sup>

On the same day “Philo-Agis” put forth his recommendation for legislative action, Breckinridge departed for Warm Springs, Virginia to seek amelioration of his continued ill health. Before speaking with any Virginia leaders of the Republican Party, Breckinridge wrote Caleb Wallace, a judge sitting on the Kentucky Supreme Court, suggesting that the judge draw up a set of resolutions for presentation to the legislature. While in Virginia, Breckinridge visited Wilson Cary Nicholas, George’s brother, who by happenstance had just received a correspondence from Thomas Jefferson, which contained a copy of protest resolutions Jefferson had intended for the legislature of North Carolina. Discouraged by unfavorable results in the recent legislative elections in North Carolina, and the resulting prospects for convincing the newly constituted legislature to join the fight, Nicholas handed

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<sup>1</sup>*Kentucky Gazette*, August 22, 1798.

<sup>2</sup>*Kentucky Gazette*, September 5 and 12, 1798.

the Jefferson draft to Breckinridge in the hope that the Kentucky legislature might formally engage in the constitutional battle.<sup>3</sup> Breckinridge agreed to champion the resolutions in the Kentucky legislature and expressed confidence that the Kentucky legislature would willfully join the fray. “I entirely approve of the confidence you have reposed in Mr. Breckinridge,” Jefferson informed Nicholas, “as he possesses mine entirely.”<sup>4</sup>

When the Kentucky legislature met in November, Breckinridge presented his version of Jefferson’s draft. Jefferson’s loquacious and belligerent draft omitted the introductory niceties Madison would include in his resolutions for Virginia and came quickly to the point. His first resolution put the national government on notice that the states were “not united on the principle of unlimited submission to their general government,” that the Constitution was a compact, that it was the states that created the national government and that whenever the national government “assumes undelegated powers, its acts are unauthoritative, void, & no force.” Jefferson was equally emphatic as to the parties to the constitutional compact: each state was “an integral party, its co-states forming, as to itself, the other party” and that because the constitutional compact did not specify a common judge as to possible infractions, “each party has an equal right to judge for itself, as well of infractions, as of the mode & measure of redress.”<sup>5</sup> Jefferson’s second through seventh resolves lectured the national government that the powers enumerated in the Constitution were the extent of its authority and, quoting the recently ratified Tenth

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<sup>3</sup>A description of the serendipitous coincidence for Breckinridge and Jefferson is described in Koch and Ammon, “The Virginia and Kentucky Resolutions,” 154-56.

<sup>4</sup>Jefferson to Nicholas, October 5, 1798, “From Thomas Jefferson to Wilson Cary Nicholas, 5 October 1798,” *Founders Online*, National Archives, <http://founders.archives.gov/documents/Jefferson/01-30-02-0372>.

<sup>5</sup>Jefferson’s *Fair Copy*.

amendment to the Constitution, admonished the national government for illegitimately assuming powers when passing each of the Alien and Sedition Acts.<sup>6</sup>

Jefferson's eighth resolve, at over 1,200 words, half again as large as the entirety of Madison's Virginia Resolutions, invoked the spirit of the Revolution, calling for the creation of a "committee of conference & correspondence" that would circulate the resolutions to the legislatures of the other states. After expressing that the union had been "friendly to the peace, happiness & prosperity of all the states," he implored the co-states to follow the lead of Kentucky and not sit idly by and tolerate violations of the compact to which they, and not the national government, were parties.<sup>7</sup> If the national government had simply abused one of its delegated powers, Jefferson continued, the *people* could simply replace the members of Congress responsible for the violation, but in the case of the Alien and Sedition Acts, where powers were exercised that had not been delegated to the national government, "a nullification of the act is the rightful remedy." Moreover, every state had "a *natural right*, in cases not within the compact to nullify of their own authority all assumptions of power by others within their limits."<sup>8</sup>

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<sup>6</sup>Ibid. The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

<sup>7</sup>Jefferson's recommendation of a committee of correspondence recalls the "Committees of Correspondence" during the War for Independence, which served as the informal, "shadow" governments of the American colonies and coordinated protests to King George III and Parliament. The symbolism of invoking such a committee likely would not have been lost on anyone who lived through the Revolution.

<sup>8</sup>Jefferson's *Fair Copy* (italics added). I have italicized the phrase "natural right" because it speaks to one of the major differences between Jefferson's theory of the constitutional compact and Madison's. Jefferson's use of the phrase "natural right" has been consistently misinterpreted as referring to the *natural law* right of the *people* to revolt in response to oppressive government action as opposed to having a *constitutional* or *legal* right to nullify unconstitutional acts of the federal government. Even Madison argued for this interpretation during the Nullification Crisis. I fundamentally disagree with such

After listing the specific evils of the Alien and Sedition Acts and the general evils incident to allowing the national government to operate unchecked, Jefferson again called on the co-states, “recurring to their *natural right* in cases not made federal,” to declare that the Alien and Sedition Act are “void and of no force, & will each take measures of its own for providing that neither these acts, nor any others of the general government, not plainly & intentionally authorised by the constitution, shall be exercised within their respective territories.” Jefferson’s ninth and final resolution authorized the committee of conference & correspondence to work with representatives of the “one or more of the co-states” in anticipation that the other states would consider action similar to Kentucky.<sup>9</sup>

Breckinridge, displaying a confidence derived from months of wrestling with the arguments to be made and the actions to be taken, made fundamental changes to Jefferson’s eighth and ninth resolves to make them consistent with the remedies proposed in resolutions that he and Nicolas had presented to, and were adopted by, their fellow Kentuckians during the various county rallies and meetings that summer. Breckinridge eliminated Jefferson’s committee of conference and correspondence and its suggested “Revolutionary parallel.” More important, he deleted Jefferson’s reference to the remedy of “nullification” and the related call on the states to thwart the enforcement of the Alien and Sedition Acts. Consistent with his desire not to countenance group resistance or confrontation outside the realm of politics, Breckinridge dropped Jefferson’s last clause that had called on the co-states to take “measures” to resist any enforcement of the Alien

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interpretations and argue that Jefferson’s use of the phrase “natural right” in this specific context is not referring to the *people’s* natural law right of revolution but the natural right of any party to a contract or treaty, in this case the state of Kentucky, to exercise certain remedies in response to a material breach by other parties to the contract or treaty, in this case the “co-States.”

<sup>9</sup>Ibid.

and Sedition Acts, and substituted the directive that the resolutions should be “transmitted to the Senators and Representatives in Congress . . . to use their best endeavors to procure . . . a repeal of the aforesaid unconstitutional and obnoxious acts.” Finally, he called on each state to “unite with this Commonwealth in requesting their repeal at the next session of Congress.”<sup>10</sup>

This not so subtle shift in rhetoric and substance squarely placed Breckinridge and Kentucky at odds with crucial aspects of Jefferson’s interpretation of the federal compact. First, Jefferson’s draft resolutions had specifically denied any need to address the national Congress—after all, the national government was not, Jefferson reasoned, a party to the constitutional compact. Breckinridge, however, clearly preferred legislative action should take the form of a protest, consistent with the resolutions passed during that summer and fall. Thus, Breckinridge re-directed Jefferson’s proposed head-on constitutional collision between the co-states into the realm of practical politics and dissent.<sup>11</sup> Second, and more significant, Breckinridge did not argue that an individual state could unilaterally nullify an act of Congress not authorized under the Constitution and deleted the remedy of nullification from the resolutions put before the Kentucky House. Like Jefferson, Breckinridge granted the legislature the right to judge whether an act of Congress exceeded its authority under the constitution. He coupled that judgment, however, with a request to the co-states to concur “in declaring these acts void and of no force.” Breckinridge explained his rationale for these modifications during the course of a debate with Federalist state legislator, William Murray. In response to Murray’s indictment of the

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<sup>10</sup>*Kentucky Resolutions of 1798.*

<sup>11</sup>Smith, “The Grass Roots Origins of the Kentucky Resolutions,” 239.

General Assembly for expressing its condemnation of the Acts, Breckinridge made it clear that only *majority* action of the co-states had constitutional meaning:

To be explicit, sir, I consider the co-States to be alone parties to the Federal compact, and *solely* authorized to judge in the last resort of the power exercised under that compact. Congress being not a party, but merely the creature of the compact, and subject as to its assumptions of power to the final judgment of those by whom and for whose use itself and its powers were all created. . . . If [Congress] should nevertheless attempt to enforce [the Alien and Sedition Acts], I hesitate not to declare it as my opinion that it is then the right and duty of the several States to nullify those acts, *and to protect their citizens from their operation*. But I hope and trust such an event will never happen, and that Congress will always have sufficient virtue, wisdom, and prudence, upon the representations of a majority of the States, to expunge all obnoxious laws whatever.<sup>12</sup> (underline added)

On the day the *Kentucky Gazette* published the text of the resolutions passed by the Kentucky General Assembly, just above a small item reporting on the weekly death toll from yellow fever in Philadelphia and New York City, the *Gazette* reported the first conviction under the Sedition Act. Republican Congressman Matthew Lyon of Vermont, who had been indicted for “being a malicious and seditious person and of a depraved mind and wicked and diabolical disposition and deceitfully wickedly & maliciously contriving to defame” President Adams, was found guilty and sentenced to four months in prison.<sup>13</sup>

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<sup>12</sup>Warfield, *The Kentucky Resolutions of 1798*, 93-94. Breckinridge’s majoritarian position on nullification reappeared a year later in the *Kentucky Resolutions of 1799*.

<sup>13</sup>*Kentucky Gazette*, November 14, 1798. The *Gazette* also reported the arrest of Lyon’s son, and two printers, one of whom was Alden Spooner, the publisher of the *Spooner’s Vermont Journal*, whose fate, “we have not yet heard.” The indictment is set forth in “The Sedition Act Trials—Historical Background and Documents,” Federal Judicial Center, [http://www.fjc.gov/history/home.nsf/page/tu\\_sedition\\_hd\\_indictment.html](http://www.fjc.gov/history/home.nsf/page/tu_sedition_hd_indictment.html). Lyon would cement his historical ties to the Commonwealth of Kentucky by moving to Kentucky in 1801 and settling in what is now Lyon County. Lyon was a member of the Kentucky House of Representatives in 1802 and served four terms as a member of Congress before losing re-election in 1810. His son, Chittenden Lyon, for whom the county is named, also served as a U.S representative from Kentucky from 1827-1835, as a supporter of Andrew Jackson. His grandson, Hylan Benton Lyon, was a career officer in the U.S. Army until the Civil War, when he resigned his commission and joined the Confederate Army as a cavalry

Three days later Kentucky state representative Robert Johnson, presented a bill to the Kentucky General Assembly that contemplated testing the constitutionality of the Sedition Act. No specific description or copy of the proposal exists, but the bill was rejected on its first reading. “The people by a large majority,” John Adair, a member of Johnson’s committee, concluded “are peaceably disposed, few if [an]y of those in the opposition contemplate any serious difference with the Federal Government.”<sup>14</sup>

Less than two weeks after Governor Garrard signed the *Kentucky Resolutions of 1798*, George Nicholas published a pamphlet that explained the overwhelming opposition to the Adams administration. Consistent with the opening sentiments of the resolutions passed throughout Kentucky, Nicholas expressed the “strongest attachment . . . to the constitution and the union of the United States” and denied the Federalist charge that Kentucky planned to improperly oppose the Sedition Act and other noxious acts of the Federalist Congress. Nicholas assured the recipient of his letter that Kentuckians would respond properly:

The laws which we complain of may be divided into two classes—those which we admit to be constitutional, but consider as impolitic; and those which we believe to be unconstitutional, and therefore do not trouble ourselves to enquire as to their policy; because we consider them as absolute nullities. The first class of laws having received the sanction of a majority of the representatives of the people of the United States, we consider binding on us . . . and we will obey them with promptitude, and to the extent of our abilities, so long as they continue in force. As to the second class, or the unconstitutional laws, although we consider them dead letters, and therefore

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officer and, by the end of the war, rode with General Nathan Bedford Forrest. See J.H. Battle, William Henry Perrin, *Kentucky. A history of the state, embracing a concise account of the origin and development of the Virginia colony; its expansion westward, and the settlement of the frontier beyond the Alleghenies; the erection of Kentucky as an independent state, and its subsequent development* (Louisville, KY: F. A. Battey Publishing Company, 1882), <https://archive.org/details/kentuckyhistoryo00batt>.

<sup>14</sup>*Kentucky Gazette*, November 14, 1798. Smith, “The Grass Roots Origins of the Kentucky Resolutions,” 241.

that we might legally use force in opposition to any attempts to execute them; yet we contemplate no means of opposition, even to these unconstitutional acts, but an appeal to the *real laws* of our country.<sup>15</sup>

Breckinridge also denied that the Kentucky Resolutions contained any sentiment for a violent confrontation in his communication to Senator Henry Tazewell of Virginia, “I can assure you with confidence we have but one object, and that is, to preserve the constitution inviolate, and that by constitutional efforts. “No people in America,” he continued, “are more sensible of the importance and necessity of union, or more alive to unconstitutional stretches of power by those in authority, than the people of Kentucky.” “I hope,” Breckinridge continued, “there is yet sufficient wisdom left in Congress, to discover the policy in expunging these obnoxious acts from the Code of the United States; which the most devoted partizans of the Government admit are unnecessary, but which all true republicans deprecate and abhor.” While the Alien and Sedition Acts remained in force, Kentucky refrained from interfering with the federal government’s authority to enforce the law. For the time being anyway, Breckinridge, Nicholas and their fellow Kentuckian were content to await the results of legislative attempts to repeal the Acts.

Historian James Morton Smith adeptly noted the irony of the similarity between Federalist charges and Republican countercharges, which should resonate with observers of contemporary politics. Republicans condemned the Federalist use of a foreign crisis for domestic political purposes as part of a larger plan ultimately “to destroy our republican government.” Conversely, Smith charged Federalists with condemning any Republican

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<sup>15</sup>*Letter from George Nicholas of Kentucky to His Friend in Virginia Justifying the Conduct of the Citizens of Kentucky, as to Some of the Late Measure of the General Government; Certain False Statements, Which Have Been Made in the Different States, of the Views and Actions of the People of Kentucky* (Lexington, KY: John Bradford, 1798, repr., Philadelphia: James Carey, 1799), 31, [https://ia700506.us.archive.org/12/items/letterfromgeorge00nichrich/letterfromgeorge00nichrich\\_bw.pdf](https://ia700506.us.archive.org/12/items/letterfromgeorge00nichrich/letterfromgeorge00nichrich_bw.pdf).

criticism of the Adams administration as an attempt to undermine the government solely for political purposes:

But though the charges advanced by both parties were similar, the rationales for the charges were different. The Federalists stressed the necessity for political unanimity, the Republicans the inevitability of dissent. By emphasizing the power of the public in a republic, the Republicans put a premium on public opinion, which might or might not coincide with the views of the constituted authorities. . . . By identifying dissent with disaffection and disaffection with disloyalty, the Federalists transformed the alienation of the people's affections from the administration into a separation from the government, even a threatened division of the Union. Relying on an inferential line of reasoning which involved the devolution from dissent to disaffection, to disloyalty, to disorganization, to dissolution and disunion, the Federalists concluded that criticism of the Adams administration was a prelude to revolutionary measures, that insurrection and secession were the twin goals of the Republican critics in Kentucky. The Republicans argued that the issue was not insurrection and separation, nor disaffection and dissolution, but patience and protest.<sup>16</sup>

Not content with being the primary draftsman of Kentucky's formal protest, and possibly frustrated with the changes wrought by Breckinridge, Jefferson attempted to influence Madison's resolutions before their submission to the Virginian legislature. Jefferson suggested that rather than inviting other states to "cooperate in the annulment of the acts," Madison's draft should invited the co-states to concur with Virginia in declaring the Alien and Sedition Acts were "ab initio, null, void and of no force, or effect."<sup>17</sup>

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<sup>16</sup>Smith, "The Grass Roots Origins of the Kentucky Resolutions," 243-44.

<sup>17</sup>Thomas Jefferson to Wilson Cary Nicholas, November 29, 1798, *Founders Online*, National Archives, <http://founders.archives.gov/documents/Jefferson/01-30-02-0399>. The principle that an unconstitutional or unauthorized law is invalid was commonplace (e.g., *Federalist Papers Nos. 10, 14, and 78*), but the issue over whether the *people* could declare such invalidity without formal action of the states or the federal judiciary was an open question. See Churchill, "Popular Nullification, Fries' Rebellion, and the Waning of Radical Republicanism, 1798-1801," 110. Americans generally followed the English tradition of abiding by laws acknowledged to be "legal" though not "constitutional," thus a resolution by Virginia or Kentucky that the Alien and Sedition Acts were unconstitutional did not necessarily imply that they were "of no force or effect." See Gutzman, "A Troublesome Legacy, 581, n24, citing Reid, *In Defiance of the Law*.

Jefferson's tactics were familiar to all participants in the revolutionary struggle with Great Britain. The claim that the Alien and Sedition Acts were "null, void and of no force, or effect" evoked colonial resistance to the Stamp Act and Townsend Acts passed by the British Parliament in the 1760s and 1770s. Even colonists conceding Parliamentary supremacy argued that certain actions of Parliament exceeded the sovereign powers of the legislative body sitting in Westminster and violated the English Constitution. Now, Jefferson hoped that the Virginia House of Delegates would harken back to the origins of American independence under what should have been far less provocative circumstances: certainly no American ascribed to the idea that the federal Congress was supreme and carried the imprimatur of ultimate sovereignty. Madison continued to resist the insertion of Jefferson's recommendation. Even arch states' rights supporter John Taylor of Caroline, deemed the proposed insertion as "dangerous and improper," because they "had a tendency to sap the very foundation of the government, by producing resistance to its laws."<sup>18</sup>

Generally considered the inferior writer when compared to his supposed mentor, Madison's *Virginia Resolutions of 1798* consisted of only 834 words compared to Jefferson's more clumsy 2,869. Madison began with two short resolutions expressing the General Assembly's "firm resolution to maintain and defend the constitution of the United States" as well as its "warm attachment to the Union of the States." Consistent with his *Federalist No. 44*, however, the second resolution quickly put the federal government on notice of the General Assembly's duty to "watch over and oppose every infraction of those principles which constitute the only basis of that Union." Consistent with the views of Jefferson and

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<sup>18</sup>*Debates in the House of Delegates of Virginia, upon certain resolutions before the House, upon the important subject of the acts of Congress passed at their last session, commonly called, the Alien and Sedition Laws* (Richmond, VA: Thomas Nicolson, 1798).

Breckinridge, Madison's third resolution made clear his view that the powers of the federal government were derived from the constitutional compact, "to which the states are parties; as limited by the plain sense and intention of the instrument constituting the compact" and that the acts of the federal government are valid to the extent "authorized by the grants enumerated in that compact." Whereas Jefferson advocated nullification, Madison's remedy sound less ominous but more ambiguous:

[I]n case of a deliberate, palpable, and dangerous exercise of other powers, not granted by the said compact, the states who are parties thereto, have the right, and are in duty bound, to *interpose for arresting the progress of the evil, and for maintaining within their respective limits, the authorities, rights and liberties appertaining to them.*<sup>19</sup> (Italics added)

Madison's fourth resolution noted Virginia's "deep regret" with the recent tendency of the federal government to expand its powers beyond the specific enumeration of powers set forth in the Constitution. The fifth and sixth resolutions contained the specific indictment against the Alien and Sedition Acts, particularly the Sedition Act and its pernicious effect of preventing the people from "freely examining public characters and measures" and its direct infringement on "free communication among the people thereon, which has ever been justly deemed, the only effectual guardian of every other right." After all, Madison noted, had not Virginia and the other states only just ratified the First Amendment to the Constitution that made it clear that the federal government had no authority respecting freedom of speech and freedom of the press. Madison's sixth resolution noted Virginia's constitutional convention and the convention's express declaration that "among other essential rights, 'the Liberty of Conscience and of the Press cannot be cancelled, abridged, restrained, or modified by any authority of the United

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<sup>19</sup>*Virginia Resolutions of 1798.*

States,' and from its extreme anxiety to guard these rights from every possible attack of sophistry or ambition . . . "20

The seventh and eighth resolutions contained Virginia's appeal to the other states to declare the acts "unconstitutional" and to take the "necessary and proper measures . . . in maintaining the Authorities, Rights, and Liberties, referred to the states respectively, or to the people."<sup>21</sup>

The written response of most of the Federalist-controlled state legislatures during the winter and spring of 1799 was predictably hostile. Delaware's response was little more than a perfunctory objection, condemning the Resolves as an "unjustifiable interference with the general government" and of having "dangerous tendencies." Rhode Island's legislature gave its "private opinion" that any attempt by the Virginia legislature to assume the authority of deciding on the constitutionality of a federal law was, itself, unconstitutional, and that "evil and fatal consequences" might result from Virginia's appeal to the state legislatures of the other states, "each state having, in that case, no resort for vindicating its own opinion, but to the strength of its own arm." Any decision on the constitutionality of acts of the federal government vis-à-vis the states was the sole purview of the federal courts and, ultimately, the Supreme Court.<sup>22</sup>

Similarly, New York argued that the judiciary, not the state legislatures, had the sole authority to decide constitutional issues between the federal government and the states

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<sup>20</sup>Ibid.

<sup>21</sup>Ibid.

<sup>22</sup>"Resolutions of the Delaware House of Representatives," February 1, 1799, [http://www.constitution.org/rf/vr\\_04.htm](http://www.constitution.org/rf/vr_04.htm); "Resolutions of the General Assembly of Rhode Island and Providence Plantations, February 1799, [http://www.constitution.org/rf/vr\\_04.htm](http://www.constitution.org/rf/vr_04.htm). Rhode Island failed to note that criminal cases were not appealable to the Supreme Court by virtue of Congress's enactment of the Judiciary Act of 1789.

but nonetheless proffered its judgment that the Alien and Sedition Acts were constitutional and advised Virginia and Kentucky to show greater confidence with “constituted authorities and chosen representatives of the people.” While Connecticut did not argue that the Virginia legislature lacked the authority to declare an act of Congress as unconstitutional, it merely declared the Alien and Sedition Acts as constitutional, “which the exigency of the country rendered necessary.” Consistent with Rhode Island and New York, the New Hampshire legislature adopted resolutions claiming that the state legislatures lacked the authority to determine the constitutionality of actions of the federal government and that such authority was the exclusive domain of the federal judiciary. It also offered, for “mere speculative purposes,” its opinion that the Alien and Sedition Acts were constitutional, and given the Quasi-War with France, were “highly expedient.” Lastly, Vermont agreed with many of its Federalist-controlled counterparts by expressing its belief that the state legislatures had no power to decide on the constitutionality of laws enacted by the federal government and that such power was exclusively vested in the federal judiciary. Vermont appeared to agree with Madison that the Constitution was a compact between the *people*.<sup>23</sup>

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<sup>23</sup>“Resolutions of the New York Senate,” March 5, 1799, [http://www.constitution.org/rf/vr\\_04.htm](http://www.constitution.org/rf/vr_04.htm); “Resolutions of the Connecticut General Assembly,” May 2, 1799, [http://www.constitution.org/rf/vr\\_04.htm](http://www.constitution.org/rf/vr_04.htm); “Resolutions of the New Hampshire House of Representatives,” June 14, 1799, [http://www.constitution.org/rf/vr\\_04.htm](http://www.constitution.org/rf/vr_04.htm); Resolutions of the Vermont House of Representatives,” October 30, 1799, [http://www.constitution.org/rf/vr\\_04.htm](http://www.constitution.org/rf/vr_04.htm). It is unclear whether these states supported *judicial supremacy* at the federal level as well, and rejected the *departmentalism* theory, i.e., the constitutional theory that each branch of the federal government had the right to interpret the Constitution within their own sphere of power, although their language certainly suggests as much. See David W. Tyler, “Clarifying Departmentalism: How the Framers’ Vision of Judicial and Presidential Review Makes the Case for Deductive Judicial Supremacy,” *William & Mary Law Review*, Volume 50, Issue 6: 2214-2264 (2009); Robert Post and Reva Siegal, “Popular Constitutionalism, Departmentalism and Judicial Supremacy,” *Yale Law School Legal*

In Massachusetts, its Senate passed a series of resolutions, and like Rhode Island, only addressed the resolutions adopted by the legislature of Virginia. Massachusetts' resolutions denied even the right of state legislature to "denounce" the federal government, a government "to which the people themselves, by a solemn compact, have exclusively committed their national concerns. Suggesting that the current controversy amounted to little more than "groundless or trivial pretexts," Massachusetts followed its fellow New England states and claimed the Constitution established judicial review and supremacy vis-à-vis the states. Moreover, if Virginia or any other state could lawfully object to actions of the federal government, the Massachusetts senators warned that the *people*, "convulsed and confused by the conflict between two hostile jurisdictions," might submit to a dictator. After defending each of the Alien and Sedition Acts as "expedient and necessary" measures of national defense. They rejected any notion that the Sedition Act violated the First Amendment, noting that the liberty of speech and the press was only the "liberty to utter and publish the truth." Invoking the "necessary and proper clause" of the Constitution, along with a federal common law empowering the federal government to take whatever

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*Scholarship Repository*, Faculty Scholarship Series, Paper 178, 1-1-2004. Larry Kramer described *departmentalism* as:

Each branch could express its views as issues came before it in the ordinary course of business: the legislature by enacting laws, the executive by vetoing them, the judiciary by reviewing them. But none of the branches' views were final or authoritative. They were the actions of regulated entities striving to follow the law that governed them, subject to ongoing supervision by their common superior, the people themselves. Kramer, *The People Themselves*, 109.

action it deemed necessary, to prohibit “scandalous misrepresentations of his measures and motives, which directly tend to rob him of the public confidence.”<sup>24</sup>

While the objections from the Federalist-controlled states were not surprising, most unexpected was the universal silence of Republican-controlled southern states. As noted, any chance for a formal response from the Tennessee legislature was stifled by local political intrigue. North Carolina’s legislature was in session while Kentucky adopted its resolves but had adjourned prior the arrival of Virginia’s. Little evidence exists that sheds light on why no formal action was taken. In South Carolina, both houses of government had adjourned prior to receiving either set of resolutions, and they would not reconvene again until November of the following year. In Georgia, it appears that the legislature initially considered taking certain action during its session in February of 1799, but eventually postponed taking any formal action, for reasons unrecorded, until the next legislative session.<sup>25</sup>

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<sup>24</sup>“Resolution of Massachusetts Senate,” February 9, 1799, [http://www.constitution.org/rf/vr\\_04.htm](http://www.constitution.org/rf/vr_04.htm). Interestingly, historians and scholars who have opined on the Virginia and Kentucky Resolutions, especially those who critique the “dangerous tendencies” of Madison and Jefferson’s respective compact theory of the Constitution, rarely address the efficacy of the arguments posed by Federalist-dominated state legislatures. Any claim that judicial supremacy was established in the 1790s is historically unsupportable, and even under the most aggressive historical interpretation in its favor, it did not exist until Marshall’s opinion in *Marbury v. Madison* in 1801. A claim that the *people* would turn to an American Napoleon if state legislatures challenged the constitutionality of laws passed by Congress just seems silly.

<sup>25</sup>Anderson, “Contemporary Opinion of the Virginia and Kentucky Resolutions II,” 236-37. The condemnation from the Federalist-controlled legislatures in New England and silence from Republican-controlled legislature in the South might suggest the Virginia and Kentucky Resolutions were not mainstream and that the arguments proffered by the New England states represented the dominant opinion on the meaning of the Constitution. I disagree with this conclusion. The principle argument of the New England states were twofold: (1) it was improper of state legislatures to judge the constitutionality of actions taken by the federal government and (2) the federal judiciary, especially the Supreme Court, was the proper political body to determine the constitutionality of actions of the

Despite the discouraging lack of response from Southern states, Jefferson was unbowed and during the summer of 1799 lobbied the protagonists in Kentucky and Virginia to pass additional resolutions to rebut the arguments formally posed by the seven Federalist states. On November 22, 1799, Kentucky passed two additional resolutions, this time explicitly invoking the term “nullification.” In contrast to the previous year, however, the Kentucky legislature was brief, noting any attempt to rehash the arguments over the constitutionality of the Alien and Sedition Acts would be “as unnecessary as unavailing.” Nonetheless, given the “unfounded suggestions” and “uncandid insinuations” contained in some of the state responses, the Kentucky legislature was compelled to counter any argument that “the silence of this commonwealth should be construed into an acquiescence in the doctrines and principles advanced and attempted to be maintained” by the co-states to the federal compact. Nor should the co-states “be deluded by the expectation, that we shall be deterred from what we conceive our duty; or shrink from the principles contained in those resolutions.” The Kentucky legislature therefore resolved:

That the principle and construction contended for by sundry of the state legislatures, that the general government is the exclusive judge of the extent of the powers delegated to it, stop nothing short of despotism; since the discretion of those who administer the government, and not the constitution, would be the measure of their powers: That the several states who formed that instrument, being sovereign and independent, have the unquestionable right to judge of its infraction; *and that a nullification, by those sovereignties, of all unauthorized acts done under colour of that instrument, is the rightful remedy*: That this commonwealth does upon the most deliberate reconsideration declare, that the said alien and sedition laws, are in their

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federal government. Neither of these principles could be considered dominant opinions during this era. State legislatures often opined on the constitutionality of government action. In fact, state judges took an oath to abide by the Constitution and sometimes were called on, in the first instance, to consider the constitutionality of federal laws. As for the Supreme Court having the final say under the Constitution, the New England states failed to acknowledge that Congress did not grant the Supreme Court jurisdiction to hear appeals of Sedition Act convictions. Therefore, on this topic, the Supreme Court would never be heard.

opinion, palpable violations of the said constitution; and however cheerfully it may be disposed to surrender its opinion to a majority of its sister states in matters of ordinary or doubtful policy; yet, in momentous regulations like the present, which so vitally wound the best rights of the citizen, it would consider a silent acquiescence as highly criminal: That although this commonwealth as a party to the federal compact; will bow to the laws of the Union, yet it does at the same time declare, that it will not now, nor ever hereafter, cease to oppose in a constitutional manner, every attempt from what quarter soever offered, to violate that compact. (Italics added)<sup>26</sup>

Although invoking nullification, the new Kentucky resolves echoed the sentiments expressed by Breckinridge during the legislative debates in November of 1798, that if such nullification did occur, it would not be the solitary action of the commonwealth of Kentucky but rather the actions of “those sovereignties” who created the federal compact—the “sovereign and independent” states. As for Kentucky, while it would “bow to the laws of the Union,” it would continue to oppose the unconstitutional laws in a constitutional manner and such obedience to unconstitutional laws should not be used as a precedent for “similar future violations of federal compact.” Kentucky’s legislature made no claim that the offending legislation was *null and void*. While Kentucky’s latest salvo against the Act appeared in newspapers throughout the country, the nation took little notice because of news of the death of George Washington.<sup>27</sup>

In Virginia, Madison and the Virginia House of Delegates rejected Jefferson’s call to pass additional resolutions, but as 1799 came to end, the Virginia House did form a special committee to draft a response to the Federalist-controlled legislatures. Madison’s *Report of 1800*, a document of over 21,000 words, contained a detailed examination and defense of each resolution passed the previous December. Madison began by reiterating the

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<sup>26</sup>*Kentucky Resolutions of 1799.*

<sup>27</sup>Anderson, “Contemporary Opinion of the Virginia and Kentucky Resolutions II,” 243.

sentiments of the first resolution, namely, that the Virginia firm resolve to maintain and defend the Constitution of the United States and support the government of the United States “in all measures warranted by” the Constitution. Madison assumed that the sentiments expressed in the second resolution—Virginia’s warm attachment to the Union, but the duty of the General Assembly to “watch over and opposed every infraction of those principles” on which the Union was created—were equally without controversy.<sup>28</sup>

Madison then turned to Virginia’s third resolution, which contained a concise summary of the elements that would constitute the “Principles of ‘98.” First, the powers of the federal government were derived from a compact, “to which the states are parties,” and such powers were limited by the “plain sense and intention” of the said compact. Second, powers exercised by the federal government not authorized by the constitutional compact were invalid. Third, that “in the case of a deliberate, palpable and dangerous exercise of other powers, not granted by the said compact, the states who are parties thereto have the right, and are in duty bound, to interpose for arresting the progress of the evil, and for maintaining within their respective limits, the authorities, rights, and liberties appertaining to them.” As for the first point, Madison explained the committee’s dismay with any notion that the federal government possessed powers that were not derived from the Constitution, and that during the ratification process, “it was constantly justified and recommended . . . that the powers not given to the government, were withheld from it and, more importantly, if there was any doubt as to this proposition, such doubt should have been removed by the 10<sup>th</sup> Amendment’s explicit reservation of powers to the states or the *people*.” As to the *parties* to the constitutional compact, Madison obviously concluded that

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<sup>28</sup>*Report of 1800.*

he needed to respond to the criticisms of Massachusetts and Vermont, and also concluded that the general language employed in December of '98 was inadequate. Thus, Madison paused to clarify what he meant when he described the Constitution as a compact between the "states." Admittedly, he conceded, the meaning of the terms "state" or "states" could sometimes be "vague," depending on the context:

Thus, it sometimes means the separate sections of territory occupied by the political societies within each; sometimes the particular governments, established by those societies; sometimes those societies as organized into those particular governments; *and, lastly, it means the people composing those political societies, in their highest sovereign capacity.* (Italics added)<sup>29</sup>

According to Madison, it was in this last sense that the "states" ratified the Constitution. And then, in one of the greater understatements in early American constitutional history, Madison grudgingly acknowledged that it was possible that some folks might have misunderstood what he meant:

Although it might be wished that the perfection of language admitted less diversity in the signification of the same words, yet little inconvenience is produced by it, where the true sense can be collected with certainty from the different applications. In the present instance, whatever different construction of the term "states," in the resolution, may have been entertained, all will at least concur in that last mentioned; because in that sense the Constitution was submitted to the "states;" in that sense the "states" ratified it; and in that sense of the term "states," they are consequently parties to the compact from which the powers of the federal government result.<sup>30</sup>

Thus, Madison made it clear that, unlike Jefferson, the parties to the constitutional compact were not the state *qua* states, as represented by the state legislatures, but the *people* of each state, acting collectively in their highest sovereign capacity to form a new government under the Constitution. This critical difference of opinion did not arise in

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<sup>29</sup>*Report of 1800.*

<sup>30</sup>*Ibid.*

response to the criticisms of the northern states or due to Madison's change of mind. While his language was inexact in December of 1798, he recognized the critical distinction between a compact between the states *qua* states and a compact between the *people* of the several states at least as early as January of 1788, in *Federalist No. 39*:

[T]he constitution is to be founded on the assent and ratification of the people of America, given by deputies elected for the special purpose; . . . , that this assent and ratification is to be given by the people, not as individuals composing one entire nation, but as composing the distinct and independent states to which they respectively belong. It is to be the assent and ratification of the several states, derived from the supreme authority in each state . . . the authority of the people themselves. The act, therefore, establishing the constitution, will not be a *national*, but a *federal* act.<sup>31</sup>

For Madison, this distinction was no trivial point. Shortly after the passage of the *Kentucky Resolutions of 1798*, but apparently before Madison had seen the final copy of the Virginia Resolutions passed by the House of Delegates on December 21, Madison wrote to Jefferson. After lamenting Alexander Hamilton's efforts to precipitate a declaration of war from France and his undue influence on President Adams, Madison expressed concern that the passion produced by the Alien and Sedition Acts might cause members of the Virginia House to adopt final resolutions that ignore "some considerations which ought to temper their proceedings." What considerations Madison had in mind became immediately clear when Madison rhetorically asked Jefferson, "Have you ever considered thoroughly the distinction between the power of the State, & that of the Legislature, on questions relating to the federal pact."<sup>32</sup> Clearly, Madison was concerned the Virginia House might adopt the Jeffersonian formulation that argued the state of Virginia was the party to the compact and

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<sup>31</sup>"*Federalist No. 39*," Yale Law School, *The Avalon Project: Documents in Law, History and Diplomacy*, [http://avalon.law.yale.edu/18th\\_century/fed39.asp](http://avalon.law.yale.edu/18th_century/fed39.asp).

<sup>32</sup>James Madison to Thomas Jefferson, December 29, 1798, *Founders Online*, National Archives, <http://founders.archives.gov/documents/Madison/01-17-02-0129>.

that the state legislature not only was the proper judge of whether the compact had been violated but also the proper body to nullify the offending Acts. To drive his point home to Jefferson, Madison immediately followed his rhetorical question with an emphatic statement that it was the people of Virginia who had the power to ultimately judge whether the Alien and Sedition Acts were unconstitutional, not the legislature. The legislature, he counseled Jefferson, is the not “the legitimate organ.” For to do so, the legislature would open itself up to the charge that it had violated the Constitution “in the very act of protesting [against] the usurpations of Congress.” Madison did not specify how the *people* would exercise this right to judge the Constitution.<sup>33</sup>

This distinction was neither trivial nor just an academic debate between two headstrong Virginians. In fact, this distinction garnered the lion’s share of the concerns raised by the small Federalist opposition during the debate in the Kentucky legislature when considering the adoption of the resolves. Federalist William Murray of Franklin County, the sole spokesman for the opposition during three days of debate, did not flinch in his attack on the Kentucky legislature’s proposed course of action:

While exclaiming against usurpation, will you yourselves become usurpers? Because the Constitution of the United States has been violated, will you violate your own Constitution? Where is the clause which has given you the censorship? Where is the clause which has authorized you to repeal or to declare void the laws of the United States?<sup>34</sup>

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<sup>33</sup>Ibid. Why Madison did not articulate a method by which the *people* would exercise their sovereign power to determine the constitutionality of actions of the federal government is unknown. Certainly, Madison could have simply referred to the process by which the *people* cast aside the Articles of Confederation and ratified the Constitution, and stressed why he and others advocated the Constitution be adopted by the *people* via popular conventions rather than having the state legislatures take the formal action of adoption and ratification.

<sup>34</sup>Warfield, *The Kentucky Resolutions of 1798*, 88. Interestingly, Murray had been one of the Kentuckians in receipt of inquiries from the Spanish governor in 1793 and 1797 regarding a possible “conspiracy” to have Kentucky break off from the United States in

After a series of rhetorical questions meant to illustrate that neither the U.S. Constitution nor the Kentucky state constitution authorized the Kentucky governor, legislature or judiciary to censor actions of the federal government, Murray placed the authority of censorship in the *people*, "It belongs then to the people at large." And fully a year before Madison clarified the meaning of his compact between the "states," Murray, the Federalist's voice in the Commonwealth of Kentucky, stated Madison's position plainly:

This Constitution was not merely a covenant between integral States, but a compact between the several individuals composing those States. Accordingly the Constitution commences with this form of expression: "We, the people of the United States, " not we, the thirteen States of America. . . [I]t is the people only that have a right to inquire whether Congress hath exceeded its powers; it is the people only that have a right to appeal for redress.<sup>35</sup>

It was in response to Murray's attack on Kentucky's House of Delegates that Breckinridge articulated, more simply and effectively than the Resolves themselves, the basis for his theory of state *nullification*. But first, Breckinridge addressed the authority for the House of Delegates to judge actions of the federal government. Unlike Jefferson, who saw the legislature as the embodiment of the state, Breckinridge, while clearly defending the right of the legislature to censor unconstitutional actions of the federal government, located the legislature's power not based on some express power in the Kentucky Constitution but as an agent and protector of the *people*, and mocked Murray's attempt to shield the Alien and Sedition Acts by invoking the name of the *people*:

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exchange for Spain granting Kentucky farmers and merchants full access to the Mississippi River. Apparently not content with simply debating Republicans, he later wounded Henry Clay in a duel in 1809. James C. Klotter, *Our Kentucky Home: A Study of the Bluegrass State* (Lexington: University of Kentucky Press, 2000), 82.

<sup>35</sup>"Speech of Mr. Murray," in William Naylor McDonald, Basil V. Duke and Richard W. Knott, eds., *The Southern Bivouac: A Monthly Literary and Historical Magazine*, Vol. 1 (Louisville, KY: B. F. Avery and Sons, 1886), 660, [http://play.google.com/books/reader?id=\\_Z0VAQAAMAAJ&printsec=frontcover&output=reader&hl=en&pg=GBS.PR1](http://play.google.com/books/reader?id=_Z0VAQAAMAAJ&printsec=frontcover&output=reader&hl=en&pg=GBS.PR1).

I consider the General Assembly as the grand inquest of the commonwealth. They are bound in duty, as well as by oath, to support their own as well as the Federal Constitution; and all attempts to violate either, from whatever quarter offered, demand their earliest consideration and representation. The legislature is the constitutional and proper organ through which the will of the people is known, and, when known, effectually executed on ordinary occasions; therefore an article declaring that the people through their legislature had a right to censure those who attempt a violation of their rights would not be more absurd than debasing. If Congress received no censure, from the State legislatures, from whom is the censure to come? The gentleman says the people. Yet when the people take up the subject and express their sentiments on it, they are stigmatized with the appellation of irregular assemblies, tumultuous mobs—mere sprouts from one root forced into unnatural growth by intrigue and ambition. . . . To be explicit, sir, I consider the co-States to be alone parties to the Federal compact, and *solely* authorized to judge in the last resort of the power exercised under that compact. Congress being not a party, but merely the creature of the compact, and subject as to its assumptions of power to the final judgment of those by whom and for whose use itself and its powers were all created.<sup>36</sup>

Recounting the discussion of this topic during the legislative debates over the Report of 1800, Madison noted in a short letter to Jefferson that the “debate turned almost wholly on the right of the Legislature to protest.” Madison apprised Jefferson that the House debate on the Report had been going on for two days and that the “attacks on it have turned chiefly on an alleged inconsistency between the comment now made, and the arguments of the last Session; and on the right of the Legislature to interfere in any manner with denunciations of the measures of the Genl. Govt.” In response to this criticism, Madison informed Jefferson that he added the language acknowledging that “the term ‘states,’ is sometimes used in a vague sense, and sometimes in different senses, according to the subject to which it is applied,” and added the concession that a number of legislators likely misunderstood the meaning Madison ascribed to the term “states” in the resolutions adopted in December of ‘98. Nonetheless, Madison’s acknowledgement and concession also

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<sup>36</sup>“Reply of Mr. Breckinridge,” in *The Southern Bivouac*, 661.

included a reiteration of Madison's view that the people of the states were the parties to the compact and that despite the confusion, "all will at least concur in that last mentioned; because, in that sense, the Constitution was submitted to the 'states,' in that sense the 'states' ratified it; and, in that sense of the term 'states,' they are consequently parties to the compact, from which the powers of the federal government result."<sup>37</sup>

Madison's *Report of 1800* then turned to the most vexing issue left unaddressed by the Constitution: What body determines whether the federal government exceeds its authority granted under the Constitution? Federalist defenders of the Alien and Sedition Acts declared unequivocally that such a determination was within the sole purview of the federal courts. A review of the rare instances where Madison discussed judicial power under the new Constitution could be interpreted as in agreement with that position. In *Federalist No. 39*, when discussing the *extent* of the federal governments and the difference between a "federal" versus a "national" government, he acknowledged that someone would have to draw the line between where the power of the federal government ended and the residual power of the states commenced:

It is true that in controversies relating to the boundary between the two jurisdictions, the tribunal which is ultimately to decide, is to be established under the general government. But this does not change the principle of the case. The decision is to be impartially made, according to the rules of the constitution; and all the usual and most effectual precautions are taken to secure this impartiality. Some such tribunal is clearly essential to prevent an appeal to the sword, and a dissolution of the compact; and that it ought to be established under the general, rather than under the local governments; or to speak more properly, that it could be safely established under the first alone, is a position not likely to be combated.<sup>38</sup>

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<sup>37</sup>James Madison to Thomas Jefferson, January 4, 1800, *Founders Online*, National Archives, <http://founders.archives.gov/documents/Madison/01-17-02-0200>.

<sup>38</sup>"*Federalist No. 39*." For a discussion of Madison's views on judicial review and the power of the federal courts, see Jack N. Rakove, "Judicial Power in the Constitutional Theory of James Madison," *William and Mary Law Review* 43 (2002): 1513-47.

But what of the role of the *people*? In *Federalist No. 44*, Madison tackled the issue again in the context of explaining Congress' power under the "necessary and proper" clause. What happened, he rhetorically asked, if Congress "misconstrued" the Constitution and "exercised powers not warranted by the its true meaning"? Madison's response was "that in the last resort a remedy must be obtained form the people who can, by the election of more faithful representatives, annul the acts of the usupers."<sup>39</sup> Had not Madison's *Virginia Resolutions of 1798* betrayed these previous sentiments when advocating for the right of interposition? Under normal circumstances, Madison likely would have agreed that his language in the *Virginia Resolutions of 1798* had overreached. But the Alien and Sedition Acts, when combined with other recent actions of the Federalist-controlled Congress, were not normal or ordinary circumstances, but, according to Madison, a "deliberate, palpable, and dangerous exercise of other powers, not granted by the said compact," including a power "expressly and positively forbidden" by the First Amendment:

which more than any other, ought to produce universal alarm, because it is leveled against the right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed, the only effectual guardian of every other right.<sup>40</sup>

And Madison would not yield on the clear right of interposition in his *Report*. He did, however, attempt to assuage the fears of his critics by reassuring them that the *people*, the sovereign parties to their constitutional compact, would not and should not proceed in "a hasty manner, or on doubtful and inferior occasions." Madison then clearly steered a clear

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<sup>39</sup>"*Federalist No. 44*," Yale Law School, *The Avalon Project: Documents in Law, History and Diplomacy*, [http://avalon.law.yale.edu/18th\\_century/fed44.asp](http://avalon.law.yale.edu/18th_century/fed44.asp).

<sup>40</sup>*Report of 1800*.

path away from Jefferson and Breckinridge's Kentucky Resolutions, and Jefferson's reliance on the law of nations and rules of international law, by pointing out that:

[e]ven in the case of ordinary conventions between different nations, where, by the strict rule of interpretation, a breach of a part may be deemed a breach of the whole, every part being deemed a condition of every other part and of the whole, it is always laid down that the breach must be both wilful (sic) and material to justify an application of the rule. But in the case of an intimate and constitutional union, like that of the United States, it is evident that the interposition of the parties, in their sovereign capacity, can be called for by occasions only, deeply and essentially affecting the vital principles of their political system.<sup>41</sup>

Here, Madison is making two critical points. First, even if one adopted Jefferson's compact theory, i.e., that the sovereign parties to the compact are the states, as represented by the state legislatures, interposition by "a state" is not a legitimate recourse to unconstitutional actions of the federal government unless the breach of the compact is willful and material and a matter that "deeply and essentially" affects the "vital principles of their political system." To further bolster this point, Madison expanded on what he meant by "a *deliberate, palpable, and dangerous* breach" of the Constitution:

It must be a case, not of a light and transient nature, but of a nature *dangerous* to the great purposes for which the Constitution was established. It must be a case, moreover, not obscure or doubtful in its construction, but plain and *palpable*. Lastly, it must be a case not resulting from a partial consideration, or hasty determination; but a case stamped with a final consideration and *deliberate* adherence.<sup>42</sup>

Without such high standard, Madison recognized the Constitution could be deemed to be amended anytime a majority of the public (assuming that could be legitimately established) disagreed with legislation, executive action or a federal court decision. If that were so, what was the purpose of the federal Congress? Unlike Jefferson, Madison clearly

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<sup>41</sup>*Ibid.*

<sup>42</sup>*Ibid.*

was not in favor of a fluid Constitution and saw stability as important to establishing a good and effective federal government. That is why he rejected, in *Federalist No. 49*, Jefferson's suggestion that constitutional conventions of the *people* should be infrequent:

[E]very appeal to the people would carry an implication of some defect in the government, frequent appeals would, in a great measure, deprive the government of that veneration which time bestows on every thing, and without which perhaps the wisest and freest government would not possess the requisite stability.<sup>43</sup>

Madison's second point was that the "states" were not, as Jefferson clearly implied, separate nations "united" by a treaty or compact but rather part of "an intimate and constitutional union," which reinforced the notion interposition was not to be interpreted as an ordinary remedy readily invoked in response to a breach of a compact or treaty, but only in very rare circumstances, and when invoked, only by the *people* of the several states, acting in their highest sovereign capacity. That the *people*, and not the states, had a *constitutional* right of interposition would not foreclose, however, the state governments from participating in obstructing enforcement of an action deemed unconstitutional by the *people*. After all, the state had a role in protecting the liberties of the *people*, not only as ordinary citizens engaged in the ordinary stuff of politics but also in their role as ultimate sovereigns of the United States. This was the point that Breckinridge was making in response to Murray during the legislative debates in November of 1798: "it would be preposterous for the state legislature, as elected representatives of the *people* of such state, to sit idly by during a legitimate constitutional dispute between the *people* and the federal government.

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<sup>43</sup>"*Federalist No. 49.*"

As to whether the “judicial authority” should be the “sole expositor of the Constitution, in the last resort,” Madison pointed out that not all instances of the federal government exercising powers not authorized in the Constitution may lend themselves to recourse in the courts and then posed the question of what happens when the judiciary exercises or sanctions “dangerous powers” beyond those granted by the Constitution?” Even if the judiciary was the last resort “in relation to the authorities of the other departments of the [federal] government,” it cannot be the last resort “in relation to the rights of the parties to the constitutional compact,” from which the judiciary, as well as the executive and legislative branches, solely derives its power. “The authority of constitutions over governments, and of the sovereignty of the people over constitutions,” he reminded the critics, “are truths which are at all times necessary to be kept in mind; and at no time perhaps more necessary than at the present.”<sup>44</sup>

Madison then turned to the series of actions recently taken by the federal government whereby the federal government sought to enlarge its powers beyond those authorized by the Constitution. Added to the Alien and Sedition Acts was the creation of the First Bank of the United States. According to Madison, these three instances, and others not specifically discussed, evidenced a concerted effort of the federal government to use general phrases in the Constitution—namely Article I, Section 8’s admonition for Congress to provide for the “common Defence and general Welfare of the United States”—to improperly expand its power.<sup>45</sup> If this general phrase, Madison argued, could be

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<sup>44</sup>Ibid.

<sup>45</sup>Article I, Section 8, clause 1 of the United States Constitution provides: “The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the *common Defence and general Welfare of the United States*; but all Duties, Imposts and Excises shall be uniform throughout the United States; . . .”

interpreted as providing an independent source of authority, as opposed to qualifying the basis on which Congress has the power and authority, the Constitution could be construed to authorize every measure related to the common defense and general welfare of the nation. “For it is evident that there is not a single power whatever, which may not have some reference to the common defence, or the general welfare . . . .” The obvious result of such an interpretation would be a government without any practical limitations on its power, obviating the need for the limitations set forth in Article 1 and making a mockery of the Bill of Rights.<sup>46</sup>

Madison then turned to the particular evils of the Alien and Sedition Act, to which he devoted the largest portion of his *Report of 1800*. First, the Alien Acts, by permitting the president to summarily determine which aliens are dangerous to the “peace and safety” of the United States, “unites legislative, judicial, and executive powers in the hands of the president.” This “less definitive, less particular, and less precise” standard for forcibly removing a person from the United States must have particularly irked Madison given his overriding desire to create effective checks and balances among the three branches of government, which he deemed essential in order to sustain a viable republic over such a diverse geographic area. Considering the certain actions of the Bush and Obama administrations that have purposefully or effectively scuttled a number of supposed civil liberties heretofore possessed by persons residing in the United States, Madison’s outrage at the possible treatment of alien friends rings especially relevant today:

In the administration of preventive justice, the following principles have been held sacred: that some probable ground of suspicion be exhibited before some judicial authority; that it be supported by oath or affirmation; that the party may avoid being thrown into confinement, by finding pledges

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<sup>46</sup>*Report of 1800.*

or sureties for his legal conduct sufficient in the judgment of some judicial authority; that he may have the benefit of a writ of *habeas corpus*, and thus obtain his release, if wrongfully confined; and that he may at any time be discharged from his recognizance, or his confinement, and restored to his former-liberty and rights, on the order of the proper judicial authority, if it shall be sufficient cause.<sup>47</sup>

All these principles of the only preventive justice known to American jurisprudence are violated by the alien-act. The ground of suspicion is to be judged of, not by any judicial authority, but by the executive magistrate alone; no oath or affirmation is required; if the suspicion be held reasonable by the President, he may order the suspected alien to depart the territory of the United States, without the opportunity of avoiding the sentence, by finding pledges for his future good conduct; as the President may limit the time of departure as he pleases, the benefit of the writ of *habeas corpus* may be suspended with respect to the party, although the Constitution ordains, that it shall not be suspended, unless when the public safety may require it in case of rebellion or invasion, neither of which existed at the passage of the act; and the party being under the sentence of the President, either removed from the United States, or being punished by imprisonment, or disqualification ever to become a citizen on conviction of not obeying the order of removal, he cannot be discharged from the proceedings against him, and restored to the benefits of his former situation, although the *highest judicial authority* should see the most sufficient cause for it.<sup>48</sup>

Madison then proceeded with his indictment of the Sedition Act, namely that the Act exercised powers not granted to the federal government in the original Constitution that were “expressly and positively forbidden” by the First Amendment to the Constitution, and which ought to produce “universal alarm; because it is levelled against that right of freely examining public characters and measures, and of free communication thereon, which has ever been justly deemed the only effectual guardian of every other right.”<sup>49</sup>

The Sedition Act had to be especially galling to Madison. One of the most effective arguments Anti-Federalists raised against ratification of the Constitution was that it omitted a “Bill of Rights.” Anti-Federalists, and even many proponents of the Constitution,

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<sup>47</sup>Ibid.

<sup>48</sup>Ibid.

<sup>49</sup>Ibid.

expressed apprehension that the lack of a Bill of Rights might expose certain presupposed liberties to regulation by Congress pursuant to the necessary and proper clause.

Proponents of the Constitution such as Madison, Hamilton and arch-nationalist James Wilson countered that a Bill of Rights was not necessary because the federal government's powers were, by definition, limited only to those enumerated in the Constitution. Not only were there no enumerated powers regarding the press, but no such powers could reasonably be derived from an enumerated power. As Wilson stated:

[I]t would have been superfluous and absurd to have stipulated with a federal body of our own creation, that we should enjoy those privileges of which we are not divested, either by the intention or the act that has brought the body into existence. For instance, the liberty of the press, which has been a copious source of declamation and opposition—what control can proceed from the Federal government to shackle or destroy that sacred palladium of national freedom? If, indeed, a power similar to that which has been granted for the regulation of commerce had been granted to regulate literary publications, it would have been as necessary to stipulate that the liberty of the press should be preserved inviolate, as that the impost should be general in its operation.<sup>50</sup>

Moreover, there was a danger that advocates for a broader grant of power and authority to the federal government might use the specific prohibitions in a Bill of Rights to argue that the rights listed in such a Bill of Rights were exhaustive and undermine the principal that the federal government only had such power and authority specifically set forth within the four corners of the Constitution. When Madison proposed the Bill of Rights to the House of Representatives in 1789, he noted that concern that “by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General

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<sup>50</sup>“Speech of James Wilson before the Pennsylvania State Legislature,” October 6, 1787, <http://www.constitution.org/afp/jwilson0.htm>.

Government, and were consequently insecure.”<sup>51</sup> The concern was addressed head-on by including the Ninth Amendment’s admonition that “the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”<sup>52</sup>

Considering the rich history surrounding the subsequent ratification of a Bill of Rights, and given the First Amendment’s explicit prohibition to protect speech and the press from interference from the federal Congress, how could the Federalist Congress, less than ten years later, pass a law criminalizing speech critical of President Adams and his policies? The Federalist arguments in favor of the Sedition Act confirmed the fear of Anti-Federalists and Madison that broader powers would be inferred to the federal government. First, they argued, there was a federal common law that authorized reasonable regulation of expression, and because the Sedition Act had incorporated truth as a defense to a charge

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<sup>51</sup>“James Madison, House of Representatives,” June 8, 1789, *The Founders’ Constitution*, <http://press-pubs.uchicago.edu/founders/documents/v1ch14s50.html>. Earlier, Madison had written to Jefferson: “My own opinion has always been in favor of a bill of rights; provided it be so framed as not to imply powers not meant to be included in the enumeration. . . . I have not viewed it in an important light—1. because I conceive that in a certain degree . . . the rights in question are reserved by the manner in which the federal powers are granted. 2. because there is great reason to fear that a positive declaration of some of the most essential rights could not be obtained in the requisite latitude. I am sure that the rights of conscience in particular, if submitted to public definition would be narrowed much more than they are likely ever to be by an assumed power.” James Madison to Thomas Jefferson, October 17, 1788, *The Founders’ Constitution*, <http://press-pubs.uchicago.edu/founders/documents/v1ch14s47.html>.

<sup>52</sup>This concern has proved prescient given that the Ninth Amendment—“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”—, which was ratified to rebut this concern, is generally considered not to confer substantive rights, but rather is rule of Constitutional interpretation. *See*, for example, Laurence H. Tribe, *Constitutional Law*, 776 n14 (2nd ed. 1998). Historian Bernard Bailyn disagreed with the dominant interpretation of legal scholars and argued that the Ninth Amendment is speaking of “a universe of rights, possessed by the people—latent rights, still to be evoked and enacted into law . . . a reservoir of other, unenumerated rights that the people retain, which in time may be enacted into law.” Bernard Bailyn, *Remarks at White House Millennium Evening*, <http://clinton2.nara.gov/Initiatives/Millennium/bbailyn.html> (2000).

of libel (something that none of the other the thirteen colonies and states had made clear by statute or in their judicial interpretations of the common law), the Sedition Act did not “abridge” *the* freedom of speech and *the* freedom of the press as it existed at the time of the Constitution. In other words, despite the supposedly clear language of the First Amendment, because the Sedition Act was allegedly less onerous than existing state common law of sedition under English common law, the Sedition Act did not abridge *the* freedom of speech or *the* freedom of the press (and in most cases, less so). Surely, the argument went, if a speaker or an editor of a newspaper could be prosecuted under a state sedition law for a particular instance of speech, the fact that such speaker could be prosecuted under a federal criminal statute that was more libertarian than the English common law or the state’s respective common laws of sedition should raise little concern. All of the fuss around the Sedition Act, the argument continued, was politically motivated. Unmentioned, of course, was the fact that state criminal sedition laws went largely unenforced after the Revolution and that the press, according to law professor Leonard Levy, had “achieved special status as an unofficial fourth branch of the government, ‘the Fourth Estate,’ who function was to check the three official branches by exposing misdeeds and policies contrary to the public interest.”<sup>53</sup>

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<sup>53</sup>Leonard W. Levy, *Emergence of a Free Press* (New York: Oxford University Press, 1985), *xii*; see also, Robert W. T. Martin, *The Free and Open Press: The Founding of American Democratic Press Liberty, 1640-1800* (New York: New York University Press, 2001). Levy’s analysis stressed the importance of the relationship between a free press and the electoral process. While Madison certainly valued such relationship, Madison’s defense of freedom of expression in the *Report of 1800* and his attacks on the Sedition Act were far more than in the service of the electoral process. The relationship between an open and free press and the *people* not only served the *people’s* right of suffrage, but also, and more importantly, the necessity of the *people’s* being sufficiently informed so as to fulfill their fundamental obligation to stand “above” the Constitution as ultimate sovereigns and judge the actions of their government.

Before Madison addressed Congress' complete lack of authority to legislate on speech and of the press (other than as it might relate to treason against the United States, and in that instance, constrained by the dictates of Article III, Section 3), Madison mocked the English common law notion that freedom of the press only could be violated by limiting the freedom of publication. While most Americans roundly rejected prior restraint, Madison thought it preposterous that the American idea of freedom of the press emerging out of the Revolutionary experience permitted the publishing of certain sentiments but laws could be passed for punishing those sentiments once published. According to Madison, unlike Great Britain, the *people*, not the government, possessed absolute sovereignty and the "security of the freedom of the press" required that the press be protected not only from prior restraint but also from any encroachments from the federal government through laws punishing the press after publication. Madison sarcastically acknowledged that his formulation necessarily required tolerance to "a greater freedom of animadversion" than would be tolerated by the "genius of such a government as that of Great Britain." After all, he pointed out, in Great Britain the king "can do no wrong" and the parliament "can do what it pleases," but in America neither the president nor Congress is infallible or omnipotent. "Is it not natural and necessary," Madison concluded, that "under such different circumstances, that a different degree of freedom, in the use of the press, should be contemplated?" Even in Britain, the government tolerates freedom of the press far in excess of what is proscribed under English law, and in America, our practices should receive more respect than the English or state common law would grant it:

In every state, probably, in the Union, the press has exerted a freedom in canvassing the merits and measures of public men, of every description, which has not been confined to the strict limits of the common law. On this footing, the freedom of the press has stood; on this footing it yet stands. And

it will not be a breach, either of truth or of candour, to say, that no persons or presses are in the habit of more unrestrained animadversions on the proceedings and functionaries of the state governments, than the persons and presses most zealous in vindicating the act of Congress for punishing similar animadversions on the government of the United States.

. . . Some degree of abuse is inseparable from the proper use of everything; and in no instance is this more true, than in that of the press. It has accordingly been decided by the practice of the states, that it is better to leave a few of its noxious branches to their luxuriant growth, than by pruning them away, to injure the vigour of those yielding the proper fruits. And can the wisdom of this policy be doubted by any who reflect, that to the press alone, chequered as it is with abuses, the world is indebted for all the triumphs which have been gained by reason and humanity, over error and oppression; . . . Had “sedition-acts,” forbidding every publication that might bring the constituted agents into contempt or disrepute, or that might excite the hatred of the people against the authors of unjust or pernicious measures, been uniformly enforced against the press, might not the United States have been languishing at this day, under the infirmities of a sickly confederation? Might they not possibly be miserable colonies, groaning under a foreign yoke?<sup>54</sup>

Putting aside the issue of the applicability of the English common law to the law of Sedition in the United States, Madison returned to the more fundamental meaning of the First Amendment, namely that the First Amendment was, first and foremost, a “jurisdictional” matter, in this case, an affirmative denial to Congress of any power whatsoever on the subject. Reminding his critics of the concerns raised by the omission of a Bill of Rights during the ratification process a little over ten years prior, Madison recounted that he and other major proponents of the Constitution had assured the American people that there was no need for a First Amendment because Congress had not been granted any power with respect to freedom of expression and that all powers not granted to the federal government, were reserved: “It is painful to remark, how much the arguments now

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<sup>54</sup>*Report of 1800.*

employed in behalf of the sedition-act, are at variance with the reasoning which then justified the Constitution, and invited its ratification.”<sup>55</sup>

With the passage of the First Amendment, there could be little doubt that Congress should make no law abridging the freedom of expression. No such power had been delegated by the original text of the Constitution and the First Amendment was intended “as a positive and absolute reservation” of power and authority to the states and the people. As if any additional support were needed, when the original amendments were introduced, it was stated that: “The conventions of a number of the states having at the time of their adopting the Constitution expressed a desire, in order to prevent misconstructions or abuse of its powers, that further declaratory and restrictive clauses should be added; and as extending the ground of public confidence in the government, will best ensure the beneficent ends of its institutions.” In order for proponents of the Sedition Act to now argue Congress does, indeed, have authority to regulate the press, they would have to employ the proverbial slight-of-hand “without a parallel in the political world” by recasting the events of the last ten years as meaning the framers of the Constitution denied any power over the press was delegated by the Constitution, then proposed an amendment to the Constitution to make such denial explicit, but now, just a few years later, concurred with advocates of the Sedition Act that some unspecified provision of the original Constitution or a previously unrecognized principle of federal common law, latent and undiscovered, actually delegated such power to Congress.<sup>56</sup>

Proponents of the Sedition Act who feared a lack of constitutional support for the Sedition Act appealed to common sense, essentially arguing that all governments must

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<sup>55</sup>Ibid.

<sup>56</sup>Ibid.

posses a natural right of self-defense against seditious speech.<sup>57</sup> Madison’s response to this rhetorical argument was simple: “The Constitution alone can answer this question. If no such power be expressly delegated, and it be not both necessary and proper to carry into execution an express power; above all, if it be expressly forbidden by a declaratory amendment to the Constitution, the answer must be, that the federal government is destitute of all such authority.” Madison recognized that there could be instances when popular speech or the press truly crossed the line and could injure those who administered the federal government, and he thought the federal system provided for their protection—they were to look to the “same laws, and in the same tribunals, which protect their lives, their liberties, and their properties,” i.e., the laws in the individual states.<sup>58</sup>

Section 2 of the Sedition Act contained the most onerous provisions, effectively outlawing any speech that had the effect of bringing the Adams administration and the Federalist-controlled Congress “into contempt or disrepute” or inciting “the hatred of the good people of the United States” against them. Such a formulation was preposterous, according to Madison, because any free examination by “intelligent and faithful citizens” of unconstitutional or ill-advised actions by the government, and any potential remedies that might be available, would necessarily elicit some level of “contempt or hatred” against the government. Madison then noted that although the Sedition Act would expire in March of 1801, there would be two elections of the House, an election of part of the Senate and the election of a president during its term, when the “great remedial rights of the people” would be stifled. Obviously, any such hindrance to a free and full examination of the issues

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<sup>57</sup>This “common sense” approach formed one of the principle arguments of John Marshall in the report adopted by the Federalist minority in the Virginia House of Delegates in response to the legislature’s adoption of Madison’s *Report of 1800*.

<sup>58</sup>*Report of 1800*.

effectively gutted the people's right to exercise their right to vote. Madison flatly rejected the Federalist argument that because truth could be asserted as a defense, the Sedition Act did not "abridge" freedom of expression, and proceeded to provide the most libertarian defense of free speech and freedom of the press since the *Zenger* case. Whatever "the meritorious intentions" of advocates of the Sedition Act, the "baneful tendency" of the Act is "little diminished" by permitting writers and publishers to prove the truth of the matter asserted in political writing when:

opinions, and inferences, and conjectural observations, are not only in many cases inseparable from the facts, but may often be more the objects of the prosecution than the facts themselves; or may even be altogether abstracted from particular facts; and that opinions and inferences, and conjectural observations, cannot be subjects of that kind of proof which appertains to facts, before a court of law.<sup>59</sup>

Moreover, it was practically impossible to punish an *intent* to defame or to be malicious without at the same time obliterating the right to freely discuss public officials and their actions. After all, do not writers and publishers who criticize the government and its policies expect, and actually desire, that if their criticism is effective, it will produce "unfavourable sentiments" so that the *people* will be inspired to take remedial action?:

To prohibit, therefore, the intent to excite those unfavourable sentiments against those who administer the government, is equivalent to a prohibition of the actual excitement of them; and to prohibit the actual excitement of them, is equivalent to a prohibition of discussions having that tendency and effect; which, again, is equivalent to a protection of those who administer the government, if they should at any time deserve the contempt or hatred of the people, against being exposed to it, by free animadversions on their characters and conduct.<sup>60</sup>

There could be no doubt, Madison concluded, that if government officials were shielded from the contempt or even hatred of the people, such officials ultimately would

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<sup>59</sup>Ibid.

<sup>60</sup>Ibid.

fail in their responsibility of being faithful servants of the *people*. After all, the right of the *people* to elect their representatives is the “essence of a free and responsible government” and “the value and efficacy of this right, depends on the knowledge of the comparative merits and demerits of the candidates for public trust; and on the equal freedom, consequently, of examining and discussing these merits and demerits of the candidates respectively.” Madison then stated the obvious, that any election between those in power and those seeking power would be a sham because:

the characters of the former will be covered by the “sedition-act” from animadversions exposing them to disrepute among the people; whilst the latter may be exposed to the contempt and hatred of the people, without a violation of the act. What will be the situation of the people? Not free; because they will be compelled to make their election between competitors, whose pretensions they are not permitted, by the act, equally to examine, to discuss, and to ascertain.<sup>61</sup>

Madison added an ominous warning to his closing comments on the evils of the Sedition Act, recalling the Virginia’s Act of Ratification, which explicitly linked freedom of conscience and of the press to the *people’s* sovereign right to reclaim the powers granted to federal government.

We, the delegates of the people of Virginia, . . . declare and make known, that the powers granted under the Constitution, being derived from the people of the United States, may be resumed by them, whensoever the same shall be perverted to their injury or oppression; and that every power not granted thereby, remains with them, and at their will, . . . and that, among other essential rights, the liberty of conscience and of the press, cannot be cancelled, abridged, restrained, or modified, by any authority of the United States.<sup>62</sup>

Madison closed out the *Report of 1800* by reaffirming Virginia’s concluding resolutions from 1798, which had expressed the “most sincere affection” of the citizens of

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<sup>61</sup>Ibid.

<sup>62</sup>Ibid. Exactly how such “resumption” would take place, Madison did not say

Virginia for the “brethren of the other states” and reiterated Virginia’s “pledge of mutual friendship” and “mutual fidelity” to the Constitution. But he could not resist returning to, and scoffing at, one of the principal arguments raised by the states critical of the Virginia and Kentucky Resolutions, namely that the federal judiciary had the sole and final authority to determine the meaning of the Constitution. The recent history of the new nation, Madison countered, suggested exactly the opposite. Madison also mocked the notion that the actions of the Virginia and Kentucky legislatures were somehow unique. After all, Madison pointed out, a declaration by the citizens of Virginia or its legislature that certain actions of the federal government were unconstitutional was no more than “expressions of opinion, unaccompanied with any other effect than what they may produce on opinion.” Moreover, like any other public body or citizen, a state legislature should be able to freely express its opinions as to the constitutional propriety of government action and freely communicate with the legislatures of its sister states. In a real sense, because the state legislatures chose Senators, are not the state legislatures the “immediate constituents of one of its branches?”<sup>63</sup> Finally, Madison reminded his critics, the state legislatures were active participants in the Constitutional system and are often explicitly called on to interpret the Constitution and make their opinions known. The states legislatures, for instance, had the right to originate amendments to the Constitution. If a new state is

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<sup>63</sup>Until ratification of the Seventeenth Amendment in 1913, which mandated direct popular elections for senators, Article I, Section 3 of the Constitution provided: “The Senate of the United States shall be composed of two Senators from each state, chosen by the legislature thereof for six Years.” State legislatures sometimes failed to timely agree on Senate candidates, leading to frequent Senate vacancies. By 1826 proposals for the direct election of senators began appearing, but it took another eighty-seven years before direct elections became reality. See “Senators Elected by State Legislatures,” United States Senate, Art & History, [http://www.senate.gov/artandhistory/history/common/generic/Feature\\_Homepage\\_ElectedStateLegislatures.htm](http://www.senate.gov/artandhistory/history/common/generic/Feature_Homepage_ElectedStateLegislatures.htm).

formed by the combination of two or more states, the legislatures of such states, as well as Congress, must concur. In each instance, obviously, discussions must take place between the states on the Constitution and nothing in the Constitution or in logic suggests that such communication is somehow the limit of its right to do so.<sup>64</sup>

In his concluding remarks, Madison harkened back to his own *Federalist No. 44*, as well as Alexander Hamilton's *Federalist No. 26* and *Federalist No. 84*, each of which envisioned that state legislatures would "sound the alarm" whenever the new federal government encroached on the liberties of the people:

[T]he appeal was emphatically made to the intermediate existence of the state governments, between the people and [the federal] government, to the vigilance with which they would descry the first symptoms of usurpation, and to the promptitude with which they would sound the alarm to the public. This argument was probably not without its effect; and if it was a proper one then, to recommend the establishment of the Constitution, it must be a proper one now, to assist in its interpretation.<sup>65</sup>

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The actions by the Kentucky and Virginia legislatures were not novelties and protestations to the contrary should have fallen on deaf ears. After all, state and colonial resolutions were common methods of protest by the *people* during the early antebellum era and the protests surrounding the Alien and Sedition Acts were only their most recent example. Consistent therewith, the *Report of 1800* explained that the Resolutions involved no claim by the Virginia House of Delegates that its announcement of its constitutional views was of legal or constitutional significance: "The declarations in such cases, are expressions of opinion, unaccompanied with any other effect, than what they may produce

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<sup>64</sup>*Report of 1800.*

<sup>65</sup>*Ibid.*

on opinion, by exciting reflection.”<sup>66</sup> According to Madison, only the *people*, as the actual parties to the constitutional compact, could take action as the ultimate sovereigns of the United States. Historian Douglas Bradburn correctly and succinctly summarized his analysis of the Virginia and Kentucky Resolutions by placing it appropriately within the context of its time:

The Virginia and Kentucky Resolutions, the most visible opposition to the Alien and Sedition Acts, have never been placed in their true context: as part of a broader movement of petitioning and remonstrance, the concerted effort of numerous local communities not only in Virginia and Kentucky but also in Pennsylvania, New Jersey, New York, Vermont, and elsewhere. In fact the Virginia and Kentucky Resolutions broke little new ground in resolving that the laws should be deemed unconstitutional, in declaring them null and void, or in examining the real character of the American union. In numerous county resolutions and local petitions, many groups of citizens had already made such declarations. The overwhelming focus on Thomas Jefferson and James Madison as the originators of ideas and the organizers of any and all formal protest against the Alien and Sedition Acts is mistaken and ultimately misleading.<sup>67</sup>

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<sup>66</sup>Ibid. Madison’s reference to a desire that the Resolves might excite “reflection” and thereby affect public opinion was not, as some might suggest, downplaying or trivializing the importance of the Resolves or public opinion. Colleen Sheehan’s scholarship on Madison skillfully illustrates how public opinion constituted a fundamental component of his constitutional interpretation. See Sheehan, *James Madison and the Spirit of Republican Self-Government* and Sheehan, “Public Opinion and the Formation of Civic Character in Madison’s Republican Theory,” *67 Review of Politics* (2005): 37-48.

<sup>67</sup>Bradburn, “A Clamor in the Public Mind,” 566-67.

## 5 MADISON'S AND JEFFERSON'S PRINCIPLES OF '98

Duke law professor H. Jefferson Powell spoke for many historians and legal scholars as to what to make of the Virginia and Kentucky Resolutions and the Principles of '98. After using almost thirty single-spaced pages to set forth a vibrant historical account of the Virginia and Kentucky Resolutions, Powell figuratively threw up his hands in his search for clarity:

[T]he compact theory of the Constitution, as articulated in 1798-1800, was ambiguous from the beginning. The [Virginia and Kentucky] Resolutions and the Report [of 1800] did *not* underwrite a clear theory of state autonomy or supremacy, as later sectional writers such as [Jonathan] Elliot suggested. Jefferson and Madison instead presented significantly different accounts of what sort of contract the Constitution was; the Kentucky legislature approved a set of resolutions that omitted crucial language from Jefferson's 1798 draft, and its 1799 Resolutions arguably diverged in meaning from both 1798 texts; Madison's 1800 interpretation of "the states" that are parties to the compact seems deliberately unclear. Ambiguity appears to have been built into the very heart of the principles of '98.<sup>1</sup>

Powell is not alone. A survey of historians and legal scholars reflect a myriad of conflicting interpretations of the Resolves. Broadly, on one side are scholars who fail to meaningfully distinguish Madison's compact theory of the Constitution from Jefferson's.<sup>2</sup> These scholars either lay the bloody shirt of the Civil War and white supremacy at the feet of both Madison and Jefferson or they reject ascribing to either the original sin of secession and racial segregation. On the other side are scholars who do distinguish Madison's compact theory of the Constitution from Jefferson's, with Madison considered the more

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<sup>1</sup>Powell, "The Principles of '98," 736.

<sup>2</sup>Scholars who identify little difference between Madison and Jefferson's respective compact theories of the Constitution include Ethelbert Dudley Warfield, Richard Ellis, Garry Wills, Ron Chernow, Kevin Gutzman, Christian Fritz, Colleen Sheehan, Gordon Wood and Daniel Walker Howe.

“moderate” and Jefferson as more “radical.”<sup>3</sup> Often, these differing interpretations arose from the contemporary political and social context in which the Resolves were analyzed or due to the historical prism through which they were viewed. Thus, Koch and Ammon, writing at the inception of the modern civil rights movement, concluded there was little meaningful difference between Madison and Jefferson, and challenged Southern segregationists, who wished to imbue their theory of racial supremacy with the legitimacy of the founders. Richard Ellis and Christian Fritz each agreed and concluded that neither should be blamed for South Carolina’s theory of nullification during the Nullification Crisis. Likewise, Madison scholar Colleen Sheehan concluded that neither the Virginia nor Kentucky Resolutions “claim sovereign authority for a state or the states,” and labeled as “anachronistic” the view that Calhoun’s subsequent theory of states’ rights lies at the feet of Madison. Likewise, Kevin Gutzman saw little difference, recognized Madison and Jefferson’s influence on these unsavory political actors, but nonetheless concluded that the Principle’s of ‘98 fairly represented the dominant understanding of the creation of the founding and should not be illegitimized by malignant acts of white supremacists. William Freehling, in his Bancroft Prize winning study of the Nullification Crisis, rejected the notion that Madison’s and Jefferson’s compact theories of the Constitution supported South Carolina’s version of nullification but concluded that both provided support for remonstrance or for secession, and just as oddly characterized Jefferson’s invocation of nullification, as a “peaceful and conservative remedy.” Gary Wills, however, found little difference but clearly judged the Principles of ‘98 as bearing its share of responsibility for later ominous

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<sup>3</sup>Scholars who identified meaningful differences between Madison’s and Jefferson’s compact theories of the Constitution include Caleb Williams Loring, John C. Miller, Dumas Malone, Ralph Ketchum, Drew McCoy, H. Jefferson Powell and William Watkins.

doctrines leading to Southern secession, white supremacy and anti-government sentiment. Ron Chernow agreed.<sup>4</sup>

Before assessing how New England Federalist in 1809-1815 or South Carolina nullifiers in the 1830s understood the Resolves, a detailed examination of the Madison and Jefferson's respective compact theories of the Constitution is fruitful. Despite the myriad of interpretations and ambiguities hindering an easy understanding of Madison and Jefferson's original meaning the Resolves, the arguments expressed by Madison and Jefferson in the Virginia and Kentucky Resolutions, combined with the arguments made them in personal correspondence clearly identified significant differences between their respective compact theories of the Constitution that has been largely missed by scholars. Madison's standard historical portrayal as Jefferson's protégé or supplicant, combined with Kentucky's resolves predating Virginia's, often leads to the conclusion that Madison and Jefferson held largely identical theories concerning the constitutional compact, the legal parties to such compact and the remedies naturally available to the parties in the event such compact was breached. Under these interpretations, Madison and Jefferson are joined

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<sup>4</sup>Koch and Ammon, "The Virginia and Kentucky Resolutions;" Ellis, *The Union at Risk*, 4-7; Fritz, *American Sovereigns*, 192-200; Sheehan, *James Madison and the Spirit of Republican Self-Government*, 132; Wills, *Necessary Evil*, 145-52; Chernow, *Alexander Hamilton*, 587; Gutzman, "A Troublesome Legacy," 581; and William W. Freehling, *Prelude to Civil War: The Nullification Controversy in South Carolina, 1816-1836* (New York: Oxford University Press, 1965); 207-09. Freehling's analysis of the Virginia and Kentucky Resolution appears to have been almost entirely dependent on Koch and Ammon's 1948 article in *The William and Mary Quarterly*, and, sadly, does not appear to reflect any original thinking on the topic. Freehling collectively referred to the Virginia and Kentucky Resolutions as "the Jeffersonian Resolutions." Freehling also mistakenly referred to Jefferson's 1798 draft, which Breckinridge used as a guide in his resolutions of 1798, as "Jefferson's 1799 draft," which Freehling contended was the inspiration for the "more radical" Kentucky Resolutions of 1799, likely due to their explicit invocation of "nullification." Freehling, *Prelude to Civil War*, 207. For a fuller discussion of the historiography of the Virginia and Kentucky Resolutions, see Chapter 2.

at the ideological hip, and this may be in large part due to Madison's defense of Jefferson during the Nullification Crisis, when Madison himself strained to reconcile Jefferson's Principles of '98 with his own.

When we analyze Madison's Virginia Resolutions and Jefferson's Kentucky Resolutions on their own terms, and the private correspondence and public statements Madison and Jefferson made during the Sedition Act crisis and thereafter, the sometimes subtle but decisive differences in their respective positions become less opaque. A fuller understanding Madison and Jefferson's respective intent also is enhanced by a study of John Marshall's reaction to the Resolves, first as a member of the political minority in the Virginia House of Delegates and then as Chief Justice of the United States. Recognizing these decisive differences is only possible by abandoning the presumption that Madison's and Jefferson's respective Principles of '98 need to be reconciled, that because they both were on the same side of the issue, that because they both described the Constitution as a "compact between the states," they were describing the same thing. As a result, what has been underappreciated was how much Madison's compact theory steered a course away from constitutional confrontation, away from the more straightforward and fairly simplistic legal theory of nullification proposed by Jefferson, and crafted a compact theory as unique as the Constitution itself, and clearly grounded in the revolutionary concept of popular sovereignty.

This Chapter analyzes Madison and Jefferson's original meaning of the Virginia and Kentucky Resolutions, as well as the original understanding of those political and legal actors who offered their theory of the creation of the Union, and the remedies to be invoked in response to unconstitutional actions of the federal government. As Chapter 3's

recitation of the grass roots protest and petitioning campaigns against the Alien and Sedition Acts effectively illustrated, neither Madison, Breckinridge nor the Kentuckians or Virginians passing formal resolutions during the fall and winter of 1798, needed Jefferson's philosophical or rhetorical skills to craft their own distinct protests against the Alien and Sedition Acts. The notion that the Constitution was a compact between the "states" was not a foreign or novel political maxim given the generation's familiarity with John Locke's social contract theory, international law and the law of nations, recent experiences under the Articles of Confederation and the arguments over the meaning of sovereignty in English legal and political history. The political and legal actors in the early republic also were fully aware of the possible remedies for a breach of a legal agreement, compact or treaty whether based on contract law or the international law of nations. Jefferson saw the states legislatures as being squarely in the middle of the legal and constitutional drama that involved a rather simple legal theory: the federal government was created by the constitutional compact between the thirteen sovereign states, and when Congress exceeded its authority, he called on the legislatures of the co-states, not Congress, to remedy the breach. For Madison, the *people* of the several states, acting collectively in their highest sovereign capacity, were the parties to the compact and when the federal government engaged in a "deliberate, palpable and dangerous" exercise of governmental power and authority not delegated to the federal government, the *people*, acting in their highest sovereign capacity, had the authority to "reform, alter or abolish" the government created by them. Regardless of the differences between Madison and Jefferson's respective theories, neither was revolutionary and neither theory described remedies outside of the

Constitution or the law of nations. Neither was invoking, or threatening to invoke, the natural law right of revolution.

Before focusing on the significant differences between Madison and Jefferson's original meaning of the constitutional compact, I have identified the four common principles Madison and Jefferson both employed during the Sedition Act Crisis in response to unconstitutional actions of the federal government:

1. The Constitution of the United States was a compact between "the states."
2. The "states" established a federal government and delegated certain specified power and authority to such government while retaining all other power and authority to the states, or to the *people* themselves. Whenever the federal government exercised power or authority not authorized under the Constitution, its actions were unconstitutional.
3. The federal government was not a party to the Constitution and, therefore, could not be the *ultimate* judge of its own power and authority.
4. Because the Constitution did not establish an independent body to ultimately determine when the constitutional compact was violated, each "state," as a party to the compact, had an equal right to judge whether a violation of such compact had occurred. Therefore, except where the Constitution assigned to the federal government a specific role to interpret and enforce the Constitution, the role of interpreting and enforcing the Constitution, and judging whether the federal government had violated the Constitutional compact, falls on the "states" as parties to the constitutional compact.

For political and legal observers who interpreted the Constitution in legalistic terms, these principles were largely straightforward and commonsensical.

*The Constitution of the United States was a "compact between the states."*

Although Madison and Jefferson would differ in their definition of what was meant by "*the states*," both agreed that the Constitution was a "compact" entered into by parties to the Constitution. To the modern ear, such a proposition might strike us as odd or a bit

preposterous, but to most political actors actually engaged in the constitutional experiment from its founding, it was commonly, though not exclusively, accepted.<sup>5</sup>

During the years preceding the Sedition Act crisis, there was little occasion to revisit the issue. Tangible disputes between the states and the federal government rarely reached a crescendo where the theory of the founding would be widely discussed or were relevant to legal disputes between the states and federal government. The first occasion involved one of the Supreme Court's first significant decisions, *Chisholm v. Georgia* (1793), wherein Supreme Court ruled 4-1 that the state of Georgia was subject to the jurisdiction of the Supreme Court and were bound by decisions of the federal government authorized under the Constitution. *Chisholm* involved a dispute between a citizen of South Carolina and Georgia over payments owed by the State of Georgia for certain goods delivered during the Revolutionary War. Despite the language in Article 3, Section 2, that the "Judicial power [of the United States] shall extend to . . . Controversies between a State and Citizens of another State," Georgia refused to appear before the court or otherwise answer the lawsuit based on its claim that it was a sovereign state, and "therefore not liable to such actions" without its consent.<sup>6</sup>

Chief Justice John Jay's majority opinion described the Constitution as a "compact" in language with which Madison would little quarrel. Jay located the sovereignty of the United States in the "people of the nation, and the residuary sovereignty of each State in the people of each State." He recounted the "political situation we were in prior to the Revolution, and

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<sup>5</sup>Along with Jefferson and Madison, explicit proponents of the compact theory included St. George Tucker, John Taylor of Caroline and Abel P. Usher, all of whom ascribed to the theory that the Constitutional was a compact. The principle opponent of such a view was James Wilson, who was the primary advocate for ratifying the Constitution during Pennsylvania's ratifying convention.

<sup>6</sup>*Chisholm v. Georgia*, 2 U.S. 419 (1793).

to the political rights which emerged from the Revolution,” which resulted in the sovereignty of the United States passing from the Great Britain to the *people* of the United States:

[The people] made a Confederation of the States the basis of a general government [i.e. the Articles of Confederation]. Experience disappointed the expectations they had formed from it, and then the people, in their collective and national capacity, established the present Constitution. It is remarkable that, in establishing it, the people exercised their own rights, and their own proper sovereignty, and, conscious of the plenitude of it, they declared with becoming dignity, ‘We the people of the United States, do ordain and establish this Constitution.’ Here we see the people acting as sovereigns of the whole country, and, in the language of sovereignty, establishing a Constitution by which it was their will that the State governments should be bound, and to which the State Constitutions should be made to conform. Every State Constitution is a compact made by and between the citizens of a State to govern themselves in a certain manner, and *the Constitution of the United States is likewise a compact made by the people of the United States to govern themselves as to general objects in a certain manner.*”<sup>7</sup> (Italics added)

John Wilson, now a Justice on the Court, was one of the four Justices who rejected Georgia’s claim of state sovereignty and consistent with his views at the time of ratification, spoke of the formation of the Union in terms that appeared to reject the notion that the Constitution was a “compact.” While Jay employed the term “compact” five times with reference to the Constitution, Wilson never used the term and simply echoed his earlier sentiments that was one, great “People of the United States” that formed the Constitution:

[T]he citizens of Georgia, when they acted upon the large scale of the Union, as a part of the “People of the United states,” did not surrender the supreme or sovereign power to that state, but, as to the purposes of the Union, retained it to themselves. As to the purposes of the Union, therefore, Georgia is NOT a sovereign state. If the judicial decision of this case forms one of

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<sup>7</sup>*Chisholm v. Georgia*, 471. In response to the *Chisholm* holding—that the federal courts had jurisdiction to hear disputes between private citizens of one state and another state—Congress passed, and the states ratified the Eleventh Amendment, which removed federal jurisdiction in cases where citizens of one state attempted to sue another state.

those purposes, the allegation that Georgia is a sovereign state is unsupported by the facts.<sup>8</sup>

Justice James Iredale was the lone dissenter in the case but shed little light on the question as to whether the Constitution was a “compact.” Iredale’s vision of the Constitution as retaining state sovereignty would have been very recognizable to adherents of Jefferson’s compact theory of the Constitution:

Every State in the Union, in every instance where its sovereignty has not been delegated to the United States, I consider to be as completely sovereign as the United States are in respect to the powers surrendered. The United States are sovereign as to all the powers of Government actually surrendered: each State in the Union is sovereign as to all the powers reserved. It must necessarily be so, because the United States have no claim to any authority but such as the States have surrendered to them. Of course, the part not surrendered must remain as it did before. . . . So far as the States under the Constitution can be made legally liable to [the authority of the General Government], so far, to be sure, they are subordinate to the authority of the United States, and their individual sovereignty is in this respect limited. But it is limited no farther than the necessary execution of such authority requires.<sup>9</sup>

Thus, unlike Jay, Iredale viewed the sovereignty issue through the prism of “governmental” sovereignty and did not place the sovereign power of the United States with the *people* of the individual states. Rather, Iredale interpreted the Constitution as allocating sovereignty between the federal and state governments, and with respect to the power and authority not expressly delegated to the federal government and, like Jefferson, believed the state governments retained complete sovereignty and were akin to a independent nation vis-à-vis the power of the federal government.

Frank Maloy Anderson, who conducted a detailed study of the state responses to the Virginia and Kentucky Resolutions, devoted considerable time to ferreting out the reactions

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<sup>8</sup>Ibid, 457. Wilson did not venture to discuss whether Georgia possessed state sovereignty with respect to matters not within “the purposes of the Union.”

<sup>9</sup>Ibid, 436.

of Federalists and Republicans outside of Virginia and Kentucky, especially Madison, Jefferson and Breckinridge's contention that the "Union was the result of a compact to which the states were parties," and concluded that:

This fundamental doctrine received no attention in any of the replies or the discussions over them, so far as the latter have been preserved, except in the reply of Vermont to Kentucky. It is probable that this assertion of Virginia and Kentucky was more generally accepted in 1799 than it was later; and it is certain that neither the Republican who asserted it nor the Federalist who denied it had any adequate conception of the results to which a logical development of the doctrine would lead.<sup>10</sup>

Massachusetts Federalist's also rejected Jefferson and Breckinridge's contention that the Constitution was a "compact" between the state governments. Because of this fact, Massachusetts concluded the state legislatures did not have the right to ultimately judge the constitutionality of acts of the federal government. Massachusetts, however, did acknowledge that the Constitution was a "solemn compact" of "the people themselves."<sup>11</sup> Likewise, Vermont rejected Kentucky's (and Jefferson's) theory that the constitutional compact was between the state governments but acknowledged that the "present Constitution of the United States was derived from an higher authority. The people of the

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<sup>10</sup>Anderson, "Contemporary Opinion of the Virginia and Kentucky Resolutions II," 237. Vermont's reply to Kentucky did not challenge the notion that the Constitution was a compact but rather that the Constitution was "formed by the state Legislatures." Vermont's proposed remedies in response to unconstitutional actions of the federal government was "the right of election, [and] the Judicial courts of the Union," and, interestingly, "in a jury of our fellow citizens," which the Vermont resolutions characterized as constituting "the ever watchful and constitutional guard against this supposed evil." "Replies of Vermont to the Kentucky and Virginia Resolutions of 1798," in E.P. Walton, ed., *Records of the Governor and Council of the State of Vermont, 1791-1804*, vol. 4 (Montpelier, VT: Steam Press of J. & J. M. Poland, 1876, 525-529, <https://play.google.com/books/reader?id=eP0PAAAAAYAAJ&printsec=frontcover&output=reader&hl=en&pg=GBS.PR2>).

<sup>11</sup>"Resolution of Vermont House of Representatives," October 30, 1799, [http://www.constitution.org/rf/vr\\_04.htm](http://www.constitution.org/rf/vr_04.htm). Massachusetts' response likely provided some impetus for Madison to specifically address, and attempt to clarify, the definition of "state" in his *Report of 1800*.

United States formed the federal constitution, and not the states, or their Legislatures.”<sup>12</sup>

No other State commented on Madison and Jefferson’s contention that the Constitution was a “compact.”

Most interesting was the response to Madison’s *Report of 1800* by the Federalist minority in Virginia authored by John Marshall.<sup>13</sup> As expected, the *Minority Report* recommended against the adoption of Madison’s defense of his Virginia Resolves but it did contain, as Anderson characterized it, “one peculiar feature” that he deemed “worthy of attention”:

As has been already remarked more than once in the course of this article, the argument for the remedy hinted at in the Virginia Resolutions was grounded upon the doctrine that the states were parties to the compact which resulted in the federal union. Madison in his argument for the resolution which contained this doctrine was forced to consider the meaning of the term states. The conclusion arrived at was that the term states in the resolutions meant “the people composing those political societies, in their highest sovereign capacity.” Thus, according to Madison’s further reasoning, the people of each state instead of the people of the United States *en masse* were the parties to the Constitution. In the counter-resolutions offered by the Federalists this interpretation of the parties to the Constitution is accepted

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<sup>12</sup>Anderson, “Contemporary Opinion of the Virginia and Kentucky Resolutions II,” 233. Thirty-three members of the Vermont legislature voted against the majority’s response and explicitly supported the Kentucky/Jefferson view that “the states individually, compose one of the parties to the federal compact or constitution.” Ibid, 235. Vermont’s response to Kentucky is set forth in Walton, *Records of the Governor and Council of the State of Vermont*, 526-29.

<sup>13</sup>*The address of the minority in the Virginia legislature to the people of that state; containing a vindication of the Constitutionality of the Alien and Sedition Acts* (Augustine Davis ed., 1799), *Eighteenth Century Collections Online*. Gale. Georgia State University, <https://find.galegroup.com.eproxy.gsu.edu/ecco/infomark.do?&source=gale&prodId=ECCO&userGroupName=atla29738&tabID=T001&docId=CW107956134&type=multipage&contentSet=ECCOArticles&version=1.0&docLevel=FASCIMILE> (hereinafter referred to as the “*Minority Report*”). As Chapter 7 illuminates, Federalist acceptance of the notion that the Constitution was formed by the *people* of the several states did not mean that there was an agreement on the meaning of state sovereignty under the Constitution or the remedies available to the states or the *people* in response to unconstitutional actions of the federal government.

entirely. The conclusion which the Federalist drew from this premise as applied to the particular question then at hand, was quite different from that drawn by Madison, but the agreement between them is significant, for it shows that many of the Federalists as well as the Republicans accepted the fundamental doctrine of state sovereignty.<sup>14</sup>

*The “states” established a federal government and delegated certain specified power and authority to such government while retaining all other power and authority to the States, or to the people themselves. Whenever the federal government exercised power or authority not authorized under the Constitution, its actions were unconstitutional.*

On its face, the first statement was but a truism. The Constitution specified the power and authority that could be exercised by the federal government and all other governmental power and authority not so delegated, was retained by the state governments or the *people*. In actuality, however, almost from the moment of its ratification, the extent of power and authority delegated by the Constitution to the federal government has been a constant source of controversy. First highlighted in the debate over the creation of the First National Bank, many of the constitutional battles regarding federalism were based on the Constitution’s “Necessary and Proper clause,” which granted Congress the power to “make all Law which shall be necessary and proper.”<sup>15</sup>

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<sup>14</sup>Anderson, “Contemporary Opinion of the Virginia and Kentucky Resolutions II,” 242. Anderson’s conclusion that the *Minority Report* reflected a Federalist acceptance of “the fundamental doctrine of state sovereignty” was, at best, misleading, or simply wrong. Because many contemporaries, including Jefferson and many delegates in the Virginia General Assembly who supported the Virginia Resolutions, interpreted “state sovereignty” as representing the sovereignty retained by the state governments under the Constitution, Federalist acquiescence to the Madison’s formulation that the *people of the several states, acting collectively in their ultimate sovereign capacity*, created the Constitution, should not be characterized as Federalist acceptance of Jefferson’s brand of “state sovereignty.” For a detailed discussion of Marshall’s *Minority Report*, see Chapter 7.

<sup>15</sup>Article I, section 8, clause 18 of the Constitution provides: “The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”

The first major conflict over the interpretation of the Necessary and Proper Clause came in 1791, when Alexander Hamilton persuaded George Washington the creation of a national bank was a reasonable means by which the federal government could better exercise its explicit power and authority with respect to taxation and the borrowing of money. Jefferson and Madison objected to this broad interpretation of the Constitution, arguing that the Necessary and Proper Clause only authorized those actions that were absolutely “necessary” to carry out the expressed powers delegated to the federal government. In his written defense of Congress’ right to create the national bank, Hamilton quoted Madison’s statements from *Federalist No. 44*:

No axiom is more clearly established in law, or in reason, than that wherever the end is required, the means are authorized; wherever a general power to do a thing is given, every particular power necessary for doing it is included.<sup>16</sup>

The second statement also appeared to be self-evident, but it did beg the questions as to what sovereign authority or governmental body has the authority to determine whether the federal government had exercised power or authority not authorized under the Constitution, and what political and legal remedies were available. As noted, a few of the states responding to the Virginia and Kentucky Resolutions argued that the federal judiciary held the exclusive power and authority to determine whether Congress exceeded its constitutional authority, but any notion that *judicial supremacy*, was generally accepted during the founding era has been overwhelmingly rejected by scholars.<sup>17</sup> In addition, since

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<sup>16</sup>“*Federalist No. 44*,” Yale Law School, *The Avalon Project: Documents in Law, History and Diplomacy*, [http://avalon.law.yale.edu/18th\\_century/fed44.asp](http://avalon.law.yale.edu/18th_century/fed44.asp).

<sup>17</sup>The concept of judicial “supremacy” is distinguishable from the right of judicial “review”, the latter being generally uncontested. Judicial “review” simply means that the Constitution, and laws enacted pursuant thereto, give the judiciary the right to judge the constitutionality of actions by the executive and legislative branches of the federal

Congress did not grant the Supreme Court the power of appellate jurisdiction in criminal cases in Chapter 13 of the Judiciary Act of 1789, prosecutions under the Sedition Act, for example, would have provided no occasion on which the Supreme Court could decide the constitutionality of the Act. Thus, opponents of the criminal provisions of the Alien and Sedition Acts, therefore, could never seek recourse from the Supreme Court even if lower federal courts disagreed on Sedition Acts' constitutionality, creating that odd possibility of the Sedition Act convictions being upheld in certain federal jurisdictions while being held unconstitutional in others.<sup>18</sup>

Remedies offered by critics of the Resolves—seeking repeal of the offending legislation in Congress or seeking ratification of a Constitutional amendment that would explicitly outlaw the offending provisions of the Acts—were equally unsatisfying and impotent to opponents of the Sedition Acts. A repeal of recently enacted legislation, for example, would be very unlikely given that the offending legislation just passed the House and the Senate and had been signed by the president. A vigorous political campaign to “throw the bums out” might change the House at the next election but likely would be less successful in the Senate given the limited number of seats contested during any two-year election cycle and given Senators were elected by state legislatures. Likewise, the president

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government as well as the actions of the states in cases that come before the Court. It does not, however, grant the judiciary the power to be the *sole* and *ultimate* determiner of the constitutionality of such actions. The power of judicial “supremacy” that once the Supreme Court rules on a constitutional issue, the ruling must be obeyed by the executive and legislative branches of the governments as well as the states and the *people*.

<sup>18</sup>Article III, Section 2 of the Constitution defines the original jurisdiction of the Supreme Court and also provides that “the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.” Pursuant to such power, Congress passed the Judiciary Act of 1789 and provided, in chapter 13, that the Supreme Court did not have appellate jurisdiction in criminal cases. Although somewhat inconsistent, the Supreme Court did have a power of habeas corpus review with respect to prisoners held in federal custody.

could be challenged only once every four years. Thus, repealing clearly unconstitutional legislation recently enacted by Congress had little practical chance of success except during a presidential election year, and only if, the electorate deemed the unconstitutional action as sufficient cause to remove a sufficient number of House and Senate members, along with the current chief executive.

Given that the judiciary was generally deemed the weakest of the three branches of the federal government, and given that Congress did not grant the Supreme Court the power to review the constitutionality of convictions under the Act, those threatened with prosecutions under the Act for criticizing the actions of the federal government could hardly interpret the political remedies offered by Sedition Act defenders as a sufficient check on what they clearly regarded as unconstitutional actions of the new national government. Likewise, seeking an explicit amendment to the Constitution faced similar obstacles and delays, and must have been appeared preposterous to Madison and Jefferson given the existence of the First Amendment and the growing tradition of freedom of expression during the revolutionary era. Given the fairly clear dictates of Article I of the Constitution and the First Amendment, what form would this new amendment take: “Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances,” and this time adding “And this time we really mean it”? And if such an amendment acceptable to Madison and Jefferson could have been crafted, passed by a Federalist Congress and ratified by the states, what would prevent Congress from ignoring it just as they ignored the current meaning of the First Amendment.

*The federal government was not a party to the Constitution and, therefore, could not be the ultimate judge of its own power and authority.*

Similar to the second common principle, the third Principle of '98 was hardly a controversial if you accept that notion that either the *people*, as Madison argued, or the states, as Jefferson proposed, formed the Constitution. If the federal government was truly a government of enumerated powers, whether expressed or implied, with all other powers and authority reserved to the states and *the people*, it would be odd to give that same government (and even more so, the one unelected branch of that same government) the sole authority to determine when it had exceeded its own authority. Admittedly, the Constitution was silent on who ultimately decided constitutional disputes. Clearly, Congress, the federal judiciary and the president had a role to play during the early republic, but it is equally clear that the states and *the people* also played a role. And if the sole recourse of the states and *the people* to unconstitutional actions were limited to the remedies of repeal or Constitutional amendment, then to critics of the growing power of the federal government, the supposed rejection of "Parliamentary supremacy" that had characterized British rule over the colonies was a cruel hoax.

*Because the Constitution did not establish an independent body to ultimately determine when the constitutional compact was violated, each "state" had an equal right to judge whether a violation of such compact had occurred.*

The fourth common Principle of '98 was the largest bone of contention raised by many of the Federalist-controlled state legislatures in their responses to the resolutions passed by Virginia and Kentucky in 1798. Critics of the Resolves argued that Article III of the Constitution, which established the Supreme Court, combined with the Supremacy Clause of Article VI, which specified that the laws of the United States were the supreme

law of the land, and superior to any conflicting law enacted by states, granted the United States Supreme Court with the sole power and authority to judge the constitutionality of legislation once enacted by Congress, and that no such power and authority resided with the state legislatures or with the *people*. While Madison and Jefferson acknowledged that the judicial branch had the power to judge cases that came before it, they rejected the argument that the Supreme Court had the exclusive power and authority to judge alleged constitutional infractions. And, as discussed, in the matter of Sedition Act convictions, Congress had taken away the Supreme Court's authority to judge the Act's constitutionality. They also rejected the notion that the Constitution's "Supremacy Clause" was even relevant in judging the constitutionality of the Alien and Sedition Acts; Virginia and Kentucky were not arguing that there was a conflicting state law. In this instance, opponents of the Acts argued, the federal government simply had no power to act.

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Madison and Jefferson diverged sharply and significantly with respect to their three remaining principles, and these differences, and the confusion they wrought, would resonate throughout the antebellum period of the republic:

*Madison Principle*

*For purposes of the constitutional compact, "the states" were the people who constituted the political society of the states, acting in "their highest sovereign capacity," who joined with the people of the co-states, and collectively created the Constitution.*

*The proper constitutional role of the state legislature in response to an unconstitutional action of the federal*

*Jefferson Principle*

*For purposes of the constitutional compact, "the states" were the free and independent states of the United States, best represented by the state legislatures, that adopted the Articles of Confederation and in whose name the people ratified the Constitution.*

*The proper constitutional role of the state legislature in response to an unconstitutional action of the federal government was to judge*

*government was to “sound the alarm” against the unconstitutional action.*

*whether the constitutional compact was violated and, if deemed necessary, exercise the appropriate remedy in response to the violation.*

*If the unconstitutional action of the federal government constituted a “deliberate, palpable and dangerous exercise” of power and authority not delegated to the federal government, the people had the right and duty to interpose themselves between the federal government and the state or the individual citizens affected by such unconstitutional actions.*

*If the unconstitutional action of the federal government constitutes an assumption of power and authority not delegated to the federal government, each state government, as a party to the compact, had the “natural right” under the compact to nullify the unconstitutional action.*

### *The Parties to the Constitutional Compact*

Under Jefferson’s formulation, the Constitution represented an agreement between the Commonwealth of Kentucky and the “co-States” as to how governmental power and authority would be allocated between the states and the newly constituted federal government. With respect to those governmental powers and authorities expressly granted to the federal government, the federal government would be sovereign and supreme. With respect to those governmental powers and authorities not granted to the federal government, the states remained sovereign and supreme. Any encroachment by the federal government on the powers and authorities reserved to the states was a direct assault on the sovereignty of the states and had to be vigorously resisted. That was the clear lesson of the American Revolution.

Jefferson placed primary responsibility for unconstitutional actions of the federal government, and the responsibility for remedying the violation, squarely on the shoulders of the co-states, even to the point of largely ignoring the federal government itself when discussing remedies. Recall, that unlike Madison’s *Virginia Resolutions of 1798* and

Breckinridge's final version of the *Kentucky Resolutions of 1798*, Jefferson's *Draft and Fair Copy* did not contemplate that the next logical step in the constitutional battle was to seek a repeal of the offending legislation in Congress. The two references in the *Kentucky Resolutions of 1798* advocating a repeal of the Alien and Sedition Acts were added by Breckinridge before their adoption by the Kentucky legislature. Technically, according to Jefferson, the individual states that ratified the Constitution, as well as the states subsequently added to the Union, were the formal parties to the constitutional compact and, therefore, were the *parties* ultimately responsible for any violation of the compact by the federal government. Fundamentally, whenever Congress violated the Constitution, it was the co-states, as the *parties* to the constitutional compact, that breached the Constitution by permitting those representatives in the House and the Senate to pass the offending legislation, and once passed, not taking sufficient action to remedy the situation.<sup>19</sup> Thus, one of the primary purposes of the Jefferson's *Draft and Fair Copy* was to put the co-states on notice that a violation of the Constitution had occurred and that it was up to the co-states to remedy the violation. Throughout Jefferson's *Draft and Fair Copy*, his language and tone reflect antagonism towards the co-states that permitted this constitutional abomination to become law and for taking no action in response thereto. At one point, Jefferson's *Draft* considered including a stern admonition that regardless of how much confidence Kentucky previously had placed "in the deliberate judgment of the co-

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<sup>19</sup>Remember that the state legislature elected Senators and were largely seen as direct representatives of the states. While members of the House of Representatives were not elected by the state legislatures, they were elected by the individual citizens who resided in congressional districts contained in each state, and the number of representatives that each state had in the House was determined by the free and slave population of each state.

states,” the co-states were on notice that the right of Kentucky to govern itself on those matters not delegated to the federal government was:

Too vitally important to be yielded from temporary or secondary considerations: that a fixed determination therefore to retain it requires us in candor & without reserve to declare, & to warn our co-states that considering the said acts to be so palpably against the constitution as to amount to an undisguised declaration that [the] compact is not meant to be the measure of the powers of the general government, but that it is to proceed in the exercise over these states of any & all powers whatever, considering this as seizing the rights of the states & consolidating them in hands of the general government with power to bind the states (not merely in the cases made federal but) in all cases whatsoever, *by laws not made with their consent, but by other states against their consent . . .* (Underline added; italics in the original)<sup>20</sup>

In other words, Jefferson was accusing the co-states, in effect, of using the federal government to change the constitutional bargain made between the parties in 1789.

Jefferson chose not to include the explicit warning to the co-states in the *Fair Copy* transmitted to Breckinridge but the remainder of the text is almost identical in both drafts. In the *Fair Copy*, Jefferson also included a call for the co-states to take measures to prevent enforcement of the Acts.

As evidenced by his *Report of 1800*, Madison disagreed with his fellow Virginian and rejected that approach. Madison clearly recognized his initial formulation of the parties to the constitutional compact in the *Virginia Resolutions of 1798* had been largely interpreted as indistinguishable from the Jefferson/Breckinridge formulation in the *Kentucky Resolutions of 1798*. Because of this predominant interpretation, Madison took great pains in his *Report of 1800* to clarify that in this particular context, the term “state” meant “the people composing those political societies, in their highest sovereign capacity” that

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<sup>20</sup>Jefferson’s *Draft*.

occupied “separate sections of territory.”<sup>21</sup> As Madison defensively explained, such a definition should have been more obvious to interpreters of his resolves given the ratification process adopted in 1789, because:

in that sense, the Constitution was submitted to the “states,” in that sense the “states” ratified it; and, in that sense of the term “states,” they are consequently parties to the compact, from which the powers of the federal government result.<sup>22</sup>

Thus, for Madison, while the state legislatures certainly had the right to judge whether the Constitution had been violated and “sound the alarm,” no constitutional remedy could be invoked by the state legislature, e.g., nullification, unless specifically provided for in the Constitution. The *people* of the several states, however, who collectively created the Constitution and were the ultimate sovereigns of the nation, certainly retained the right to take remedial action in response to the “deliberate, palpable and dangerous exercise” of power and authority by the federal government not granted under the Constitution. For both Madison and Jefferson, each was attempting to pick up where the ratification process concluded and reconcile the role of the sovereign, the creators of the Constitution, with the traditional power and authority typically reserved for a sovereign. Madison and Jefferson simply disagreed on where ultimate sovereignty lay when the federal government exceeded its constitutional authority.

The experience of the founding generation with the notion of *sovereignty* was during the American Revolution, when the colonies unsuccessfully attempted to negotiate away restrictions on the rights of the sovereign, whether defined as king or Parliament. Now, only two decades later, in the face of potential war with France, Madison was developing

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<sup>21</sup>*Report of 1800.*

<sup>22</sup>*Ibid.*

concepts of popular sovereignty as unique as the American experiment in representative government. Given that, it was no surprise that most of the interpreters of the *Virginia Resolutions of 1798* and the *Report of 1800* failed to grasp the significance of what Madison was trying to say. Thus, state responses to the Resolves largely ignored the issue as to whether the constitution was a “compact” between sovereign entities and therefore, ignored the related issue as to whether the state governments or the *people* of the several states were the parties to such compact. Only Massachusetts and Vermont spoke clearly on the matter and each denied that the states legislatures created the Constitution. Massachusetts, however, did agree with the formulation that Madison made clear in his *Report of 1800*, that the Constitution was “a solemn compact,” created by the “people themselves.” Vermont declared that it was “the people of the United States that formed the federal constitution.” Whether Vermont considered the *people* as one great American people, acting *en masse* is unclear.<sup>23</sup>

For Madison, his conclusion that the *people* of the several states created the Constitution followed common sense. Ratification conventions took place at the state level and if one of the state conventions failed to ratify the Constitution, such state would not be a state subject to the new Constitution regardless of whether a majority of the state conventions ratified the Constitution, and regardless of whether a majority of the *people* voting in state conventions throughout the country voted for its adoption. Theories that the American people, acting *en masse*, created the Constitution appeared to solely rely on the preamble of the Constitution, which began, “We the people of the United States.” Originally, the draft Preamble provided: “We the People of the States of New-Hampshire,

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<sup>23</sup>“Resolution of the Commonwealth of Massachusetts, In Senate;” “Vermont Response to Kentucky Resolutions.”

Massachusetts, Rhode Island and Providence Plantations, Connecticut, . . . ,” the change to the “We the People of the United States” formulation has taken on a mythical meaning in some histories of the Constitution, epitomized by this interpretation, crafted by The Gilder Lehrman Institute of American History:

The preamble of the working draft and the final version differ significantly. In the August 6 preamble, delegates described themselves as representatives of “the States of New-Hampshire, Massachusetts, Rhode-Island,” etc. The final version, beginning “We the People of the United States,” shows that in the six weeks between the writing of the draft and of the final version, the idea of a united nation had been born. A single nation with a unified government had replaced an earlier vision of a confederation of states.<sup>24</sup>

Even a cursory review of the history surrounding the drafting of the Preamble belies any significance to the phrasing ultimately adopted by the Philadelphia Convention. The Committee on Style, which crafted the final draft of the Constitution, placed the final version of the Preamble in the Constitution during the last days of the Constitutional Convention. The original phrasing was consistent with prior documents ratified by the United States, such as the 1778 Treaty of Alliance with France, the Articles of Confederation, and the 1783 Treaty of Paris recognizing American independence in which the phrase “the United States” was followed immediately by a listing of the states, from north to south. The Committee of Style, specifically Gouvenor Morris, recognized that it had a practical problem to solve. As drafted, the Constitution would go into effect whenever the popularly elected ratifying conventions of nine states approved it, and no one knew for sure which states would approve, and which states might fail to approve, the proposed Constitution. If a particular state convention failed to ratify the Constitution, and the people

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<sup>24</sup>“Two versions of the Preamble to the Constitution, 1787,” The Gilder Lehrman Institute of American History, <http://www.gilderlehrman.org/history-by-era/creating-new-government/resources/two-versions-preamble-constitution-1787>.

of such state were listed in the Preamble, would the state conventions that ratified the Constitution have to retroactively go back and amend the approved version to removed the name of the non-ratifying state? No one in favor of ratification wanted ratification conventions to reconvene, for fear of entertaining further tweaks to the document. That the change to the Preamble was not proposed or discussed on the floor of the convention before final adoption by the Philadelphia convention suggests little significance was attached to the change. The extent to which the Preamble speaks to the issue at all, it does not support the notion that the *people*, acting *en masse*, created the Constitution.

### *The Proper Role of the State Legislatures*

Madison's vision of the reconstituted nation clearly rejected Jefferson's theory that the states *qua* states were the parties to the compact and his related theory that the state legislatures were the proper bodies to not only judge whether the federal government had breached the compact but also the proper entity to take remedial action. As Madison stated numerous times in the *Report of 1800*, the resolutions of the legislature were mere expressions of *opinion* and *protest*. Thus, when the Virginia House of Delegates passed the *Virginia Resolutions of 1798* and issued its *Report of 1800*, it was not acting formally as a legal body imbued with the powers of a sovereign, but rather as an advocate for the *people* of the state of Virginia. As explained by Alexander Hamilton and Madison in the *Federalist Papers*, the role of the state legislatures in protecting the rights of the *people* against possible encroachment by the federal government was to be one of the important roles played by the state legislatures under the new Constitution. Hamilton, in *Federalist No. 26*, sounded more ominous than the Republicans of 1798 when he stated:

the State legislatures, who will always be not only vigilant but suspicious and jealous guardians of the rights of the citizens against encroachments from the federal government, will constantly have their attention awake to the conduct of the national rulers, and will be ready enough, if any thing improper appears, to sound the alarm to the people, and not only to be the VOICE, but, if necessary, the ARM of their discontent.<sup>25</sup>

Hamilton was equally dogmatic in *Federalist No. 84*, when he addressed concerns raised by opponents of the Constitution in New York, who feared that the newly constituted federal government, being geographically remote from most of the *people*, would be able to exercise its expanded powers free of public scrutiny:

It is equally evident that the same sources of information [regarding actions of the State governments] would be open to the people in relation to the conduct of their representatives in the general government, and the impediments to a prompt communication which distance may be supposed to create, will be overbalanced by the effects of the vigilance of the State governments. The executive and legislative bodies of each State will be so many sentinels over the persons employed in every department of the national administration; and as it will be in their power to adopt and pursue a regular and effectual system of intelligence, they can never be at a loss to know the behavior of those who represent their constituents in the national councils, and can readily communicate the same knowledge to the people. Their disposition to apprise the community of whatever may prejudice its interests from another quarter, may be relied upon, if it were only from the rivalry of power. And we may conclude with the fullest assurance that the people, through that channel, will be better informed of the conduct of their national representatives, than they can be by any means they now possess of that of their State representatives.<sup>26</sup>

Madison employed similar language in *Federalist No. 44*:

If it be asked what is to be the consequence, in case the Congress shall misconstrue . . . the Constitution, and exercise powers not warranted by its true meaning, I answer, the same as if they should misconstrue or enlarge any other power vested in them; . . . [T]he success of the usurpation will depend on the executive and judiciary departments, which are to expound and give effect to the legislative acts; and in the last resort a remedy must be

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<sup>25</sup>"*Federalist No. 26*," Yale Law School, *The Avalon Project: Documents in Law, History and Diplomacy*, [http://avalon.law.yale.edu/18th\\_century/fed26.asp](http://avalon.law.yale.edu/18th_century/fed26.asp).

<sup>26</sup>"*Federalist No. 84*," Yale Law School, *The Avalon Project: Documents in Law, History and Diplomacy*, [http://avalon.law.yale.edu/18th\\_century/fed84.asp](http://avalon.law.yale.edu/18th_century/fed84.asp).

obtained from the people who can, by the election of more faithful representatives, annul the acts of the usurpers. The truth is, that this ultimate redress may be more confided in against unconstitutional acts of the federal than of the State legislatures, for this plain reason, that as every such act of the former will be an invasion of the rights of the latter, these will be ever ready to mark the innovation, to *sound the alarm* to the people, and to exert their local influence in effecting a change of federal representatives.<sup>27</sup> (Italics added)

For Jefferson, given his belief that the states *qua* states were the parties to the compact, logic and tradition dictated that the legislatures of Virginia and Kentucky were the most appropriate political body to take action against the federal government. After all, the legislature was the embodiment of the retained governmental sovereignty of the states with respect to those powers and authorities not expressly delegated to the federal government. For Jefferson, the Constitution did not represent a sea change in the relationship between the *people*, the states and the national government but simply a reallocation of governmental powers and authorities properly exercised by governmental entities. Admittedly, the federal government was now granted greater powers than under the Articles of Confederation, especially in the areas of taxation and foreign policy, but such changes did not amend the fundamental relationship between the various states and the national government with respect to governmental power and authority retained by the states.

The difference of opinion between Madison and Jefferson on this point was made even clearer in Madison's December 29, 1799, letter to Jefferson. After lamenting Hamilton's efforts to precipitate a declaration of war from France and his undue influence on President Adams, Madison expressed concern that the passion produced by the Alien

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<sup>27</sup>"*Federalist No. 44*," Yale Law School, *The Avalon Project: Documents in Law, History and Diplomacy*, , [http://avalon.law.yale.edu/18th\\_century/fed44.asp](http://avalon.law.yale.edu/18th_century/fed44.asp).

and Sedition Acts might cause members of the Virginia House to adopt final resolutions that ignore “some considerations which ought to temper their proceedings.” What considerations Madison had in mind became immediately clear when Madison then rhetorically asked Jefferson:

Have you ever considered thoroughly the distinction between the power of the State, & that of the Legislature, on questions relating to the federal pact. On the supposition that the former is clearly the ultimate Judge of infractions, it does not follow that the latter is the legitimate organ especially as a Convention was the organ by which the Compact was made. This was a reason of great weight for using general expressions that would leave to other States a choice of all the modes possible of concurring in the substance, and would shield the Genl. Assembly agst. the charge of Usurpation in the very act of protesting agst the usurpations of Congress.<sup>28</sup>

Clearly, Madison was worried that the Virginia House might adopt the Jeffersonian position, which argued that not only was the Virginia legislature the proper judge of whether the compact had been violated but also the proper body to exercise the appropriate remedy and nullify the offending Acts. Such action by the state legislature, concluded Madison, would open up the legislature to the charge by Federalists that the Virginia legislature was violating the Constitution during the course of protesting the unconstitutional actions of the federal government.

This distinction was no small one. During the debates over the Report of 1800, Madison noted in a short letter to Jefferson that the “debate turned almost wholly on the right of the Legislature to protest” and the meaning of such protest.<sup>29</sup> This topic also had been the sole subject of a memorandum delivered to Madison contemporaneously with his

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<sup>28</sup>James Madison to Thomas Jefferson, December 29, 1798, *Founders Online*, National Archives, <http://founders.archives.gov/documents/Madison/01-17-02-0197>, *Madison Papers*, 17, Charlottesville: University Press of Virginia, 1991, 297–299.

<sup>29</sup>James Madison to Thomas Jefferson, January 9, 1800, *Founders Online*, National Archives <http://founders.archives.gov/documents/Madison/01-17-02-0203>, *Madison Papers*, 17, 351–352.

discussions with Jefferson. The unidentified author began by agreeing with Madison’s definition of the term “state,”—“. . . that the state-governments neither created nor can abrogate the federal compact, and that the people of the states did create, and may abrogate it”—but questioned whether a discussion of the *people* as being the parties to the compact undermined the argument that it was proper for the state legislatures to protest violations of the compact: “But if the word is to be thus understood, what is to prevent the conclusion, that the people alone ought to interfere, in correcting violations of the constitution?”<sup>30</sup> This topic—“the right of the Legislature to interfere in any manner with denunciations of the measures of the Genl. Govt.”—also was the principle topic of the Madison’s letter to Jefferson on January 4, 1800, where Madison admitted that his Virginia Resolutions’ description of the “states” as parties to the constitutional compact had been misunderstood by legislators, and that much of the debate on the resolutions the previous year were “equally inaccurate & inconsistent.” And here, Madison once again characterized the right of the legislature as being nothing more than the right “to interfere by declarations of opinion.”<sup>31</sup>

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<sup>30</sup>“Memorandum from an Unidentified Correspondent, [ca. 2 January] 1800,” *Founders Online*, National Archives, <http://founders.archives.gov/documents/Madison/01-17-02-0199>, *The Papers of James Madison*, vol. 17, Charlottesville: University Press of Virginia, 1991, 300–02. Moncure Daniel Conway identified the author as Edmund Randolph based on a calendar entry referencing a two-page letter from Edmund Randolph to Madison dated 1799 and concerning “Remarks on the meaning and intent of certain words used in certain Resolutions of the Virginia Assembly” (Conway, *Omitted Chapters of History Disclosed in the Life and Papers of Edmund Randolph*, pp. 366–69). The letter, however, was not in Randolph’s hand, nor is it in the hand of John Taylor of Caroline, as suggested in the *Index to the James Madison Papers*. Ibid.

<sup>31</sup>James Madison to Thomas Jefferson, January 4, 1800, *Founders Online*, National Archives (<http://founders.archives.gov/documents/Madison/01-17-02-0200>, *Madison Papers*, 17, 302).

### *Jefferson's Theory of State Nullification*

Thomas Jefferson's Kentucky Resolutions endorsed the right of an individual state to nullify an act of Congress when Congress assumed powers not delegated to the federal government under the Constitution. Critical to understanding Jefferson's remedy of nullification is supplementing the language of his *Draft* and *Fair Copy* with his personal correspondences during this period. Take, for example, two letters penned by Jefferson during the late summer of 1799, the first to James Madison on August 23, 1799 and the second to William Cary Nicholas on September 5, 1799. Inspired by a long spring and summer of direct and indirect rebukes from not only the Federalist-controlled Northern and Mid-Atlantic states but the silence of the Southern states in the Union, Jefferson remained undeterred and insisted on pursuing one last attempt to rally the co-states into corrective action. Remember, unlike Madison's *Virginia Resolutions of 1798*, Jefferson's *Draft* and *Fair Copy* did not solicit the cooperation of the co-states in an attempt to repeal the offending legislation; those provisions in the *Kentucky Resolutions of 1798* were added by Breckinridge. Rather than being solicitous, Jefferson's tone toward the co-states was consistently threatening, and his personal correspondence during this era not only reflects Jefferson's endorsement of state nullification but also the threat of secession if the co-states did not take corrective action. This threat of secession was not based on some natural law right of the *people* to rebel in response to governmental oppression but the legal right of the states governments, as parties to the compact, to terminate the compact in response to a breach of the compact by the other parties to the agreement.

Unlike Madison, who placed the blame for the constitutional crisis on the collective shoulders of the overzealous Adams administration and the Federalist Congress, whose

resolutions called on the other states to seek a repeal of the Acts, Jefferson identified the ultimate source of the constitutional crisis as the acquiescence of the co-states to the actions of the Adams administration and Federalist-controlled Congress. Recall that in his *Draft*, Jefferson considered including an explicit warning to the co-states that Kentucky would not sit idly by while the suffering under the “laws not made by their consent, but by other states against their consent.”<sup>32</sup>

Jefferson chose not to include this explicit warning in his *Fair Copy* and, consistent with his remedy of nullification, simply called for the co-states to agree with Kentucky and take measures to prevent enforcement of the Acts. Did Jefferson’s omission of the explicit warning to the co-states reflect a change in philosophy amidst greater reflection? Unlikely. As his letter to Madison in August of 1799 shows, from the inception of his efforts to rally support against the Alien and Sedition Acts, Jefferson’s believed that it was “our co-states” that effectively permitted the federal Congress to exceed its Constitutional authority and it was “our co-states” that sat idly by without working towards a repeal of the repugnant laws and without taking tangible steps to frustrate their enforcement.<sup>33</sup>

In his August 1799 letter to Madison, Jefferson reiterated his displeasure with failure of the co-states to redress the unconstitutional actions of the Congress and renewed his determination to make one last attempt to rally the co-states into corrective action. In the hope Kentucky and Virginia would “pursue the same tract” against the “Consolidationers” by having their respective legislatures pass new resolutions, Jefferson enclosed a letter received from Wilson Cary Nicholas three days prior and suggested

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<sup>32</sup>Jefferson’s *Draft*.

<sup>33</sup>*Ibid*.

Madison meet with Nicholas and Jefferson at Monticello.<sup>34</sup> Jefferson proposed that these new resolutions of Virginia and Kentucky contain a:

firm *protestation* against the principle & the precedent; and a *reservation* of the rights resulting to us from these palpable violations of the constitutional compact by the Federal government, and the approbation or acquiescence of the several co-states; so that we may hereafter do, what we might now rightfully do, whenever repetitions of these and other violations shall make it evident that the Federal government, disregarding the limitations of the federal compact, mean to exercise powers over us to which we have never assented.<sup>35</sup> (Italics in original; underline added).

Two critical points emerge from these passages. First, Jefferson's use of "reservation of rights" in the context of "palpable violations of the constitutional compact" was not some cryptic reference to "rights" of the *people* retained under the Ninth Amendment or to powers reserved to the states or the *people* under the Tenth Amendment, but rather speaks to his reliance on general contract law principles and the law of nations. As Emmerich de Vattel expressed it in *The Law of Nations*, when discussing the proper mode of terminating disputes between nations:

There are occasions even when it may be proper for him who has the clearer right, to renounce it, for the sake of preserving peace,—occasions which it is the part of prudence to discover. To renounce a right in this manner, is not abandoning or neglecting it.<sup>36</sup>

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<sup>34</sup>Apparently the meeting never took place due to Nicholas's inability to attend. See Thomas Jefferson to William Cary Nicholas, September 5, 1799, *Founders Online*, National Archives, <http://founders.archives.gov/?q=Date%3A1799-09-05&s=1111311111&r=8>.

<sup>35</sup>Thomas Jefferson to James Madison, August 23, 1799, *Founders Online*, National Archives, <http://founders.archives.gov/documents/Jefferson/01-31-02-0145>.

<sup>36</sup>Emmerich de Vattel, *The Law of Nation, Or, Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury*, Bela Kapossy and Richard Whitmore, eds., (Indianapolis: Liberty Fund, 2008), <http://oll.libertyfund.org/titles/2246>, Chapter XVIII: Of the Mode of terminating Disputes between Nations, §326. Vattel repeated this same concept when discussing conflicting property claims between nations:

It is also very evident that we cannot plead prescription in opposition to a proprietor who, being for the present unable to prosecute his right, confines

The Ninth and Tenth Amendments speak to the rights held or retained by the *people* or the power retained by the states under the Constitution. Here, Jefferson is not reiterating the point that Congress did not have the *authority* to enact the Alien and Sedition Acts; the unconstitutional nature of the offending legislation has been already established and he is now discussing the appropriate *remedy* to be exercised by the parties to the compact in response to a breach of such compact. Jefferson called on Madison to once again rally Virginia to *protest* the Alien and Sedition Acts, and to notify the co-states that Virginia is *reserving its rights* to take appropriate action if the constitutional violation by the Congress continues. In other words, Jefferson wanted Madison's new resolutions to include an explicit warning Virginia could act alone.

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himself to a notification, by any token whatever, sufficient to shew that it is not his intention to abandon it. Protests answer this purpose. With sovereigns it is usual to retain the title and arms of a sovereignty or a province, as an evidence that they do not relinquish their claims to it. Ibid, [http://oll.libertyfund.org/titles/2246#Vattel\\_1519\\_729](http://oll.libertyfund.org/titles/2246#Vattel_1519_729).

A “reservation of rights” or “non-waiver of rights” means that the failure of a party to exercise certain rights and remedies in response to a breach of an agreement or treaty should not be interpreted as a waiver of such rights or remedies, and does not preclude the non-breaching party from exercising such rights and remedies in the future with respect to that same or similar breach. This reference to “reservation of rights” smacks of contract law and the law of nations and reiterates his interpretation that the Constitution was akin to an agreement, treaty or compact between independent States. *See*, for example, Boleslaw Adam Boczek's discussion of the concept in, *International Law: A Dictionary*:

The major objective of a protest by a state is to preserve or reserve its rights involved in a certain situation or express its lack of recognition of, or acquiescence in certain facts. Otherwise if a state fails to protest, its attitude may, under the circumstances, be construed as a tacit renunciation or waiver of the right involved, that it is a unilateral act of abandoning a right. But renunciation or waiver, whether tacit or express, must be clear and cannot be inferred from mere failure to act or passage of time. Boleslaw Adam Boczek, *International Law: A Dictionary* (Lanham, MD: Scarecrow Press, Inc., 2005), 34.

Second, Jefferson made it clear once again that the offending action was not only “from these palpable violations of the constitutional compact by the Federal government” but also from “the approbation or acquiescence of the several co-states.” It is the “several co-states” that are ultimately to blame for the violation of the compact, according to Jefferson, and it is these co-states who were apprised of the dire consequences that would result from recurring breaches of the compact. After recommending an expression of its “warm attachment to union with our sister-states” in “affectionate and conciliatory language,” Jefferson now recommended a warning to the co-states that secession from the Union is a possible remedy if Kentucky and Virginia are called on to sacrifice:

... those rights of self government the securing of which was the object of that compact: that not at all disposed to make every measure of error or wrong a cause of scission, we are willing to view with indulgence to wait with patience till those passions & delusions shall have passed over which the federal government have artfully & successfully excited to cover its own abuses & to conceal it’s designs; fully confident that the good sense of the American people and their attachment to those very rights which we are now vindicating will, before it shall be too late, rally with us round the true principles of our federal compact. But determined, were we to be disappointed in this, to sever ourselves from that union we so much value, rather than give up the rights of self government which we have reserved, & in which alone we see liberty, safety & happiness. (underlines added)<sup>37</sup>

Jefferson reiterated the threat of secession in his letter to Nicholas on September 5, employing almost identical language as contained in his August 23 letter to Madison. After apprising Nicholas of his correspondence with Madison, Jefferson listed the three fundamental points he conveyed to Madison, for his “consideration and consultation,” and repeated the implicit warning that Kentucky is “not at all disposed to make every measure

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<sup>37</sup>Thomas Jefferson to James Madison, August 23, 1799, *Founders Online*, National Archives, <http://founders.archives.gov/documents/Jefferson/01-31-02-0145>. Apparently Madison penned a letter to Jefferson on August 28<sup>th</sup> but a copy has not been located, *Founders Online*, National Archives, <http://founders.archives.gov/documents/Madison/01-17-02-0169>.

of error or of wrong, a cause of scission,” and coupled it with “reserving the right to make this palpable violation of the federal compact the ground of doing in future whatever we might now rightfully do, should repetitions of these and other violations of the compact render it expedient.” But could Jefferson’s reservation of rights language simply have been a reference to the right of nullification? No. After noting Madison’s objection to including such reservation of rights language, Jefferson informed Nicolas of his own agreement to back off of the threat, “not only in deference to [Madison’s] judgment, but because, as we should never think of separation but for repeated and enormous violations, so these, when they occur, will be cause enough of themselves.” In other words, while Jefferson was not yet willing to publically threaten secession, the remedy of secession was clearly an arrow in the quiver of remedies available to Kentucky and Virginia if the need should arise in the future.<sup>38</sup>

So Jefferson made explicit in his letter to Madison and in his letter to Nicolas what was implicit in his compact theory of the Constitution: Kentucky and Virginia will patiently await the corrective action of the co-states but if such action does not take place, Kentucky and Virginia will consider all of the remedies available under the constitutional compact, including nullification and secession. Although Jefferson stated in his letter to Madison that he “sketched [these] ideas hastily,” he must have been referring to the speed of his hands in crafting the letter and not his lack of contemplation, for as Koch and Ammon note,

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<sup>38</sup>Thomas Jefferson to Wilson Cary Nicholas, September 5, 1799, *Founders Online*, National Archives, <http://founders.archives.gov/documents/Jefferson/01-31-02-0151>.

“Jefferson had had more than a year since the enactment of the Alien and Sedition Acts to mature his thoughts on the appropriate remedy.”<sup>39</sup>

While historians cognizant of the August 23 and September 5 letters recognized Jefferson’s intention to publicly and explicitly threaten secession (that is, until Madison persuaded him otherwise), what historians missed was the extent to which Jefferson’s *Draft* and *Fair Copy* always included, by definition, the threat of secession. Even if Jefferson had not made explicit what clearly had been implicit in his draft resolutions, it is fanciful to conclude that Jefferson’s compact theory of the Constitution did not endorse a state’s right to nullify unconstitutional laws enacted by the federal government and to secede from the Union if the co-states persisted in acquiescing to clear and repeated violations of the constitutional compact. The August 23 and September 5 letters also confirmed Jefferson’s deletion of certain language in his earlier drafts of the Kentucky resolutions was not driven by a conclusion his words did not accurately express his views, but simply his judgment such views, including the explicit threat of secession, need not be clearly expressed at this point. By the summer of 1799, with his patience waning, Jefferson recommended not only the threat of nullification but also the threat of secession to generate action.

Because Jefferson’s analyzed breaches of the constitutional compact through the prism of the “law of nations” and general contract law, Jefferson logically followed his analysis of a material breach of the Constitution to its logical and justifiable remedies: the

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<sup>39</sup>Koch and Ammon, “The Virginia and Kentucky Resolutions,” 168-69. While the argument can be made that Jefferson never publicly advocated secession, the August 23 letter to Madison and the September 5 letter to Nicholas, along with his articulated compact theory of the Constitution, premised on the “law of nations” and general contract law, clearly did and the issue of secession was never far from his mind during much of the 1790s.

parties to the constitutional compact could render null and void Congress' unauthorized attempt to impermissibly "amend" the Constitution or consider such attempt a material violation of the compact, which justified termination of the compact, i.e., nullification and secession.

From this perspective, Jefferson was correct in viewing the co-states as the chief protagonists in this Constitutional drama. Technically, Virginia or Kentucky's threat of secession could not emanate from the federal government's "palpable violations of the constitution compact." After all, as Jefferson repeatedly reminded his contemporaries, the federal government was not a party to the compact. Thus, when Jefferson first sets forth the implied right of secession in his proposed resolution to Madison, although he attacks the Federal government," he immediately adds "the approbation or acquiescence of the several co-states." It was the concurrent "approbation and acquiescence of the co-states," both the Federalist-controlled northern and middle states, which explicitly rejected Kentucky's pleas, as well as the Republican-controlled southern states, and their failure to promptly rectify the unconstitutional exertion of authority by the Federal government, that violated the compact. This is why the explicit threat of secession in the Jefferson's proposed resolution is directed, not at the indissoluble Union represented by the new federal government, but at the "union with our sister-states."<sup>40</sup>

An overwhelming number of scholars have missed this legal foundation for Jefferson's remedy of nullification, likely due to Jefferson's references to "natural rights" in his *Fair Copy*. In his *Fair Copy*, Jefferson referred to the "natural right" of the every state

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<sup>40</sup>Thomas Jefferson to James Madison, August 23, 1799.

twice in his eighth resolution. The first was when he discussed the appropriate remedy to improper actions of the federal government:

that in cases of an abuse of the delegated powers the members of the general government, being chosen by the people, a change by the people would be the constitutional remedy; but, where powers are assumed which have not been delegated, a nullification of the act is the rightful remedy: that every state has a *natural right*, in cases not within the compact [casus non foederis] to nullify of their own authority all assumptions of power by others within their limits.<sup>41</sup> (Italics added)

The second reference to “natural rights” was also in the context of defining the unconstitutional nature of the Alien and Sedition Acts, which Jefferson saw as part of a series of actions that should be viewed by the co-states as:

... seizing the rights of the states, and consolidating them in the hands of the General government with a power assumed to bind the states (not merely in the cases made federal [casus foederis] but) in all cases whatsoever, by laws made, not with their consent, but by others against their consent; that this would be to surrender the form of government we have chosen, & to live under one deriving it's powers from it's own will & not from our authority, and that the co-states, recurring to their *natural right* in cases not made federal, will concur in declaring these acts void and of no force, & will each take measures of it's own for providing that neither these acts, nor any others of the general government, not plainly & intentionally authorised by the constitution, shall be exercised within their respective territories.<sup>42</sup> (Italics added)<sup>43</sup>

The standard interpretation of Jefferson's references to a “natural right” of nullification was they were referring to the *people's* natural right of revolution in response to government oppression.<sup>44</sup> Even Madison, during his rhetorical battle with South Carolina nullifiers, claimed Jefferson use of the phrase “natural right” was akin to the justification for

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<sup>41</sup>Jefferson's *Fair Copy*.

<sup>42</sup>*Ibid.*

<sup>43</sup>*Ibid.*

<sup>44</sup>See, e.g., Merrill D. Peterson, *Jefferson and the New Nation*, 614-15; Fritz, “A Constitutional Middle-Ground Between Revision and Revolution,” 182-83; Fritz, *American Sovereigns*, 209.

revolution existing under both natural law and English constitutional doctrine. Christian Fritz disagreed somewhat by pointing out that Jefferson's reference to "natural right" did not necessarily mean that Jefferson was referring to the *people's* right of revolution, but "natural" in the sense of being the "obvious product of limited government resting on popular sovereignty," a theory, like the "right of revolution," relied on a natural law basis more so than a constitutional basis. Nine years later, Fritz clarified this point by explaining that in addition to the *people* having the constitutional right "as the sovereign to shape the constitution," the *people* also have a "natural right . . . to act when government took arbitrary and tyrannical steps." This latter natural right, Fritz claimed, was what Jefferson alluded to in his *Draft and Fair Copy*.<sup>45</sup>

I disagree with these interpretations and contend that scholars have consistently misinterpreted Jefferson on this point, largely due to ignoring the perspective from which Jefferson interpreted the constitutional compact. For Jefferson, the Constitution was akin to an agreement, contract or treaty between the "sovereign and independent" nations. Consistent therewith, each of Jefferson's invocations of the term "natural right" was not in the context of describing the evils or oppression brought on by the Alien and Sedition Acts as justifying a revolutionary or natural law remedy by the *people*. Jefferson is not talking about circumstances Madison later described (during the Nullification Crisis) as the *people* "shaking off the yoke" of tyranny or the *people* having "the *natural* right to resist intolerable oppression," but rather, Jefferson was referring to the "natural," "reasonable," "logical," or "indisputable" right of parties to an agreement, compact or treaty to invoke customary remedies in response to the unauthorized assumption of power or authority by one party

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<sup>45</sup>Fritz, "A Constitutional Middle-Ground Between Revision and Revolution," 182-83; Fritz, *American Sovereigns*, 209.

or the unauthorized imposition of an obligation on the other contracting party not contemplated in such agreement, compact or treaty. That is why the two references to a “natural right” in the *Fair Copy* referred to “cases not within the compact,” immediately followed in brackets with the Latin phrase, “*casus non foederis*,” a phrase typically used in the context of diplomacy and treaty alliances to denote rights or powers not set forth in the relevant treaty.<sup>46</sup> Thus, any assumptions of power and authority by one contracting party, or imposition of obligations by one contracting party on another, not authorized under such agreement, compact or treaty are breaches of such agreement, compact or treaty, and necessarily grants to the non-breaching party the right to exercise certain remedies. Among these customary and “natural” remedies would be the right of the non-breaching party to object to the attempted assumption or imposition, deny its legitimacy, treat the assumption or imposition as void and of no effect, and if deemed necessary, terminate such agreement, compact or treaty.

As with most of the founding elites in the United States during the Revolutionary era, Jefferson was well versed in the “law of nations” and, given his intellectual curiosities and diplomatic experiences in Paris during the American Revolution, was well versed with the “bible” on the subject, Emmerich de Vattel’s *The Law of Nations*. Vattel was the international jurist most widely cited in the first fifty years after the Revolution, and

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<sup>46</sup>The phrase “*casus foederis*” refers to an event that triggers signatories to an alliance or treaty to comply with their obligations of support, e.g., a defensive alliance is triggered when one party to the alliance is invaded by a third party, triggering the obligations of the other party to the alliance to come to the aid of the invaded party. Jefferson’s used the phrase “*casus non foederis*” to reiterate that the constitutional compact did not authorize the Alien and Sedition Acts.

according to Benjamin Franklin, who had three copies of the newest edition, in French, the book “has been continually in the hands of the members” of the Continental Congress.<sup>47</sup>

In the case of the Alien and Sedition Acts, Jefferson is objecting to the Congress, a legislative creation of the compact between the states, using the Alien and Sedition Acts to assume a whole host of powers not contemplated in the Constitution and the co-states, the other parties to the constitutional compact, acquiescing to such assumption. Thus, when the national government, as agents for the respective co-states, seized power and authority not contemplated, or specifically prohibited, by the Constitution—or as Jefferson phrased it, “in cases not within the compact [*casus non foederis*]”—and the co-states failed to remedy such breaches, each of the other contracting parties have a “natural right” under the law of agreements, compact and treaties to exercise whatever remedies are available to the contracting parties.

Jefferson did not conveniently rediscover international law in response to the latest Federalist assumption of power; he long applied concepts of international law when discussing the right of the national government under the Articles of Confederation. For instance, during his ministership to France, Jefferson expressed his irritation over Congress’s inability to collect revenue from the states to Edward Carrington.<sup>48</sup> Jefferson exclaimed, “It has been so often said, as to be generally believed, that Congress have no power by the confederation to enforce any thing, e.g. contributions of money,” but, Jefferson continued, “[i]t was not necessary to give them that power expressly; they have it by the *law of nature* . . .” Furthermore, he said, “when two nations make a compact, there

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<sup>47</sup>*U.S. Steel Corp v. Multistate Tax Comm’n*, U.S. 452 (1978), 459-65, 462, n12).

<sup>48</sup>Carrington was a member of the Continental Congress, who later served as the jury foreman at the 1807 treason trial of Aaron Burr. *Biographical Directory of the United States Congress*, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=C000183>.

results to each a power of compelling the other to enforce it.”<sup>49</sup> Previously, in response to French author and politician Jean-Nicolas D meunier, Jefferson conceded that a compact might not explicitly contain the remedies available to a non-breaching party. Whenever:

two or more nations enter into a compact, it is not usual for them to say what shall be done to the party who infringes it. Decency forbids this. And it is unnecessary as indecent, because the right of compulsion naturally results to the party injured in the breach.<sup>50</sup>

Although these observations took place while the American states were subject to the Articles of Confederation, as historian Brian Steele observed, “it seems clear that these reflections shaped his view of the union created by the Constitution and provided the framework within which we should consider his views of that union.”<sup>51</sup> Ironically, Steele’s analysis focused on Jefferson views of one state violating the Constitution in the face of the legitimate exercise of federal power, and the authority of the remaining states under the “law of nature” to compel enforcement. But as Vattel correctly pointed out, the “law of nature” goes both ways; if one or more states engaged in collective action and authorized the illegitimate exercise of power under the compact, a single state had recourse under the “law of nature” applicable to nations:

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<sup>49</sup>(Italics added). Thomas Jefferson to Edward Carrington, August 4, 1787, *Founders Online*, National Archives (<http://founders.archives.gov/documents/Jefferson/01-11-02-0588>, 678. See Brian Steele, “Thomas Jefferson, Coercion, and the Limits of Harmonious Union,” *Journal of Southern History*, Vol. 66, No. 4 (2008): 823-54, 826-27. Steele noted that with respect to the last quote, the editors of *The Papers of Thomas Jefferson* transcribed the word “nations,” whereas earlier editors used the term “parties.”

<sup>50</sup>Thomas Jefferson, “Answers to D meunier’s First Queries,” January 24, 1786, *Founders Online*, National Archives, <http://founders.archives.gov/documents/Jefferson/01-10-02-0001-0002>.

<sup>51</sup>Steele, “Thomas Jefferson, Coercion, and the Limits of Harmonious Union,” 833. Steele conceded Jefferson may have had a change of heart regarding the Articles in 1818, then characterizing the Articles of as a “treaties of alliance” that might have been insufficient to justify the remedy of compulsion. *Ibid.*

As the engagements of a treaty impose on the one hand a perfect obligation, they produce on the other a perfect right. The breach of a treaty is therefore a violation of the perfect right of the party with whom we have contracted; and this is an act of injustice against him.<sup>52</sup>

Vattel also commented on the consequences of one party to a treaty violating such treaty and what rights the non-breaching party had to cancel the treaty:

Treaties contain promises that are perfect and reciprocal. If one of the allies fails in his engagements, the other may compel him to fulfil them:—a perfect promise confers a right to do so. But if the latter has no other expedient than that of arms to force his ally to the performance of his promises, he will sometimes find it more eligible to cancel the promises on his own side also, and to dissolve the treaty. He has undoubtedly a right to do this, since his promises were made only on condition that the ally should on his part execute every thing which he had engaged to perform. The party, therefore, who is offended or injured in those particulars which constitute the basis of the treaty, is at liberty to chuse the alternative of either compelling a faithless ally to fulfil his engagements, or of declaring the treaty dissolved by his violation of it. On such an occasion, prudence and wise policy will point out the line of conduct to be pursued.<sup>53</sup>

An agreement or compact need not explicitly provide for all of the remedies that a non-breaching party may exercise when the other party to such compact or contract repeatedly breaches such agreement and fails to cure such breaches. Such authority is implicit in the nature of the legal principles governing contracts and compacts. Under the law of contracts, absent specific provisions to the contrary, a breach by one party entitles the non-breaching party to exercise certain remedies—those “rights given to a party which that party may exercise upon a default by the other contracting party.”<sup>54</sup> Aside from money damages, generally inappropriate in the context of compacts among nations or states

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<sup>52</sup>Vattel, *The Law of Nations*, Book II, 196.

<sup>53</sup>Ibid, Book II, 214.

<sup>54</sup>*Black's Law Dictionary*, Special Deluxe Fifth Edition (West Publishing Co., 1979), 1163.

unless specifically contemplated in the agreement or treaty,<sup>55</sup> typical remedies for breach of contract include specific performance, reformation and rescission. In addition, the non-breaching party may be relieved of performing its contractual obligations.<sup>56</sup> Thus, once you adopt the premise that the Constitution is a compact, subject to the “laws of nature” and the “law of nations,” and conclude that one party has materially breached such contract (e.g., the Alien and Sedition Acts), unless the Constitution limits the remedial rights available to the non-breaching party, the potential remedies that might be deemed available to the non-breaching party would include remedies consistent with theories of interposition, nullification and secession.<sup>57</sup>

I disagree with Merrill Peterson, who concluded, “It is impossible to say precisely what Jefferson’s theory was in the Resolutions of ‘98.”<sup>58</sup> Such a conclusion simply does not comport with Jefferson’s multiple drafts of his Kentucky Resolutions and his private correspondence during this period. Far from ambiguous, Jefferson’s compact theory of the Constitution and the remedies of nullification and secession that naturally emerged therefrom, reflect a clear, thoughtful and consistent mind. Jefferson’s compact theory of the Constitution largely saw each of several states as akin to separate nations, each exercising

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<sup>55</sup>For example, Congress enacted numerous special statutes permitting Indian tribes to recover damages through the court of claims, and in 1946 Congress established the Native American Claims Commission to settle claims. “Treaties,” *Encyclopedia of American Foreign Policy*, (Facts on File, 2004).

<sup>56</sup>The simplest example is a contract for services where the service provider fails to perform, which alleviates the supposed service recipient from its obligation to pay the service provider.

<sup>57</sup>Ibid, Book II, 216. But Vattel, perhaps informing Madison’s “deliberate, palpable and dangerous” condition for interposition, Vattel counseled that any such cancellation should not be done on a whim or pretext and the actions of the non-breaching party may not have, “in every slight offence, a pretext for receding from his engagements. This precaution is extremely prudent, and very conformable to the care which nations ought to take of preserving peace, and rendering their alliances durable.” Ibid.

<sup>58</sup>Peterson, *Thomas Jefferson and the New Nation*, 615.

its sovereign capacity, to enter into a voluntary association with neighboring independent and sovereign states to address problems deemed best solved through cooperation and collective action. Jefferson's view of Virginia as a separate, distinct nation did not end with the termination of the Articles of Confederation and the ratification of the Constitution. In both cases, the United States was a nation for "special purposes" while Virginia remained a nation for all others. Jefferson not only believed that it was appropriate for the state legislatures to judge the constitutionality of a federal law but also, consistent with his compact theory of the Constitution, believed that the legislatures and other instruments of state authority had the right to use direct action to frustrate the enforcement of unconstitutional laws within the territory and jurisdiction of such state.<sup>59</sup>

From the inception of his efforts to rally support against the Alien and Sedition Acts, Jefferson's believed that it was the co-states that had violated the Constitution by permitting the federal Congress to exceed its Constitutional authority and pass the Alien and Sedition Acts, and it was the co-states that had sat idly by after their passage and enforcement without working towards a repeal of the repugnant laws or taking tangible steps to frustrate their enforcement.

### *Madison's Theory of Interposition by the People*

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<sup>59</sup>See, for example, Thomas Jefferson Letter to Edmund Randolph, August 18, 1799, *Founders Online*, National Archives, <http://founders.archives.gov/documents/Jefferson/01-31-02-0142>. In his letter to Randolph, in the midst of soliciting Madison and Wilson Cary Nicholas regarding additional resolutions to be passed by Virginia and Kentucky, Jefferson mocked the idea of a federal common law, describing the United States as a nation "for special purposes only"—to resolve disputes between the states and with foreign nations. Because the United States was, unlike Virginia, a nation for special purposes only, it could not "adopt any general system, because it would have embraced objects on which this association had no right to form or declare a will. It was not the organ for declaring a national will in these cases." *Ibid.*

James Madison's *Virginia Resolutions* endorsed the right of the *people* of each state to act collectively with the *people* of the co-states and effectively nullify an action of the federal that constitutes a "deliberate, palpable, and dangerous exercise" of power and authority not delegated to the federal government under the Constitution. Consistent with the scholarship assessing Jefferson's remedy of state nullification, scholarship analyzing Madison's theory of interposition typically focused on the alleged right of the state governments to hinder or prevent enforcement of the offending legislation. The most prominent example of state interposition in the twentieth century was the state resistance to the integration of public schools, public accommodations, housing, employment and voting during the 1950s and 1960s.

As discussed above, Jefferson's compact theory of the Constitution drew from a traditional and developed legal and diplomatic world, applying well-accepted and straightforward principles derived from the common law of contracts, the law of treaties and the law of nations. And applying such general contract legal principles to the Constitution, remedies such as nullification and secession would be naturally available to the non-breaching party in response to a clear breach of such agreement, treaty or compact by other parties to the agreement.

Madison clearly rejected this interpretation of the Constitution. Although not a practicing lawyer, Madison also was well-read in the law, as his prior writings testify, and he knew that Jefferson's legalistic approach to the constitutional compact carried the suggestion that the Constitution, at its core, was little different than the Articles of Confederation, little more than an agreement, treaty or compact between independent

States.<sup>60</sup> As a result, in his *Report of 1800*, Madison addressed head-on Jefferson's implied principle that the Constitution was akin to a treaty between and among thirteen (now sixteen) nation-states. There were similarities between a constitutional compact and a treaty, Madison observed, but there also are important distinctions:

Even in the case of ordinary conventions between different nations, where, by the strict rule of interpretation, a breach of a part may be deemed a breach of the whole, every part being deemed a condition of every other part and of the whole, it is always laid down that the breach must be both willful and material to justify an application of the rule. But in the case of an intimate and constitutional union, like that of the United States, it is evident that the interposition of the parties, in their sovereign capacity, can be called for by occasions only, deeply and essentially affecting the vital principles of their political system.<sup>61</sup>

Whereas Jefferson identified the state governments as being the relevant sovereign when analyzing the appropriate remedy in response to unconstitutional actions of the national government, Madison's compact theory of the Constitution drew from the concept of popular sovereignty, the idea that the *people* of the several states who ratified the Constitution were the ultimate sovereigns of the nation and had the ultimate power and authority to judge the constitutionality of actions of the federal government. Many interpreters of Madison's *Virginia Resolutions of 1798* supposed that Madison was speaking of the state governments when he stated "the states who are parties thereto, have the right, and are in duty bound, to interpose for arresting the progress of the evil, and for maintaining within their respective limits, the authorities, rights and liberties appertaining

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<sup>60</sup>For a discussion of "Madison's significant grasp of the law and his striking curiosity about the problem of language," see Mary Sarah Bilder, "James Madison, Law Student and Demi-Lawyer," *Law and History Review*, Vol. 28, Issue 2 (2010): 389-450. Bilder's description of Madison is set forth at 390.

<sup>61</sup>*Ibid.*

to them.”<sup>62</sup> After all, such a right and duty would be consistent with the role of the state governments to protect the liberties of the *people* Madison and Hamilton described in the *Federalist Papers*. Madison certainly recognized the right of the state governments to interpose from time to time to protect the liberties of the *people*. Consistent therewith, presumably the organs of state governments—state courts and magistrates and even the state militia—could be uncooperative and possibly undermine any attempted enforcement of the Sedition Act within state territory. That is certainly what Jefferson had in mind. But in this instance, especially in the context of the Sedition Act, Madison was describing a more powerful form of interposition that only could be exercised by the ultimate sovereign of the United States, the *people* of the several states, acting collectively.

Critical to understanding Madison’s theory of interposition in the context of the Alien and Sedition Acts was his extensive examination of freedom of expression and the negative impact the Sedition Act could have on the ability of the *people* to fulfill their role as the ultimate sovereigns of the United States. No one has done a more skillful job exploring this aspect of Madison’s *Virginia Resolutions* than historian Christian Fritz. In his *American Sovereigns*, Fritz highlighted the nuances of Madison’s use of the term “interposition” and the meaning contemporaries would have ascribed to it:

The word “interposition” did not carry the implication attached to it today that interposition nullified a law, the understanding attributed to it during its use in the sectional debates preceding the Civil War. Rather, what Madison and his contemporaries meant by “interposition” seemed to come from its classic sense. As used in astronomical and scientific texts of the period, it described the movement of something between two other things in a relationship. In this sense, the moon interposed when it came between the

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<sup>62</sup>*Virginia Resolutions of 1798*.

earth and the sun, allowing those on earth to reaffirm how the sun provided light to the earth.<sup>63</sup>

In this sense, state legislatures could, by protest and petitioning, be said to interpose themselves between the *people* and the federal government. According to Fritz, a “successful interposition occurred when either the government backtracked, conceding that it had overstepped its constitutional boundaries as asserted by the interposition, or when the people in light of the interposition chose to change the constitutional order.”<sup>64</sup> In his *Report of 1800*, Madison does address interposition by the state legislatures in terms consistent with Fritz’s interpretation:

It is no less certain that other means might have been employed, which are strictly within the limits of the Constitution. The legislatures of the states might have made a direct representation to Congress, with a view to obtain a rescinding of the two offensive acts; or, they might have represented to their respective senators in Congress their wish, that two-thirds thereof would propose an explanatory amendment to the Constitution; or two-thirds of themselves, if such had been their option, might, by an application to Congress, have obtained a convention for the same object.<sup>65</sup>

Later, during his verbal jousting with the South Carolina nullifiers, he reiterated this point to Alexander Rives, when he defended the right of the state legislatures to “interpose

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<sup>63</sup>Fritz, *American Sovereigns*, 193. For examples of scholars equating interposition with state nullification, see Ellis, *The Union at Risk*, 4 (describing the Virginia and Kentucky Resolutions as asserting the right of states to “interpose” or “nullify” an act of Congress); Wills, *A Necessary Evil*, 148, 152 (calling Madison “an abettor” of nullification for using the “strong” and active word “interpose”). With respect to Fritz’s definition of “interpose,” see Samuel Johnson, *Dictionary: The Oxford English Dictionary* (2nd ed., 1989), VII:1130-31; Jedidiah Morse, *The American Universal Geography* (Boston, 1796, I:37; Noah Webster, *An American Dictionary of the English Language* (2 vols., New York, 1828).

<sup>64</sup>Fritz, *American Sovereigns*, 194.

<sup>65</sup>*Report of 1800*.

a *legislative* declaration of opinion on a constitutional point.”<sup>66</sup> Madison closed his *Report of 1800* defending state interposition:

It cannot be forgotten that, among the arguments addressed to those who apprehended danger to liberty from the establishment of the general government over so great a country, the appeal was emphatically made to the intermediate existence of the state governments between the people and that government, to the vigilance with which they would descry the first symptoms of usurpation, and to the promptitude with which they would sound the alarm to the public. This argument was probably not without its effect; and if it was a proper one then to recommend the establishment of a constitution, it must be a proper one now to assist in its interpretation.<sup>67</sup>

In this sense, the Virginia and Kentucky Resolutions themselves were a classic form of interposition by the legislatures of Virginia and Kentucky. In fact, it was this language that appears to have been the basis for many scholars concluding that Madison’s principle purpose in his *Report of 1800* was to defend the right of the Virginia legislature to interpose. Koch and Ammon, for example, concluded their analysis of interposition, thusly: “Nowhere is it clearer that the intermediate existence of the state governments between the people and the ‘General Government,’ was indispensable, as Madison conceived it, to the preservation of the large republic.”<sup>68</sup>

But as Christian Fritz recognized, interposition was not just a constitutional tool of protest to be wielded by the state legislatures; the *people* held the constitutional right of interposition as well. Fritz interpreted the *people’s* right to interpose in broad strokes, to

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<sup>66</sup>James Madison to Alexander Rives, undated, but sent prior to Rives’s reply, dated January 7, 1833, [http://oll.libertyfund.org/titles/1940#Madison\\_1356-09\\_1408](http://oll.libertyfund.org/titles/1940#Madison_1356-09_1408); Fritz, *American Sovereigns*, 203.

<sup>67</sup>*Report of 1800*.

<sup>68</sup>Koch and Ammon, “The Virginia and Kentucky Resolutions,” 173. For similar analysis, see Banning, *Sacred Fire of Liberty*, 390. 392-93. Recall this was the principle concern raised in the “Memorandum from an Unidentified Author, i.e., that discussion of the proper meaning of the term “state” detracted from the argument that the Virginia legislature had the right to judge the constitutionality of actions of the general government.

include simple expressions of public opinion, protests, petitions, remonstrances, and simply going to the polls and voting on Election Day, but it also included the right of the *people*, acting in their highest sovereign capacity, to alter or abolish the Constitution.<sup>69</sup> And what Madison made clear in his *Report of 1800*, is that the type of interposition that forms the thrust of the *Virginia Resolutions* is not the right the state legislatures to *interpose* as a protector of the *people*, or even the right of the *people* to protest unconstitutional actions of the federal government, but rather the right of the *people*, acting in their highest sovereign capacity, to interpret and modify the meaning of the Constitution outside the dictates of Article V.

When the *Report of 1800* specifically addressed the third resolution of 1798, which invoked the remedy of interposition, Madison made it clear that the Constitutional right of interposition was a remedy to be invoked by the *people* acting in their highest sovereign capacity:

It appears to your committee to be a plain principle, founded in common sense, illustrated by common practice, and essential to the nature of compacts, that, where resort can be had to no tribunal, superior to the authority of the parties, the parties themselves must be the rightful judges in the last resort, whether the bargain made has been pursued or violated. The Constitution of the United States was formed by the sanction of the states, given by each in its sovereign capacity. It adds to the stability and dignity, as well as to the authority of the Constitution, that it rests on this legitimate and solid foundation. The states, then, being the parties to the constitutional compact, and in their sovereign capacity, it follows of necessity, that there can be no tribunal above their authority, to decide in the last resort, whether the compact made by them be violated; and, consequently, that, as the parties to it, they must themselves decide, in the last resort, such questions as may be of sufficient magnitude to require their interposition.<sup>70</sup>

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<sup>69</sup>Fritz, *American Sovereigns*, 193, 210.

<sup>70</sup>*Report of 1800*.

Under Madison's formulation, the Constitution represented the agreement between the *people* of Virginia and the *people* of the other states in the Union as to how the *people* would be governed in their everyday lives. In the event of a dispute between the *people* and the federal government, the *people* could exercise their rights as ordinary citizens and work for a repeal or change their representatives at the next election. As the ultimate sovereigns of the United States, however, under extraordinary circumstances, the *people* could collectively act in such capacity and reform or amend the Constitution without reliance on Article V, just as the *people* had cast aside the Articles of Confederation and created the Constitution out of whole cloth without any apparent legal authority in the Articles to do so.<sup>71</sup>

Madison did not come to this right of the *people* to alter the Constitution only for political convenience amidst the legislative and policy battles with Federalists over the Sedition Act. In *Federalist No. 49*, Madison described a process of amending the Constitution outside the four corners of the existing Constitution, a process akin to

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<sup>71</sup>Robert Churchill established the false choice between Jefferson's theory of individual state nullification, which he characterized as the moderate position, versus *popular nullification*, which "authorizes the people to judge the constitutionality of laws and to resist all unconstitutional legislation." With respect to the latter, Churchill had in mind the various "Rebellions"—Shays's, Whiskey and Fries's—of the 1780s and 1790s. Madison proposed something completely different and it is unclear where it would fall in Churchill's radical v. moderate schematic. Madison advocated formal action of the *people* to "interpose" in the case of a "*deliberate, palpable, and dangerous exercise of other powers, not granted by the said compact.*" That is very different than Churchill's formulation, which grants small groups of individuals the right to resist not only unconstitutional actions of the federal government but also actions based on delegated powers of the federal government that "transgress the 'higher constitutional' realm of the fundamental liberty of the individual." See Churchill, "Popular Nullification, 134, n4. This notion of revolutionary libertarianism, according to Churchill, also included the formation of local armed associations patterned after eighteenth-century militias as legitimate institutions charged with the duty of resisting illegitimate laws and invasions of the community by agents of the state. In that respect, I agree with Churchill that both Madison's and Jefferson's Principles of '98 rejected Churchill's notion of *popular nullification*.

constitution making. Recall that Madison expressed grave concern with Jefferson's suggestion that the *people* should frequently reconvene constitutional conventions for purposes of amending and reaffirming the Constitution. In *Federalist No. 49*, Madison was specifically addressing Jefferson's suggestion that "whenever any two of the three branches of government shall concur in opinion, each by the voices of two thirds of their whole number, that a convention is necessary for altering the constitution, or CORRECTING BREACHES OF IT, a convention shall be called for the purpose." Madison acknowledged the logic of the proposal, consistent with his belief that the *people* (and not the States) were the parties to the Constitution. After all, he surmised:

As the people are the only legitimate fountain of power, and it is from them that the constitutional charter, under which the several branches of government hold their power, is derived, it seems strictly consonant to the republican theory, to recur to the same original authority, not only whenever it may be necessary to enlarge, diminish, or new-model the powers of the government, but also whenever any one of the departments may commit encroachments on the chartered authorities of the others.<sup>72</sup>

Despite the logic and supposed appeal of such a proposal, Madison flatly rejected it. He feared that frequent appeals to the *people* would undermine government, render it unstable and necessarily increase the power of the faction or party that momentarily controlled the legislature. Madison also expressed concern that the *people* would be swayed by temporary passions, and not by reason, a result, he feared, that might jeopardize republican government. He did not, however, foreclose any direct appeal to the *people*, evoking a standard very similar to that which he would later apply to interposition. An "appeal to the people themselves," Madison intoned, "must be allowed to prove that a constitutional road to the decision of the people ought to be marked out and kept open, for

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<sup>72</sup>"*Federalist No. 49*," Yale Law School, *The Avalon Project*, [http://avalon.yale.edu/18th\\_century/fed49.asp](http://avalon.yale.edu/18th_century/fed49.asp).

*certain great and extraordinary occasions.*<sup>73</sup> Thus, Madison's *Virginia Resolutions* and his threatened remedy of interposition was a forewarning to the federal government and the *people* of the co-states that the *people* may have something to say in the event of a continued "deliberate, palpable and dangerous exercise" of power by the federal government. Madison, he took this right of the *people* seriously and he somberly noted that the *people* would not to be taken this action lightly:

It does not follow, however, that because the states, as sovereign parties to their constitutional compact, must ultimately decide whether it has been violated, that such a decision ought to be interposed, either in a hasty manner, or on doubtful and inferior occasions. . . . It must be a case, not of a light and transient nature, but of a nature *dangerous* to the great purposes for which the Constitution was established. It must be a case, moreover, not obscure or doubtful in its construction, but plain and *palpable*. Lastly, it must be a case not resulting from a partial consideration, or hasty determination; but a case stamped with a final consideration and *deliberate* adherence.<sup>74</sup>

As noted above, the formal process by which the *people* would decide the constitutional compact had been violated would be reserved to those occasions that were of a "nature *dangerous* to the great purposes for which the Constitution was established," "plain and *palpable*," and a case not based on momentary passions but "stamped with a final consideration and *deliberate* adherence."<sup>75</sup> At this point in the crisis, Madison did not call on the *people* to take such action. The resolutions did put the national Congress on notice, however, that the *people* had it within their "constitutional" authority to interpose themselves, as ultimate sovereigns and parties to the constitutional compact, if the *people* deemed the Alien and Sedition Acts as a "deliberate, palpable, and dangerous exercise" of powers not granted under the constitutional compact. On such an occasion, the *people*

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<sup>73</sup>(Italics added). Ibid.

<sup>74</sup>Ibid.

<sup>75</sup>Ibid.

could employ all constitutional means to arrest “the progress of the evil” and to protect the rights and liberties of the *people*.<sup>76</sup>

There can be no doubt that Madison believed the Alien and Sedition Acts could evolve into such an occasion. Had the Sedition Act trials progressed at a greater rate and had the Republicans, and more broadly, the *people*, been effectively prevented from vigorously debating its merits and criticizing the government, there can be no doubt that Madison would not have hesitated to call for formal action by the *people*.

As to what form this sovereign right of interposition would take was unstated. In his *Report of 1800*, Madison claimed that such specificity was not yet necessary; the specific facts and circumstances would need to be considered before the appropriate action was taken. Thus, the resolutions did not require that the form of interposition:

... be discussed, how far the exercise of any particular power, ungranted by the Constitution, would justify the interposition of the parties to it. As cases might easily be stated, which none would contend ought to fall within that description; cases, on the other hand, might, with equal ease, be stated, so flagrant and so fatal, as to unite every opinion in placing them within that description.<sup>77</sup>

Madison brand of interposition by the sovereign *people* could have taken a number of forms. Most likely the method Madison had in mind was collective action by a representative group of the *people* in a formal setting convention similar to the Philadelphia convention of 1787. Such a “national” meeting likely would have produced resolutions and specific directions to the federal and state governments to cease and desist from enforcing specific provisions of the offending legislation, accompanied by a directive to each branch of the federal government to take such action (or refrain from taking any

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<sup>76</sup>Ibid.

<sup>77</sup>Ibid.

action) as was necessary to comply with the formal dictates of the *people*, the ultimate sovereigns under the Constitution. These resolutions and directives likely would have been submitted to state “ratifying” conventions and it would be at these “ratifying” conventions that the *people* would have formally adopted, without amendment or modification, the recommendations of the *people’s* special representatives. In essence, this would be nullification by the *people* as the sovereigns of the United States.

Many questions remained with respect to the *people’s* collective right of nullification. Given the support for the Alien and Sedition Acts in the Federalist-controlled states in the Northeast and Mid-Atlantic states, it was very unlikely that all of the state conventions, if the state delegates were legitimately chosen, would nullify the Acts. Thus, what level of agreement with the “articles of nullification” would be required in order to nullify the acts of Congress? Three-fifths of the state conventions? Two thirds? A simple majority of the state conventions? Christian Fritz concluded, without explanation, that Madison’s vision of interposition or nullification by the *people*, collectively acting in the sovereign capacity, required a “majority” of the *people* of the several states but did not explain what he meant by a “majority.” I suspect Fritz’s based his conclusion on language contained in the *Virginia Declaration of Rights*, which provided, “a majority of the community hath an indubitable, unalienable, and indefeasible right to reform, alter or abolish it, in such manner as shall be judged most conducive to the public weal.”<sup>78</sup> If so, this rather simple formulation suggests that a simple majority of the *people* of the United States could act as the sovereign and nullify federal law action regardless of how many state conventions approved the “articles of nullification?” But in that case, the desires of a

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<sup>78</sup>*Virginia Declaration of Rights.*

minority of the state conventions override the desires of a majority of the states conventions? On the hand, a majority of the state conventions could vote for nullification but such state conventions did not represent a majority of the population of the United States. Perhaps if events forced Madison to further explain his theory he would have advocated that the ultimate sovereigns of the United States collectively take action only when at least a majority of state conventions approve of an action and such state conventions represent at least a majority of the *people* of the United States. The questions and permutations are almost limitless.

As the election year of 1800 commenced, Madison and the Virginia legislature did not yet see the need to encourage the *people* to take any formal constitutional action as the ultimate sovereigns of the United States but rather, consistent with the rather ordinary practice of protesting against unpopular actions of the central government (whether British or American), to “sound the alarm,” rally public opinion in other states and seek a repeal of the law.<sup>79</sup> Madison never directly broached the topic of whether his theory of interposition by the *people* would have the effect of nullifying a federal law but it would be odd indeed if the *people*, acting in their highest sovereign capacity, formally commenced a process akin to a constitutional convention, and concluded that: (1) the federal government engaged in a “deliberate, palpable and dangerous exercise” of power not delegated (and in some instances, emphatically prohibited) under the Constitution, (2) the violation of the Constitution was of a “nature *dangerous* to the great purposes for which the Constitution was established,” (3) the violation was “plain and *palpable*,” and (4) the formal process was “stamped with a final consideration and *deliberate* adherence,” that such process would not

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<sup>79</sup>George Nicholas, during the summer and fall of protest in Kentucky, suggested one method of direct action that could be employed by the *people*: jury nullification.

include the decision of the *people* that the offending legislation was null and void and without any legal effect.

Amidst a series of political struggles over the meaning of the Constitution, and in the face of potential war with France, Madison was developing concepts as unique as the American experiment in representative government. Given that, it was no surprise that most of the interpreters of the *Virginia Resolutions of 1798* and the *Report of 1800* failed to grasp the significance of what Madison was trying to say.

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Madison and Jefferson had set forth their respective interpretations of the constitutional compact. What was unclear was how the people, and their respective representatives in the federal and state governments would interpret these theories when the next constitutional crisis arose between the states and the federal government. Ironically, the first real test would occur while Jefferson and Madison occupied the White House.

## 6 FEDERALISTS EMBRACE THE PRINCIPLES OF '98

With the election of Thomas Jefferson in 1800 and Republican's seizure of control of both houses of Congress, Federalist political power largely was limited to the control of state governments in New England. Now in the political minority, with ever-diminishing influence over national affairs, Federalists generally behaved as Republicans had under Federalist rule, and openly discussed the merits of a union with former revolutionary colleagues they now little understood or respected. As South Carolina nullifiers would later relate, New England Federalists often interpreted policies of the federal government as consciously and maliciously discriminating against the legitimate interests of their region. Federalist angst culminated in a regional convention in Hartford, Connecticut, in December of 1814, in which Federalist opposition to the War of 1812, and the Republican policies that preceded it, generated invocations of the Virginia and Kentucky Resolutions, demands for major changes to the Constitution, the contemplation of a separate peace with Great Britain and possible disunion.

Modern scholars assessing the history of the Federalist Party largely ignored the constitutional philosophy behind Federalist opposition to Republican rule during the first two decades of the nineteenth century or treat it as an aberration. The Federalist embrace of the Principles of '98 did not fit within the more dominant, and preferred, narrative of Federalist support for nation-building and internal improvements, and its opposition to slavery.<sup>1</sup> In light of twentieth century America's general disdain for any notion of states'

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<sup>1</sup>For largely favorable verdicts on the Federalist Party, see George Dangerfield, *The Era of Good Feelings* (New York: Harcourt, Brace, 1952); Shaw Livermore, *The Twilight of Federalism: The Disintegration of the Federalist Party, 1815-1830* (Princeton: Princeton University Press, 1962); Linda K. Kerber, *Federalists in Dissent: Imagery and Ideology in*

rights, and its pre-Civil War association with Southern slave owners and South Carolina nullifiers, to modern sensibilities, the reputation of the Federalist Party has emerged relatively unscathed. Consider this largely glowing summary from *The Reader's Companion to American History*:

The Federalist Party originated in opposition to the Democratic-Republican Party in America during President George Washington's first administration. Known for their support of a strong national government, the Federalists emphasized commercial and diplomatic harmony with Britain following the signing of the 1794 Jay Treaty. The party split over negotiations with France during President John Adams's administration, though it remained a political force until its members passed into the Democratic and the Whig parties in the 1820s.<sup>2</sup>

Federalist reliance on the Principles of '98 during a material portion of its relatively brief political history was largely unexplained:

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*Jeffersonian America* (Ithaca: Cornell University Press, 1970); Garry Wills, *James Madison* (New York: Times Books, 2002) and *Negro President: Jefferson and the Slave Power* (Boston: Houghton Mifflin Co., 2003); David H. Fischer, *The Revolution in American Conservatism: The Federalist Party in the Era of Jeffersonian Democracy* (New York: Harper & Row, 1965), chapter 9; Doron Ben-Atar and Barbara B. Oberg, eds., *Federalism Reconsidered* (Charlottesville: University Press of Virginia, 1998), especially essays by Rogers M. Smith, Rosemarie Zagarii and Paul Finkelman. For a discussion of the emergence of the Federalist Party and its importance to the formation of a modern democratic state, see Seymour M. Lipset, *The First New Nation: The United States in Historical & Comparative Perspective* (Garden City, NY: Doubleday, 1963); Paul Goodman, "The First American Party System," in William N. Chambers and Walter D. Burnham, ed., *The American Party Systems: Stages of Political Development* (New York: Oxford University Press, 1967), 56-89.

In 2005, historian Richard Buel fired a broadside against Federalist behavior during the Jefferson and Madison administrations by claiming "Federalist behavior, rather than British action, was the *critical* factor propelling the Republicans to declare war in 1812." Richard Buel, Jr., *America on the Brink: How the Political Struggle Over the War of 1812 Almost Destroyed the Young Republic* (New York: Palgrave Macmillan, 2005), 2. In essence, Buel argued, Federalist rhetoric and political opposition effectively bullied Republicans into the conflict, and the Hartford Convention was nothing less than attempted political blackmail during a time of war.

<sup>2</sup>"The Federalist Party," History.com, <http://www.history.com/topics/federalist-party>, citing Eric Foner and John A. Garraty, ed., *The Reader's Companion to American History* (New York: Houghton Mifflin Harcourt Publishing Company, 1991).

But Federalist obstruction of the war effort seriously undercut its newfound popularity [resulting from its “widespread opposition to Jefferson’s ill-conceived Embargo of 1807”], and the Hartford Convention of 1814 won for it, however unjustly, the stigma of secession and treason.<sup>3</sup>

Alas, the Federalist Party and its vision for America was underappreciated in its day by an agrarian nation suspicious of governmental power, but has been largely vindicated by modern times:

Its emphasis upon banking, commerce, and national institutions, although fitting for the young nation, nevertheless made it unpopular among the majority of Americans who, as people of the soil, remained wary of state influence. Yet its contributions to the nation were extensive. Its principles gave form to the new government. Its leaders laid the foundations of a national economy, created and staffed a national judicial system, and enunciated enduring principles of American foreign policy.<sup>4</sup>

The Federalist embrace of the Principles of ‘98 began gradually, and not with the outbreak of War in 1812 but five years earlier, when President Jefferson and the Republican Congress passed the Embargo Act of 1807. Similar to the deep fissures that developed between Republicans and Federalists in the 1790s over the creation of the National Bank, the genesis of the perilous disagreements between Republicans and Federalists in the first two decades of the nineteenth century centered on the power of the federal government to regulate commerce and on America’s foreign policy vis-à-vis Great Britain and France.<sup>5</sup> On the one hand, Jefferson and fellow Republicans were enthusiastic supporters of the French Revolution and feared Great Britain’s desire to reestablish control over the United States. On the other hand, Federalists believed that French radicalism had

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<sup>3</sup>Ibid.

<sup>4</sup>Ibid.

<sup>5</sup>For a discussion of American paranoia concerning British and French influence on American politics, see Lawrence A. Peskin, “Conspiratorial Anglophobia and the War of 1812,” *Journal of American History* (2011): 647-669 and Gordon S. Wood, “Conspiracy and the Paranoid Style: Causality and Deceit in the Eighteenth Century,” 39 *William and Mary Quarterly*, Issue 3 (1982): 402-441.

infected Jefferson and his adherents, which would undermine traditional values of religion and hierarchy, while unleashing the worst elements of “excessive” democracy and mob rule.<sup>6</sup> Historian Alison LeCroix aptly described the mutual paranoia:

If Federalists viewed Republicans as godless, Jacobinical followers of the deist Jefferson, Republicans saw Federalists as Anglophilic would-be aristocrats. Each had its pet conspiracy theory: according to the Republicans, the mercantile machinations of the “Essex Junto” stalked the land, while the Federalists saw clandestine Jacobin societies fomenting riots in every urban coffeehouse.<sup>7</sup>

Federalist suspicion of Jeffersonian rule commenced with Jefferson’s 1803 acquisition of the Louisiana territories from France. Federalists feared that the addition of western “foreigners” would threaten the political power of New England. Samuel Taggart epitomized the anxiety of many Federalists when he described the purchase as involving not only the acquisition of land but also “nearly all the varieties of the human species, to be found in the civilized world, peoples whose sentiments, habits, manners, and prejudices are very different, and whose local interests and attachments are various.” For Federalists, the addition of vast new lands and its inhabitants surely meant a further increase in the region’s growing political impotence. Not lost on most Federalists was the fact that these new citizens of the west, like the European immigrants of the 1790s that garnered Federalist attention during the passage of the Alien and Sedition Acts, naturally would identify with the more democratic leanings of the Republican Party.<sup>8</sup>

The deep unease over the Louisiana Purchase produced the initial Federalist

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<sup>6</sup>Alison L. LaCroix, “A Singular and Awkward War: The Transatlantic Context of the Hartford Convention,” *American Nineteenth Century History*, Vol. 6, No. 1 (2005): 3-32, 7; Steven Watts, *The Republic Reborn: War and the Making of Liberal America, 1790-1820*, New Studies in American Intellectual and Cultural History (Baltimore: Johns Hopkins University Press, 1989), 239.

<sup>7</sup>LaCroix, “A Singular and Awkward War,” 7.

<sup>8</sup>Banner, *To the Hartford Convention*, 111-14.

rumblings of disunion. While a small group of northern Federalists led by Senator Timothy Pickering of Massachusetts secretly explored the idea of a separate northern confederacy, Caleb Strong sentiments were more typical of most Federalists. Rather than desiring disunion, Strong simply lamented that such might be inevitable:

[I]t is hardly to be supposed that the Western States will long continue connected with us. They will soon possess all the requisites for their complete security, and will naturally prefer a government of their own and among themselves to one at a great distance. The territory of the U.S. is so extensive as to forbid us to indulge the expectation that we shall remain many years united. But whenever a separation shall take place, I hope it will be effected, not only without concession, but with perfect good-will. We may be happy as neighbors, where a union would be inconvenient.<sup>9</sup>

Federalist John Lowell, Jr. published a pamphlet, under the pseudonym “A Massachusetts Farmer,” expounding his belief that the United States should be divided at the Allegheny Mountains. Echoing the well-accepted maxim of Montesquieu that a republic should only consist of a small territory or it could not long endure, Lowell desired a reversal of the Louisiana Purchase, which he likened to a necessary amputation, “as a man would part with a gangrene limb to save his life.”<sup>10</sup>

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<sup>9</sup>Caleb Strong to Thomas Pickering, February 7, 1815, in *Proceedings of the Massachusetts Historical Society*, Vol. 1, 1791-1835, Massachusetts Historical Society (Cambridge: Press of John Wilson & Son, 1879), 312, <https://play.google.com/books/reader?id=yzMTAAAAYAAJ&printsec=frontcover&output=reader&hl=en>.

<sup>10</sup>John Lowell, Jr., *Thoughts in a Series of Letters in Answer to a Question Respecting the Division of the States, by a Massachusetts Farmer* (n.p., 1813). Madison’s *Federalist No. 10* was written to, in part, address this concern. New England hostility and suspicion toward western expansion reappeared from time to time through the Civil War. While Federalist “disunion” plans often stressed preservation of the original union along the eastern seaboard, with the joint separation from the West, the natural logic of their arguments, and their hostility toward Southern culture and slavery argued for a separation from the entire nation. See Banner, *To the Hartford Convention*, 115-16. In fact, even eleven years later, during deliberations at the Hartford Convention, and after years of butting heads with the founders of the Virginia dynasty, Federalists such as Harrison Gray Otis still identified the West as the greater threat to the union, and not the sectional differences with the South: “The great and essential interests of the people,” wrote Otis, “are common to the

The political hostility and suspicion between Republicans and Federalists rose to new levels during the second Jefferson administration when Great Britain adopted an aggressive policy of impressing seamen working on American vessels into the Royal Navy during its war with Napoleon's France. By 1807, Great Britain had impressed approximately 10,000 men who claimed U.S. citizenship, and approximately 6,000 still remained in British service. In response, Jefferson proposed and Congress passed, the Embargo Act of 1807, a general embargo that prohibited all shipping of exports from the United States to Great Britain. The embargo of exports followed on the heels of the Nonimportation Act of 1806, which had prohibited the importation of certain consumer goods from Great Britain. Designed to force Great Britain to respect American shipping rights, by the spring of 1808, New England ports effectively were closed, and the regional economy was heading toward recession. Wages for sailors and laborers dependent on shipping were cut in half while prices for farm produce plummeted.<sup>11</sup>

In March of 1808, citizens of Northampton, Massachusetts petitioned Congress and President Jefferson, in very deferential and solicitous language, seeking a repeal of the Embargo Act and an end to the suffering at home:

In this view your memorialists beg leave to state, that commercial enterprize & exertion are praised. That numerous class of individuals, heretofore employed in navigation, are deprived of the only means by which they obtained bread for themselves & their families, and that many of them are thrown back upon the interior, in a state of wretchedness, which no description can equal, that bankruptcies are continually occurring in our great towns, which spread their effects and produce bankruptcies in the

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south and to the east." *Public Documents: Containing Proceedings Of the Hartford Convention Of Delegates; Report of the Commissioners While At Washington; . . .* (Boston: Massachusetts General Courts Senate, 1815, repr., Kessinger Publishing, LLC, 2010), 5, <https://play.google.com/books/reader?id=NLtEAAAIAAJ&printsec=frontcover&output=reader&hl=en&pg=GBS.PA1>.

<sup>11</sup>Taylor, *The Civil War of 1812*, 105, 117.

country which again branch out & extend their disastrous consequences to the door of almost every citizen. The farmer is unable to find a market for this surplus produce, or to realize his dues, for such as he may heretofore have vended. His hopes of an honorable & needful reward for the toils of the last season are defeated, his spirits depressed, & his laborious industry checked, by the gloomy prospect of the future. From these discouraging & ruinous effects of the laws above mentioned your memorialists pray that relief may be granted.<sup>12</sup>

In addition to the Northhampton petitioners, seventy other local communities joined the protest and printed blank petitions advocating repeal of the embargoes and related legislation.<sup>13</sup> But the petitions fell on deaf ears and certain New Englanders took more drastic measures by undermining the embargo by indirectly trading with Great Britain along the Canadian border with New York and Vermont. To suppress the smuggling, Jefferson called out the state militia to patrol the border, but smugglers were undeterred and some openly challenged the militia with force of arms, with one skirmish resulting in the deaths of three militiamen. In retaliation for the violence, Jefferson and the Republican Congress enacted the Enforcement Act, which prohibited the export of all goods, whether by land or sea, regardless of its destination. The Act, signed into law by Jefferson on April 24, 1808, also granted port authorities the right to seize cargoes without a warrant and to try any merchant or shipper who allegedly contemplated a violation of the embargo.<sup>14</sup>

Federalists responded with an orchestrated newspaper campaign against the embargo. Under the pseudonym “Hampden,” one Federalist argued that the popular resistance to the embargo was proof of its unconstitutionality and cautioned officials

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<sup>12</sup>*Petition of sundry inhabitants of Northampton in the county of Hampshire and state of Massachusetts*, March 19, 1808, Robert C. Byrd Center for Legislative Studies, *Early Petitions to Congress*, <http://www.byrdcenter.org/index.php/resources/early-petitions-to-congress/>.

<sup>13</sup>Fritz, *American Sovereigns*, 210-11.

<sup>14</sup>Taylor, *The Civil War of 1812*, 115-23.

empowered to enforce the embargo to tread lightly if the administration wished to avoid further violence.<sup>15</sup> Some Federalist newspapers in Massachusetts followed the Hampden letters with a series titled “A Separation of the States and its Consequences to New England” by “Falkland.” “Falkland” placed the blame for the country’s political division and recent disunionist sentiment squarely on Virginia and its resentment of New England’s commercial success.<sup>16</sup> While “Falkland” acknowledged that disunion would be “an evil which can never be sufficiently deprecated by every true patriot,” a continuance of the embargo, which the author claimed was quickly reducing New England to “imbecility and poverty,” was worse: “We are ready for separation, if our independence cannot be maintained without it. We know and feel our strength, and we will not have our rights destroyed by the mad schemes of a Virginia philosopher.”<sup>17</sup> The *Richmond Enquirer*, a supporter of the Jefferson administration, accused Federalists of seeking a separation of the union.<sup>18</sup>

Relations with New Englanders and the federal government further deteriorated with the enactment of yet another Enforcement Act on January 5, 1809. This time, the citizens of Newburyport bypassed the federal Congress and directly petitioned Massachusetts legislators “as the more immediate guardians” of their “rights” and pleaded with their state representatives to “interpose” on their behalf. A month later delegates from fifty-one towns in Hampshire County met in convention to address the administration’s

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<sup>15</sup>*Salem Gazette*, September 13, 1808.

<sup>16</sup>*Salem Gazette*, September 27 through October 11, 1808.

<sup>17</sup>*Salem Gazette*, October 11, 1808; Charles Warren, *The Supreme Court in United States History*, Vol 1: 1789-1821 (n.p.: Little, Brown, and Company, 1922), 359, <https://play.google.com/books/reader?id=iL0BAAAAYAAJ&printsec=frontcover&output=reader&hl=en&pg=GBS.PP1>.

<sup>18</sup>*Richmond Enquirer*, November 1, 1808.

“shameful violations” of the constitution. Echoing Madison’s *Report of 1800*, because “sovereignty resides in the people,” they argued, citizens had a right to judge the “conduct and measures” of their elected representatives.<sup>19</sup>

In response to local petitions, a joint committee of the Massachusetts House and Senate proposed, and both houses adopted, a series of resolutions stating that the embargo was, “in the opinion of the legislature, in many respects, unjust, oppressive and unconstitutional, and not legally binding on the citizens of this state.” Like the Virginia and Kentucky legislatures in 1798 and 1799, however, the Massachusetts legislature did not purport to nullify the Embargo Act, and consistent with its admonition to Virginia in 1799, recommended that judicial courts were the proper governmental bodies to ultimately judge the constitutional efficacy of the Act:

While the laws continue to have their free course, the judicial courts are competent to decide this question, and to them every citizen, when aggrieved, ought to apply for redress. It would be derogatory to the honour of the commonwealth to presume that it is unable to protect its subjects against all violations of their rights, by peaceable and legal remedies. While this state maintains its sovereignty and independence, all the citizens can find protection against outrage and injustice in the strong arm of the state government.<sup>20</sup>

Interestingly, while the “judicial courts” were cited as the proper venue to seek legal recourse, Massachusetts made it clear that the state, and the *people*, would not sit idly by if the courts failed to grant relief or Congress failed to repeal the offending legislation:

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<sup>19</sup>*Newburyport Resolutions at a legal meeting of the inhabitants of Newburyport . . . holden at the Court-House on Thursday, the 12 of January 1809*, 13. *An Address to the People of the County of Hampshire, By a Committee Appointed for that Purpose* (Northampton, MA, 1809); Boston Town Records, 1796-1813, 240. See also Banner, *To the Hartford Convention*, 298-99; Benjamin W. Labaree, *Patriots and Partisans: The Merchants of Newburyport, 1764-1815*, The Norton Library Series, (Cambridge: Harvard University Press, 1962), 164-67.

<sup>20</sup>“Resolutions of the Enforcement Act, February 15, 1809,” in Herman V. Ames, ed., *Interpretation of the Constitution During the First Two Decades of its History, 1789-1809* (Philadelphia: University of Pennsylvania Department of History, 1900), 34-35.

The committee are deeply sensible of the accumulated distress which has so long oppressed the whole community, and borne with aggravation on some particular parts of it. They cannot too highly applaud the unexampled patience and forbearance which has been already exhibited under this pressure of undeserved calamities. And they would earnestly recommend the exercise of the same forbearance, until all those peaceable and orderly means which the constitution and laws of our country will permit, and all those political expedients, which our habits and usages can suggest, shall have been exhausted in vain.<sup>21</sup>

The Connecticut legislature passed a resolution declaring the latest enforcement act as unconstitutional and declaring that state officials would not fail to exercise their constitutional role to “sound the alarm” when the federal government exceeded its delegated powers:

That to preserve the Union, and support the Constitution of the United States, it becomes the duty of the Legislatures of the States, in such crisis of affairs, vigilantly to watch over and vigorously to maintain the powers not delegated to the United States, but reserve to the States, respectively, or to the people; and that a due regard to this duty will not permit this Assembly to assist, or concur in giving effect to the aforesaid unconstitutional act, passed to enforce the Embargo.<sup>22</sup>

The constitutionality of Jefferson’s embargo, and related enforcement regulations, reached a federal district court in Massachusetts in 1808. Federal district court judge John Davis, ruled that under Article 1, Section 8, clause 3 of the Constitution, the “care, protection, management and control” of commerce was “vested by the constitution, in the congress of the United States, and subject only to “the limitations and restrictions, expressed” in the Constitution and the “treaty making power of the president and the

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<sup>21</sup>“Resolutions of the Enforcement Act,” February 15, 1809, 34-35.

<sup>22</sup>*The Connecticut Courant*, March 1, 1809.

senate.” Further, Judge Davis made it clear that Congress’s power to regulate commerce among nations was not confined to:

the adoption of measures, exclusively beneficial to commerce itself, or tending to its advancement; but, in our national system, as in all modern sovereignties, it is also to be considered as an instrument for other purposes of general policy and interest. . . . The mode of its management is a consideration of great delicacy and importance; but, the national right, or power, under the constitution, to adapt regulations of commerce to other purposes, than the mere advancement of commerce, appears to me unquestionable.<sup>23</sup>

During its 1809 winter session, the Massachusetts’s legislature responded to the local populace’s request for action and adopted four resolutions, similar to resolves adopted by Virginia and Kentucky in 1798. The first declared that the embargo and subsequent enforcement acts were, “in the opinion of the legislature, in many respects, unjust, oppressive and unconstitutional, and not legally binding on the citizens of this state.” The second authorized a remonstrance to Congress urging a repeal of the latest enforcement act. The third called for cooperation among “sister states” to procure constitutional amendments giving “the commercial states their fair and just consideration.” And finally, the fourth requested the president of the state senate and speaker of the state house of representatives to transmit a copy to the legislatures of the sister states and solicit their concurrence with Massachusetts in order to “rescue our common country from impending ruin, and to preserve inviolate the union of the states.”<sup>24</sup>

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<sup>23</sup>*U.S. v. The William*, 28 Fed. Cas. 614 (D. Mass. 1808), *The Founders’ Constitution*, [http://press-pubs.uchicago/founders/documents/a\\_1\\_8\\_3\\_commerces12.html](http://press-pubs.uchicago/founders/documents/a_1_8_3_commerces12.html).

<sup>24</sup>Massachusetts General Court, *The Patriotik Proceedings of the Legislature of Massachusetts, During their Session from Jan. 26 to March 4, 1809* (Boston, 1809), 52-53, <https://books.google.com/books/reader?id=iC45AQAAMAAJ&printsec=frontcover&output=reader&pg=GBS.PA52>.

Unlike Virginia and Kentucky, a few of Massachusetts' sister states answered the call of Massachusetts. In Connecticut, Governor Jonathan Trumbull called a special session of the General Assembly to give the legislature "a correct view of the dangers which impend our public interests, liberty, rights and property," and reminded the legislators, in language Madison surely would have recognized, that "[w]henver our national legislature is led to overleap the prescribed bounds of their constitutional powers on the State Legislature, in great emergencies, devolves the arduous task—it is their right—it becomes their duty, to interpose their protecting shield between the right and liberty of the people, and the assumed power of the General Government."<sup>25</sup> Earlier that same month Trumbull had rebuffed the Secretary of War's request for Connecticut state militiamen to enforce the embargo, on the grounds that "neither the constitution nor the status of this State," nor "the constitution or laws of the United States" authorized such a request from the federal government.<sup>26</sup>

The legislature acknowledged its obligation and duty to "assert the unquestionable right of this State to abstain from any agency in the execution of measures, which are unconstitutional and despotic," and adopted two resolutions. The first agreed with Massachusetts to press for amendments to the Constitution and to "zealously cooperate . . . in all legal and constitutional measures" to procure such amendments. The second, and final, resolution requested that Governor Trumbull transmit copies of its resolutions to

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<sup>25</sup>"Speech of Governor Jonathan Trumbull at the Opening of the Special Session of the [Connecticut] Legislature," February 23, 1809, in Herman V. Ames, ed., in Herman V. Ames, *State Documents on Federal Relations: The States and the United States* (Philadelphia: Department of History, University of Pennsylvania (1911), 39; "Resolutions of the [Connecticut] General Assembly," February 23, 1809, and "Report and Resolutions of Rhode Island on the Embargo," March 4, 1809, in Ames, *State Documents*, 39-40.

<sup>26</sup>"Editor's Note," Ames, *State Documents on Federal Relations*, 38.

Massachusetts and to the legislatures of the sister states, seeking their concurrence “in restoring to commerce its former activity, and preventing the repetition of measures which have a tendency, not only to destroy it, but to dissolve the Union, which ought to be inviolate.”<sup>27</sup>

Rhode Island also was quick to respond. On March 4, 1809, both branches of the General Assembly pledged “to interpose for the purpose of protecting them from ruinous inflictions of usurped and unconstitutional power,” and judged the “numerous and vexatious restrictions” of the federal government as infringing upon the “undeniable rights and privileges of the good people of this State,” and “unjust, oppressive, tyrannical and unconstitutional.” Like the legislatures of Massachusetts and Connecticut, Rhode Island closed its series of resolutions with the request of its governor to transmit a copy of its resolutions to its sister states for their concurrence and support “for the preservation of the Union of the States, and for the removal of the political evils under which we are now suffering.”<sup>28</sup>

Concern with the Enforcement Act was not limited to New England. The *Baltimore Federal Republican* attacked the bill in the name of the Virginia Resolutions, decrying the act as authorizing the federal government to exercise powers never delegated by the States, effectively dissolving the “civil compact.” The Act was a force bill, according to the *Republican*, and the government would do well to remember, “a law which is to be enforced

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<sup>27</sup>“Resolutions of the General Assembly,” February 23, 1809, in Ames, *State Documents on Federal Relations*, 41-42.

<sup>28</sup>“Report and Resolutions of Rhode Island on the Embargo,” March 4, 1809, in Ames, *State Documents on Federal Relations*, 42-44.

at the point of bayonet will bring on a struggle which may terminate in the overthrow of the government. Our rulers are answerable for the issue.”<sup>29</sup>

Jefferson recognized that there was serious opposition to his embargo, especially its enforcement measures, but wished that it would remain in place beyond the end of his presidency in the hope that Great Britain might finally submit and accept some concessions. But Congress was in no mood to wait and on February 27, 1809, it repealed the embargo, effective March 4, the last day of the Jefferson administration.<sup>30</sup>

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By June of 1812, the combination of three factors led Madison and the Republican-controlled Congress to declare war on Great Britain: (1) the British Orders of Council, which authorized the Royal Navy to interfere with American commercial shipping the Madison administration; (2) the continued impressment of seamen from American ships; and (3) the British alliance with native Indians within American territory.<sup>31</sup> Tensions between Republicans and Federalists were at a fever pitch throughout much of the conflict and periodically carried over from the realm of politics onto the battlefield, where officers

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<sup>29</sup>*The Connecticut Courant*, January 18, 1809, quoting from the Baltimore *Federal Republican*, in John S. Pancake, “Baltimore and the Embargo: 1807-1809,” *Maryland Historical Magazine*, Vol. XLVII, No. 3 (September 1952): 173-87, 183, [http://msa.maryland.gov/megafile/msa/speccol/sc5800/sc5801/000001/000000/000187/pdf/msa\\_sc\\_5881\\_1\\_187.pdf](http://msa.maryland.gov/megafile/msa/speccol/sc5800/sc5801/000001/000000/000187/pdf/msa_sc_5881_1_187.pdf). The use of the phrase “Force Bill” was usually associated with the force bill passed in 1832 in response to South Carolina’s ordinance of nullification. The law empowered President Andrew Jackson to use the army and navy, if necessary, to enforce the laws of Congress, specifically the tariff measures to which South Carolina had objected.

<sup>30</sup>Pancake, “Baltimore and the Embargo,” 184-85. Emblematic of the collapse of support even within the Republican Party was the unanimous vote for repeal by the Maryland congressional delegation, including Senator Samuel Smith, who had been one of the embargo’s staunchest supporters. *Ibid*, 184.

<sup>31</sup>Taylor, *The Civil War of 1812*, 411.

with Republican or Federalist sympathies often clashed. According to historian Alan Taylor, on the one hand, Republicans viewed the war as “an ideological struggle between American republicanism and British monarchy,” with the greatest threat to victory being Federalists who “clogged the efforts and dampened the zeal of the Republicans.” On the other hand, Federalists viewed Republicans as “reckless, undisciplined, and dishonorable” in their conduct of the war.<sup>32</sup>

The bitterness of the Republican-Federalist disagreement over the war was epitomized by the opinion’s expressed in the nation’s newspapers. The Republican newspaper Baltimore *American* defined those opposed to the war as “Enemies” and “Tories.” The editor of Philadelphia’s *Democratic Press* threatened to publish the names and addresses of men opposed to the conflict.<sup>33</sup> Thomas Jefferson joined in the hyperbole by predicting to President Madison that Southern citizenry would tar and feather war opponents, while the fate of Northern leaders should be found at the end of a rope:

[F]ederalists indeed are open mouthed against the declaration but they are poor devils here, not worthy of notice. A barrel of tar to each state South of the Potomac will keep all in order, & that will be freely contributed without troubling government. To the North they will give you more trouble. You may there have to apply the rougher drastics of . . . hemp and confiscation.<sup>34</sup>

On June 22, 1812, when the news of Congress’s declaration of war arrived in Baltimore, a mob tore down the printing office of the Federalist newspaper, the *Federal Republican*. The paper’s editor, wealthy landowner, Alexander Contee Hanson, may have acted precipitously when he previously described the British as champions of liberty and

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<sup>32</sup>Ibid, 176.

<sup>33</sup>Baltimore *American*, July 16, 1812; Donald R. Hickey, *War of 1812: A Forgotten Conflict* (Urbana: University of Illinois Press, 1989), 55.

<sup>34</sup>Thomas Jefferson to James Madison, June 29, 1812, *Founders Online*, National Archives, <http://founders.archives.gov/documents/Jefferson/03-05-02-0155>.

Republicans as puppets for the Napoleon. Soon, any Federalist opposition to the war was deemed treasonous. Mob action in Baltimore against Hanson and his allies eventually led to the stabbing death of Revolutionary War hero James Lingan and serious injuries to eleven others. Federalists were aghast and drew on their Sedition Act past by blaming the riots on the evils of democracy and unchecked immigration. In August, a Boston crowd retaliated by seizing Republican congressman Charles Turner of Plymouth and “kicked him through town.” In September, New York Federalists met in convention to protest the suppression of free speech and mob violence, and predicted that Republicans would, through such tactics, “prepare the way for civil war.”<sup>35</sup>

In Massachusetts, Boston became the center of Federalist resistance and protest to the war. Massachusetts governor Caleb Strong proclaimed a public day of fasting “to atone for a declaration of war” against the nation from which we are descended, and which for many generations has been the bulwark of our religion.”<sup>36</sup> The Massachusetts state legislature urged all citizens of Massachusetts, Federalist and Republican, to unite and form a peace party in opposition to the war.<sup>37</sup>

New England’s opposition to the war was reignited when Madison instituted a new embargo in December of 1813. In his January 12, 1814, address to the Massachusetts legislature, Governor Strong declared the new embargo unconstitutional. Strong’s address echoed Madison’s *Virginia Resolutions* invocation of the *people’s* right to freely examine “public characters and measures, and of free communication among the people thereon”:

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<sup>35</sup>Taylor, *The Civil War of 1812*, 177-80; Hickey, *War of 1812*, 68-69; Banner, *To the Hartford Convention*, 308.

<sup>36</sup>*New England Palladium & Commerical Advertiser*, June 30, 1812, 1.

<sup>37</sup>LaCroix, “Singular and Awkward War,” 8.

The right of fully investigating political subjects and of freely expressing our sentiments in relation to them, is secured to us by our Constitution, and is essential to the public safety and the preservation of a free government. Without the exercise of this right, the most oppressive laws would not be repealed, nor the most grievous abuses reformed, and whoever attempts to invalidate this privilege, whatever name he assumes, is not a friend to republican liberty.<sup>38</sup>

The latest embargo, Strong claimed, “contains provisions of such a character, as makes it worthy of inquiry, whether any measures can properly adopted by this government, which would likely to induce Congress to repeal them, or to amend them in such manner as to tender their constitutionality less questionable.”<sup>39</sup> In reply to Strong’s address, the Massachusetts House attacked the “disposition manifested, in some portions of our country, to stifle fair inquiry, to suppress the freedom of speech and of the press, and thus to protract the evils of misgovernment,” and provided their litany of *real* causes of the war, including “a jealousy of commercial states, envy of their posterity, fear of their power, contempt for their pursuits, and ignorance of their true character and importance.” The House branded the embargo “an instrument of slavery rather than of mutual defense and security,” which “absolves from the obligation of citizens, all those who are disqualified by its arbitrary provisions from enjoying their rights, or fulfilling their duties as citizens.”<sup>40</sup>

The Senate echoed the free expression sentiments of the House, but did so more clearly with relation to the relationship between the federal government, the states, and

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<sup>38</sup>“Governor’s Speech,” January 12, 1814, *Resolves of the Commonwealth of Massachusetts, Passed at the Several Sessions of the General Court, Holden in Boston* (Boston: Russell, Cutler and Co., 1812-15, 345-50, 346, <https://play.google.com/books/reader?id=aBURAAAAYAAJ&printsec=frontcover&output=reader&hl=en&pg=GBS.PP1>).

<sup>39</sup>*Ibid*, 348.

<sup>40</sup>“Answer of the House of Representatives,” January 12, 1814, *Resolves of the Commonwealth of Massachusetts, Passed at the Several Sessions of the General Court, Holden in Boston* (Boston: Russell, Cutler and Co., 1812-15, 351-355, <https://play.google.com/books/reader?id=aBURAAAAYAAJ&printsec=frontcover&output=reader&hl=en&pg=GBS.PA351>).

the *people*. Freedom of speech and of the press, the Senate intoned, was “peculiarly precious” to “people, whose political liberty is dependent upon the observance of articles of compact, among independent states and sovereignties.” The “people of each associated state,” the Senate continued, “have two chief securities for their independence; the right of discussing public measures, inherent in the individual; and, under specified exceptions, the right of directing the force of the militia, inherent in the state. Neither of these securities can exist long, without the other.” The direct linkage of freedom of expression and the control of the instruments of organized violence strikes the modern ear as the disturbing jingoism of a second amendment absolutist, but recall that the concerns first raised by the citizens of Kentucky during that summer of 1798 also linked the evils of the Sedition Act with Adam’s and Hamilton’s raising of a standing army. For the survivors of revolutionary America, who deemed their pecuniary security as threatened by the majority of their sister states, and whose very lives and personal security were threatened by a nation that would soon defeat Napoleon, the sentiments expressed likely reflected their true anxiety. And under such stress, the Senate majority continued to link the “securities” of freedom of expression and control of the militia:

Freedom, under such a political compact, cannot exist at all, without both. It is to be expected, therefore, that all unwarrantable designs upon the constitution of such a country, will be preceded, or accompanied, by attempts to deprive the individuals of the one right and the states of the other. When such designs are suspected, much more when they are avowed and apparent, it is the duty of the constituted guardians of the safety of a people to call them to a frequent and vivid contemplation of those principles, which are essential to the existence of their liberties. . . . There can be no surer criterion, that the projects of rulers are incompatible with the safety of a people, than an attempt to seize powers inconsistent with the very nature of a free constitution.<sup>41</sup>

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<sup>41</sup>“Answer of the Senate,” January 12, 1814, *Resolves of the Commonwealth of Massachusetts, Passed at the Several Sessions of the General Court, Holden in Boston* (Boston:

After a detailed indictment of the various Republican embargoes, enforcement acts and its conduct of the war concluded with the verdict that the hardships suffered by New Englanders during the war with Great Britain far exceeded anything suffered prior to it: “A war, ostensibly for seamen’s rights, has, in a manner, swept that whole class of men from the ocean. A war, avowedly, for the rights of commerce, has been so managed as to reduce it to a state, in which it has no rights; or which is equivalent to having none.” As for the constitutional authority of the Congress to regulate commerce, the Senate charged the Congress with creating a novel constitutional doctrine: “[U]nder the power to regulate commerce, Congress have a right to annihilate it.”<sup>42</sup> Echoing Jefferson’s formulation of the proper remedies in his Kentucky Resolutions, the Senate conceded that many of the policies complained of by New Englanders over the last seven years “were but abuses of powers, acknowledged to exist in the general government,” and the proper remedy should be sought “in the ordinary processes of election.” The most recent embargo of the Madison administration, along with its enforcement provisions, however, were “of a different character,” and may “demand legislative interposition, in behalf of our injured citizens.”<sup>43</sup>

By the end of the legislative session, thirty-five towns had passed resolutions objecting to Madison’s conduct of the war. In late February 1814, a joint committee of the Massachusetts House and Senate issued a report, which claimed that since 1800, the basis of union “had been destroyed by a practical neglect of [the Constitution’s] principles” resulting in [192] “abuses, privations, and oppressions.” The report held “the southern and

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Russell, Cutler and Co., 1812-15, 356-63, <https://play.google.com/books/reader?id=aBURAA AAYAAJ&printsec=frontcover&output=reader&hl=en&pg=GBS.PA356>.

<sup>42</sup>Ibid.

<sup>43</sup>Ibid.

western sections of the Union” responsible, claiming they were impelled by “an open and undisguised jealousy of the wealth and power of the commercial states.” The report, authored by Harrison Gray Otis, mirrored many of the sentiments expressed by the House and Senate in early January, and re-exerted the proper role of the states:

A power to regulate commerce is abused when employed to destroy it, and a manifest and voluntary abuse of power sanctions the right of resistance as much as a direct and palpable usurpation. The sovereignty reserved to the states, was reserved to protect the citizens from acts of violence by the United States, as well as for purposes of domestic regulation. We spurn the idea that the free, sovereign and independent state of Massachusetts is reduced to a mere municipal corporation, without power to protect its people, and to defend them from oppression, from whatever quarter it comes. *Whenever the national compact is violated, and the citizens of this state are oppressed by cruel and unauthorized law, this legislature is bound to interpose its power, and wrest from the oppressor his victim.* (Italics added)<sup>44</sup>

And Otis very well knew that Madison and other Republicans would recognize his reliance on Madison’s *Virginia Resolutions*: “This is the spirit of our union, and thus has it been explained by the very man, who now sets at defiance all the principles of his early political life.”<sup>45</sup>

After a detailed review of all the memorials received from the various towns and cities across the state, the committee considered three courses of action. The first, the legislature sent yet another protest to Congress, was rejected because it had “again and again resorted to, and with no affect than to increase the evils complained of.” The second, enacting laws “tending directly to secure the citizens of this commonwealth in their persons, and property and rights; and for providing punishments for all such as should violate them,” would have involved direct conflict with the federal government and raised

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<sup>44</sup>*Niles’ Weekly Register*, March 5, 1814, 4-8, <https://play.google.com/books/reader?id=pU88AAAIAAJ&printsec=frontcover&output=reader&hl=en&pg=GBS.PA4>.

<sup>45</sup>*Niles’ Weekly Register*, March 5, 1814, 7.

the specter of violence. The committee rejected this approach, arguing that “the provisions of our state and national constitutions [i.e., the Fourth Amendment], as well as the common law are so plain, that no act of the legislature can afford any additional security.” The third proposal, which represented the middle ground, called for the appointment of delegates to meet with delegates from “such other states as shall elect any, for the purpose of devising proper measures to procure the united efforts of the commercial states, to obtain such amendments or explanations of the constitution, as will secure them from future evils.”<sup>46</sup>

The committee rejected the calling of a convention at that time until the members of the state House and Senate, who would soon be returning to Boston for the next general session, had a chance to learn the “views and wishes” of their constituents as well as the “wishes and disposition of the other states.” Despite the delay, it was clear that unless the fortunes of war bent towards the United States, a regional convention was likely. It also would have the benefit of being patterned after the Virginia Resolutions:

We know of no sure or better way to prevent that hostility to the union, the result of oppression which will eventually terminate in its downfall, than for the wise and good, of those states, which deem themselves oppressed, to assemble with delegated authority, and to propose, urge, and even insist upon such explicit declarations of power, or restriction, as will prevent the most hardy from any future attempt to oppress, under the color of the constitution. This was the mode proposed by Mr. Madison in answer to the objections made, as to the tendency of the general government, to usurp upon that of the states. And though he at a former period led the legislature of Virginia into an opposition, without any justifiable cause; yet it may be supposed that he and all others who understand the principles of our concurrent sovereignty, will acknowledge the fitness and propriety of their asserting rights, which no people can ever relinquish.<sup>47</sup>

The Maryland House of Delegates adopted a memorial in support of Massachusetts on January 28, 1814 in terms almost indistinguishable from the language used in Otis’s

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<sup>46</sup>Ibid.

<sup>47</sup>Ibid.

committee report, including comparing Madison's embargo to "the Boston port bill of 1774" and lamenting "the still greater miseries of the people of New England" resulting from the westward expansion of the United States, which deprived New England of their deserved "influence in the national councils."<sup>48</sup>

The actions of the Massachusetts and Maryland legislators triggered a series of denunciations from newspapers sympathetic to the Madison administration. Hezekiah Niles, the publisher of *Niles' Weekly Register*, in his "Editorial retrospect and remarks," decried Maryland's "alliance" with Massachusetts as a betrayal of the legacy of George Washington: "Let me ask those who *really* are 'federalists,' who honestly and sincerely receive Washington's Farewell Address, as the rule and guide of their political faith, how it is possible they can act with the faction at *Boston*." Niles reminded those sympathetic with the New England Federalists that Washington "directed us to suppose a dissolution of the union as impossible as to avoid death," and then turned his attack directly against the legislators in Boston:

Little did that great man believe that in ten or fifteen years after his death, men in *Boston*, "the cradle of the revolution," should coldly sit down and *calculate a separation of the states*. Less did he suppose that in the *legislature of Massachusetts*, the *expediency* of that diabolical measure should become a question of debate! Much less did he believe that the faction which proposed, supported and encouraged such notions, would fasten upon *his* name, and cloak *their* baseness and *his* virtues. Unmanly hypocrites! Thus to abuse the memory of the dead; and, as far as in you lies, to ascribe to the deceased a depravity that he would have looked into annihilation!<sup>49</sup>

Niles then broadened his attacks to the Federalist newspapers "at *Boston*, and some other towns in Massachusetts," who, along with the British, employed "every effort of genius and falsehood . . . to prepare the public mind for rebellion" against the United States,

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<sup>48</sup>Buel, *America on the Brink*, 193.

<sup>49</sup>*Niles' Weekly Register*, March 5, 1814, 1.

and who used “the most barefaced lies and outrageous misrepresentations . . . to excite state jealousies and partial sympathies. Niles reserved his most vitriolic language for the British instigators of disunion, whose character he compared to a tiger, who “having gorged himself to the full, yet nestles in the bowels and blood of his victim, insatiate of murder and delighting death.”<sup>50</sup>

Others Republican newspapers joined in with criticism. The *Aurora* of Philadelphia, who vehemently supported the Virginia and Kentucky Resolutions, and whose founder, Benjamin Franklyn Bache, was arrested for violation of the Sedition Act in 1798, disparaged the Massachusetts committee report under the headline “Treason Exploded.” The legislature of New Jersey, with a newly-formed Republican majority, rebutted the Maryland House of Delegates with its own resolution that directed “contempt and abhorrence” at “the ravings of an infuriated faction, either issuing form a legislative body, a maniac governor, or discontented or ambitious demagogues.”<sup>51</sup>

Concurrent with attacks from Republican newspapers, Republicans in Congress amped up their rhetoric of condemnation of Federalist protests against the war. In mid-January, James Fisk lambasted Representative Cyrus King for Federalist efforts to defeat or frustrate legislation aimed at recruiting new soldiers into the federal army. When King’s claimed that the Republicans were solely responsible for the country’s difficulties in successfully prosecuting the war, Fisk invoked Tennessee congressman Felix Grundy’s notion of “moral treason” to King:

They are to be charged to those who have weakened the arms of their country; who have divided the opinions of the people; who have refused to defend the rights of their country. If that American feeling had prevailed

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<sup>50</sup>Ibid, 2.

<sup>51</sup>*Niles’ Weekly Register*, March 5, 1814, 11.

everywhere which ought to animate the bosoms of every man, we should have had no occasion to go to war. . . . But for the Opposition, we should never have been at war.”<sup>52</sup>

Fisk’s charges and attack on King provoked further counter-charges, this time from congressmen who would play a very different role during the Nullification Crisis. First, congressman Daniel Webster rose in opposition to Fisk’s charges of moral treason. It was insatiable Republican desire to conquer Canada, Webster argued, which had caused the war, not the “constitutional and legal” Federalist protestations of the litany of embargoes and enforcement acts. He then chastised Fisk and his fellow Republicans for attempting to quash legitimate “freedom of inquiry, discussion, and debate.”<sup>53</sup>

Webster’s counter-attack provoked yet another volley from another supporter of the war, John C. Calhoun, who distinguished between political opposition that was within the bounds of the constitution, “innocent and useful,” and that which crossed the line into illegitimate opposition, which he claimed was the “the most dangerous of political evils.” For Calhoun in 1814, the voice of the minority should be confined to “those bounds which love of country and political honesty prescribe.” Such criticism is “one of the most useful guardians of liberty.” But the opposite was also true. Criticism crossed the permissible line when such speech was the product of “faction and ambition,” when “[t]he fiercest and most ungovernable passions of our nature—ambition, pride, rivalry, and hate—enter into its dangerous composition.” Calhoun continued to reveal his limited notion of freedom of expression when he pointed out that no article in the federal Constitution “authorized dangerous and vicious species” of opposition. The fact that such speech was “not expressly

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<sup>52</sup>*The debates and proceedings in the Congress of the United States: with an appendix, containing important state papers and public documents, and all the laws of a public nature: with a copious index* (Washington, D.D.: Gales and Seaton, 1834-1856), 13<sup>th</sup> Congress, first and second session, 932, 933-34.

<sup>53</sup>George Ticknor Curtis, *Life of Daniel Webster*, Vol. 1 (New York: Appleton), 122.

forbidden” by the Constitution was not persuasive, for such an interpretation would mean that there was “no limitation to their constitutional rights.” Surely, Calhoun noted, the Constitution could not mean, “what is not forbidden is justifiable.” Calhoun implicitly recognized that the ability of Congress to curb such speech was practically limited, “for there are many acts of the most dangerous tendency (of which an unprincipled opposition is one), which in their very nature are not susceptible of that rigid definition necessary to subject them to punishment.” He called on those in favor of the war to “guard against the pernicious effects” of such a “factious opposition.”<sup>54</sup>

By the spring of 1814, after extensive legislative debates in the States and in the federal Congress, and after a flurry of petitions from various citizens, towns, and counties had made their way to Congress and to President Madison, Federalist efforts to materially impact the conduct of national affairs through protest had proved futile. This futility, however, did not prevent New England Federalists from celebrating the defeat of Napoleon with music and parades through the streets of Boston while British ships lied in wait at the outskirts of Boston Harbor.<sup>55</sup>

With New England continuing to threaten desperate measures that would undermine America’s conduct of the war, Madison considered his options for peace. In late 1813, as American fortunes in the conflict continued to decline, Madison accepted a British

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<sup>54</sup>“Speech of John C. Calhoun,” January 17, 1814,” in John C. Calhoun and Richard Kenner Cralle, ed., *The Works of John C. Calhoun, Speeches of John C. Calhoun Delivered in the House of Representatives and the Senate of the United States* (New York: D. Appleton and Company, 1883), 56-68, 62-64, 67-68, [https://play.google.com/books/reader?id=6Etx\\_aVIYYC&printsec=frontcover&output=reader&hl=en](https://play.google.com/books/reader?id=6Etx_aVIYYC&printsec=frontcover&output=reader&hl=en); *The debates and proceedings in the Congress of the United States: with an appendix, containing important state papers and public documents, and all the laws of a public nature: with a copious index* (Washington, D.D.: Gales and Seaton, 1834-1856), 13<sup>th</sup> Congress, first and second sessions, 1000-1002; Buel, *America on the Brink*, 194-95.

<sup>55</sup>LaCroix, “A Singular and Awkward War,” 9-10.

offer to negotiate an end to the conflict. Any meaningful American leverage in negotiations was extinguished, however, with the fall of Napoleon's regime in the spring of 1814, freeing up thousands of British troops that could be recommitted to an all-out invasion of the former colonies. Madison lowered his expectations, and with them, his demands for settlement. The British, buoyed by its victory over France, now demanded changes to the continent's borders as protection against any possible future invasion of Canada, including part of eastern Maine and an Indian buffer zone between the Ohio River and the Great Lakes. The creation for a buffer zone was to be the *quid pro quo* for the Indian allies that had supported British troops in the Great Lakes region. John Quincy Adams, Madison's U.S. Minister to the Court of St. James's, rejected and privately ridiculed the demand for a buffer zone, characterizing the treaty proposal as condemning "vast regions of territory to perpetual barrenness and solitude, that a few hundred savages might find wild beasts to hunt upon it." American passion and consistency on this point convinced the British negotiators, leading one to exclaim, "I had, till I came here, no idea of the fixed determination which prevails in the breast of every American to extirpate the Indians and appropriate their territory." When British demands became public in October of 1814, Federalists generally accepted the terms as the proper price for Republicans waging an unjust war while Madison, while Republicans interpreted the buffer zone as an impediment to westward expansion that would threaten the future of the union.<sup>56</sup>

As American fortunes in the war continued to wane, disunion became a real possibility. While New Englanders contemplated disunion, in Washington, Madison struggled to keep the federal government fully functioning and ward off threats of a

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<sup>56</sup>Taylor, *The Civil War of 1812*, 413-15; John Quincy Adams, *Diary of John Quincy Adams* (Cambridge: Belknap Press of Harvard University Press, 1981), 131-32.

separate peace between New England states and the British. In August, a British invasion of Washington, D.C. left the White House and the Capitol a charred ruin. The president had dismissed his secretary of war while his secretary of the navy announced he would be leaving his post on December 1. Shortly thereafter, Madison's secretary of the treasury resigned when he proved ineffective in combatting the nation's growing fiscal crisis, while the country's banking system neared collapse.<sup>57</sup> British navy commanders pressured America's coastal cities to adopt a policy of neutrality or surrender, or face annihilation. For example, on Nantucket Island, a Republican majority agreed with its Federalist neighbors to seek a separate peace agreement with British admiral Alexander Cochrane in the face of possible starvation from Cochrane's naval blockage. Likewise, the inhabitants of eastern Maine took an oath of neutrality while under British occupation.<sup>58</sup>

In October 1814, the Massachusetts legislature formally proposed what it had temporarily rejected earlier in the year: New England states meet to discuss the region's grievances in a convention to be held at Hartford, Connecticut. In the face of a Republican boycott of the proceedings, the Massachusetts legislature elected twelve delegates to the convention. Rhode Island would send four delegates while seven would come from the host state of Connecticut. In addition to the state delegates, delegates from three counties (two in New Hampshire and one in Vermont) also would attend. In Congress, divisive rhetoric increased. On December 9, 1814, Daniel Webster, then a congressman from New Hampshire, later hailed during the Nullification Crisis as the grand champion of nationalism, stood before his House colleagues and excoriated the Madison administration for its policy of conscription:

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<sup>57</sup>Taylor, *The Civil War of 1812*, 416.

<sup>58</sup>*Ibid*, 413-15.

The operation of measures thus unconstitutional & illegal ought to be prevented, by a resort to other measures which are both constitutional & legal. It will be the solemn duty of the State Governments to protect their own authority over their own Militia, & to interpose between their citizens & arbitrary power. These are among the objects for which the State Governments exist; & their highest obligations bind them to the preservation of their own rights & liberties of their people. . . . Both they & myself live under a Constitution [of New Hampshire] which teaches us, that “the doctrine of non-resistance against arbitrary power & oppression, is absurd, slavish, & destructive of the good & happiness of mankind.”<sup>59</sup>

As Christian Fritz and Alison LaCroix each separately noted, the twenty-six delegates who considered possible disunion, or other actions to change the course of America’s conduct of the war, were not radicals or a “band of extremists.” Five delegates were respected merchants while the remaining twenty-one were lawyers, nine of whom were judges. Two delegates had authored legal treatises, and George Cabot, “perhaps the most respected leader of New England Federalism,” presided over the convention. But despite their collective moderation, the delegates would be considering the fate of the union under very unusual circumstances. As plans crystallized for the convention to commence in December, the delegates were under no illusions as to what was at stake.<sup>60</sup>

Shortly after the call for the convention, Massachusetts governor, Caleb Strong, sent a secret emissary, Thomas Adams to Halifax, Nova Scotia, with instructions to meet with Sir John Sherbrooke, commander of British forces occupying Maine, “to ascertain whether Negotiation will under existing circumstances be agreeable to the British Government.”<sup>61</sup>

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<sup>59</sup>“Daniel Webster’s speech on the Conscription Bill made in the House of Representatives, December 9, 1814,” in *The Letters of Daniel Webster: From Documents Owned Principally by the New Hampshire Historical Society*, C. H. Van Tyne, ed. (New York: McClure, Phillips & Co., 1902), 66, <https://play.google.com/books/reader?id=sCtAAAI AAJ&printsec=frontcover&output=reader&hl=en&pg=GBS.PR5>.

<sup>60</sup>Fritz, *American Sovereigns*, 213; LaCroix, “A Singular and Awkward War,” 10.

<sup>61</sup>“The Proposals of the American Agent Enclosed with the Foregoing Dispatch,” in Spencer Tucker, James R. Arnold, Roberta Weiner, Paul G. Pierpaoli and John C. Fredriksen,

And as Congress debated yet another conscription bill, the governors of Massachusetts, Connecticut and Rhode Island refused a federal requisition for troops on the grounds it endangered their states and violated the constitution. They asserted (supported by an advisory opinion of the Massachusetts's highest court agreed) that while the Constitution authorized national service, state governors had the power to decide whether that service was warranted.<sup>62</sup> In December, with the British fast approaching New Orleans, and with the twenty-six delegates readying to decide the fate of the union in Hartford, Daniel Webster, who would later champion unfettered rights for the federal government during the Nullification Crisis, evoked the Principles of '98 in his arguments against a military draft. The military draft, Webster argued, was "unconstitutional and illegal," and he urged:

[T]he State Governments to protect their own authority over their own militia, and to interpose between their citizens and arbitrary power. These are among the objects for which the State Governments exist and their highest obligation bind them to the preservation of their own rights and the liberties of their people. . . . [My constituents and I] live under a constitution which teaches us that "the doctrine of non-resistance against arbitrary power and oppression is absurd, slavish, and destructive of the good happiness of mankind." With the same earnestness with which I now exhort you to forbear from these measures, I shall exhort them to exercise their unquestionable right of providing for the security of their own liberties.<sup>63</sup>

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eds., *The Encyclopedia of the War of 1812: A Political, Social and Military History*, 3 volumes, Vol. 1 (Santa Barbara, CA: ABC-CLIO, LLC, 2012), 929. Alison LaCroix concluded that Strong's proposals were taken very seriously by the British colonial secretary, Lord Bathurst, who granted Sherbrooke authority to negotiate a separate peace with New England in the event that peace talks currently underway in Ghent proved unproductive. The United States and Great Britain reached a final agreement in Ghent by the time Bathurst's letter of authorization reached Sherbrooke. LaCroix, "A Singular and Awkward War, 10.

<sup>62</sup>Ames, *State Documents on Federal Relations*, 41-42.

<sup>63</sup>"Daniel Webster's speech on the Conscription Bill." The language Webster quoted came from Article 10, "Right of Revolution," of the New Hampshire state constitution, which read in full:

Government being instituted for the common benefit, protection, and security, of the whole community, and not for the private interest or

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Madison and his fellow Republicans took Federalist threats of disunion seriously. As the delegates prepared to convene in Hartford, Federalist newspapers and pamphleteers in Massachusetts openly speculated on the prospects of secession. As Governor Strong was initiating secretive negotiations for a separate peace with Great Britain, the *Columbia Centinel* pronounced that disunion and a settlement with Britain would be justified because New England was “unquestionably absolved from all obligations to the United States, since the United States have ceased to perform any of its obligations toward them.” The *Centinel* concluded that the convention “cannot do a more popular act, not only in New England, but throughout the Atlantic States, than to make a Peace for the good of the whole.” In response to these troubling rumblings, Secretary of War James Monroe dispatched Colonel Thomas Jessup to monitor the political situation, while observing the movement of British ships lurking offshore. In the event of secession, Jessup would seize the federal arsenal at Springfield and rally local Republican supporters, backed by one thousand federal troops, which Monroe had redeployed east from the northern front in Niagara to the Massachusetts border.<sup>64</sup> Jessup’s assessed the ominous state of affairs on the ground and

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emolument of any one man, family, or class of men; therefore, whenever the ends of government are perverted, and public liberty manifestly endangered, and all other means of redress are ineffectual, *the people may, and of right ought to reform the old, or establish a new government.* The doctrine of nonresistance against arbitrary power, and oppression, is absurd, slavish, and destructive of the good and happiness of mankind. (Italics added)

For a description of New England’s defense concerns and their impetus for the Hartford Convention, see Donald R. Hickey, “New England’s Defense Problem and the Genesis of the Hartford Convention,” 50 *New England Quarterly* (1977), 587-604.

<sup>64</sup>Taylor, *Civil War of 1812*, 415; Fritz, *American Sovereigns*, 216; LaCroix, “A Singular and Awkward War,” 19.

reported back to Monroe what measures should be taken in the event the Convention endorsed disunion:

a spirit of the most determined opposition to the general government pervades all ranks and classes of the *majority* of Massachusetts, and they they only want the signal of the Convention to manifest that sentiment in open acts of hostility. Connecticut is more moderate: she would lose more by a revolution than all New England besides. . . . I think it, therefor, very doubtful whether she will consent to a severance of the Union.

. . . If New England determines on opposition her power should be instantly crushed: give her time to organize an independent govt. and she will bid defiance to the power of the Union. Her population is now nearly equal to that of the whole United States at the commencement of the American Revolution—the organization of her militia is perfect—and some of the states are raising regular corps by enlistment. . . . These are people of calculation you may be assured, they will not attempt to separate without being prepared to resist—their first measure of resistance will probably be an alliance with Great Britain which will secure them the right to the fisheries and a free trade to India and Europe—and there is no doubt but in that event of their seizing all the public vessels, naval and military stores, and public property of every description within their power.<sup>65</sup>

Jessup's cold and calculating description of New England as a potential military foe underlined the anxiety of the moment, and he boldly made his presence known to Federalist leaders. He met regularly with the mayor of Hartford, who was a member of the convention, in an attempt to procure details of the secret proceedings; he flew a British flag at half-mast under an America flag while marching recruiting parties through the streets of Hartford. He and his military officers attended balls in full uniform, some of whom displayed wounds recently received in battle. The resolve of the Madison administration to put down any rebellion had been clearly communicated.<sup>66</sup>

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<sup>65</sup>Thomas S. Jessup to James Monroe, December 31, 1814, reprinted in Jack Allen Clark, "Thomas Sydney Jessup: Military Observer at the Hartford Convention," 29 *New England Quarterly*, no. 3 (1956): 393-399, 396.

<sup>66</sup>LaCroix, "A Singular and Awkward War," 20.

The Convention adjourned on January 4, 1815, with the approval of its Report, which was published eight days later, and immediately reprinted in most Massachusetts newspapers. The *Report of Delegates*, presumably authored by Otis, did not call for disunion or nullification; rather it mirrored the recommendations of the Virginia and Kentucky Resolutions by requesting assistance and cooperation from the co-states. First, the delegates requested the state legislatures solicit from the federal government the federal taxes raised from the New England states necessary to offset the cost of that region's state militias. Second, the delegates called on the legislatures of the New England states represented at the Convention to properly provision the state militias in order to "repel any invasion and finally, it called on the co-states to support a series of constitutional amendments to enhance New England's political influence within the Union."<sup>67</sup>

The constitutional amendments proposed by the Convention were unsurprising. First, the apportionment provision with respect to the taxing power of the federal government under Article 1, section 2, would be revised so that taxes now would be apportioned "according to their respective numbers of free persons, . . . excluding Indians not taxed, and all other persons." In isolation, this would have increased the relative tax burden of New England because it eliminated the counting of three-fifths of the slaves that disproportionately lived in the South. But, of course, the elimination of the three-fifths

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<sup>67</sup>*Report of the Delegates from the Legislatures of the States of Massachusetts, Connecticut, and Rhode-Island, and from the Counties of Grafton and Cheshire in the State of New-Hampshire and the county of Windham in the State of Vermont, assembled in Convention, January 4, 1815, in Public Documents: Containing Proceedings of the Hartford Convention of Delegates; Report of the Commissioners While at Washington and More* (Boston: Massachusetts Senate, 1815, repr., Kessinger Publishing LLC, 2007), 3-32. ("Report of the Delegates"); LaCroix, "A Singular and Awkward War," 21; Fritz, *American Sovereigns*, 213.

clause also applied to representation in Congress, thereby increasing the relative power of the New England states. Second, no new state would be admitted into the union without the approval of two-thirds of both the House and the Senate. This effectively gave New England a veto to prevent the addition of further western states, which Federalists believed would naturally identify with the Republican Party. The third, fourth, fifth resolutions specifically addressed the substantive “evils” perpetrated by the Jefferson and Madison administrations: Congress could no longer place an embargo on U.S. ships for more than sixty days; Congress could no longer “interdict the commercial intercourse between the United States and any foreign nation” without the acquiescence of two-thirds of both the House and the Senate; and (3) Congress could not declare war without the concurrence of two-thirds of both Houses unless for defense in response to an invasion. The sixth and seventh amendments were direct assaults on the Republican Party and the state of Virginia. The sixth would have prohibited any naturalized citizen of the United States from becoming a member of the House or Senate or holding any civil office of the United States. Finally, the chief executive was limited to one term and successive presidents could not come from the same state.<sup>68</sup>

Much of the *Report of Delegates* relied on Madison’s Virginia Resolutions and his *Report of 1800*. By choosing delegates to meet in convention, it followed Madison’s preferred course by placing the authority to take constitutional action in the hands of the *people* as opposed to the state legislatures. The latter certainly could take action, but only at the direction of the *people*. It also declared “acts of Congress in violation of the Constitution” as “absolutely void,” but like Madison’s *Virginia Resolutions*, however,

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<sup>68</sup>*Report of Delegates*, 21.

unconstitutional acts of the federal government did not mean that “a confederate State” should “fly to open resistance upon every infraction of the Constitution.” Rather, the appropriate remedy to be employed at any given time should be proportionate to the violation, in language clearly derived from Madison’s *Virginia Resolutions*:

The mode and the energy of the opposition should always conform to the nature of the violation, the intention of its authors, the extent of the injury inflicted, the determination manifested to persist in it, and the danger of delay. . . . *But in cases of deliberate, dangerous, and palpable infractions of the Constitution, affecting the sovereignty of a State, and liberties of the people; it is not only the right but the duty of such a State to interpose its authority for their protection, in the manner best calculated to secure that end.* (Italics added).<sup>69</sup>

As Christian Fritz noted, however, Otis departed from Madison’s *Virginia Resolutions* in a number of important respects. First, Otis specifically referred to the “sovereignty of a State,” which Fritz interpreted as implying that independent sovereign states, and not the collective *people* of the states, created the constitution. Second, Otis’s standard designated the state as the party to take action in the case of “deliberate, dangerous, and palpable infractions” of the Constitution, whereas Madison’s *Report of 1800* made it clear that the right of interposition was a remedy to be invoked by the *people* of the several states, collectively acting in their highest sovereign capacity. Thus, Otis’s formulation, like Jefferson’s *Draft*, suggested that a single State could nullify a federal law, and presumably, could choose to secede from the union for a breach of the compact. Recall that even Breckinridge argued during the adoption of the *Kentucky Resolutions of 1798*, and the language of the *Kentucky Resolutions of 1799*, that nullification required a majority of the state legislatures. Finally, Otis’s formulation did not contemplate constitutional action by the *people*, implying that the *people’s* right to take constitutional action was limited to the

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<sup>69</sup>*Report of Delegates*, 9.

ordinary political remedies—protests, petitions and periodic elections. Thus, while Otis and the other Federalist employed the device of holding a convention of the *people*, which Madison thought necessary for nullification, the language of the convention presumed little power of the *people* to take independent constitutional action. This interpretation is reinforced by the closing resolution in the *Report of Delegates*, which warned the federal government that if “peace should not be concluded, and the defence of these States should be neglected . . . it will in the opinion of the Convention be expedient for the Legislatures of the several State to appoint Delegates to another Convention . . . with such powers and instructions as the exigency of a crisis so momentous may dictate.” Even here, the delegates to the Convention would appear to be acting on behalf of, and at the direction of the State legislatures.<sup>70</sup>

Otis’s formulation of the constitutional compact was well understood by Federalist newspapers of the period, and this was well before Jefferson’s *Draft* became known or his role in the drafting of the *Kentucky Resolutions of 1798*. The *Connecticut Spectator* in August 1814 characterized the constitution as “nothing more than a treaty between independent sovereignties.” An article in the *Boston Daily Advertiser* exploring “The Nature of our Government” began by asserting that after the Revolution, Massachusetts became “free, sovereign and independent.” As for the federal Constitution, the author asked, “Who were the parties, and what was the nature and design of that compact?” According to this author, the “contracting parties” of the Constitution “were SOVEREIGN STATES,” which was

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<sup>70</sup>Fritz, *American Sovereigns*, 214; Jefferson’s *Draft and Fair Copy*.

“nothing more or less than a treaty between independent sovereigns.”<sup>71</sup> This formulation, frankly, was much clearer than Jefferson’s or Breckinridge’s, and it too saw little constitutional role for the *people* other than as representatives of the States:

The Constitution was framed by delegates, or ministers, sent from the several States. In the convention of these persons, the *States*, and not the *individuals* were considered as present. The Constitution was submitted, under the recommendation of the Legislatures of the respective States, to the people for their ratification. Throughout the instrument the contracting parties are the United States and the Individual States.”<sup>72</sup>

In order to illustrate his point, the writer posed a “hypothetical” case where a state enacted a law “forbidding the payment of Federal taxes and the enforcement of a federal military conscription”:

In either of these cases, . . . [t]he United States may, through its officers and agents, attempt to carry any law, however odious and unconstitutional, into effect. . . . If force were resorted to, on the part of the United States, it would be nothing more or less than war, between one sovereign State, and that power, whatever it might be, which should come with hostile intentions. The war would be conducted, like any other war, according to the law of nations. The citizens of the State taken in arms, would be prisoners of war, not *traitors*. The utmost that the United States could allege would be, that a sovereign State had broken its treaty, however false and groundless such assertion might be.<sup>73</sup>

A later article in the *Columbian Centinel* of Boston reiterated the Constitution’s reliance on the law of nations for its interpretation and the various remedies available to the parties in the event of its violation:

. . . [O]ur duty to the general government is founded on principles more palpable, intelligible, and accurately defined; it is founded on express

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<sup>71</sup>Frank Maloy Anderson, “A Forgotten Phase of the New England Opposition to the War of 1812,” 6 *Mississippi Valley Historical Society Proceedings* (1912-1913): 176-88, 180, 183 and 184, <https://play.google.com/books/reader?id=oVUUAAAAYAAJ&prntsec=frontcover&output=reader&hl=en&pg=GBS.PA176>.

<sup>72</sup>*Boston Daily Advertiser*, November 14 to 24, 1814; Anderson, “A Forgotten Phase of the New England Opposition to the War of 1812,” 185.

<sup>73</sup>*Ibid.*

*compact and treaty*, written in characters and terms, which cannot be misunderstood. . . . To our respective State governments our allegiances is *natural, inalienable*, and “*founded on the will of God, as collected from expediency*.” But each State has entered into a solemn compact with all the other States, by which, *to a certain extent, and for certain purposes*, a portion of State sovereignty is ceded to a general government formed by this union. To that *extent*, and for those *purposes*, we owe obedience to the general government; to them our allegiance is *secondary, qualified and conditional*; to our State sovereignties it is *primary, universal and absolute*.<sup>74</sup>

Federalist newspapers also were well aware of Madison’s Virginia Resolutions and scolded the president for allegedly abandoning his earlier views. In a series of articles addressed to “The President of the United States” in the *Boston Daily Advertiser* in November 1814, the author cited “axioms” and “principles” that Madison had now abandoned but that New Englanders still respected. Among these was the right of the federal government to implement “odious and unconstitutional” laws. In such event, the writer intoned, “the State authority may enact that such supposed laws shall not be carried into effect.” For support, the author cited the Virginia Resolutions and excerpts from Madison’s *Federalist Papers*. The author, however, erroneously contended that Madison had claimed the right of “a State legislature” to “interfere, and oppose the Government of the United States, whenever it is dissatisfied with the policy which that Government may pursue.”<sup>75</sup> Of course, no fair reading of the Virginia Resolutions, or for that matter, Jefferson’s or Breckinridge’s Kentucky Resolutions, supported constitutional resistance in the form of secession or nullification to a *policy* of the federal government. Only a violation

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<sup>74</sup>*Columbian Centinel*, November 28, 1814.

<sup>75</sup>*Boston Daily Advertiser*, “To the President of the United States on the subject of the New England Convention,” No. II. “The Nature of Government,” November 15, 1814, No. III. “The Meaning of the Federal Compact,” November 16, 1814, No. IV. “Mr. Madison’s Opinion on State Sovereignty.” November 17, 1814.

of the Constitution where the federal government exercised powers not granted by the compact, could justify such remedy.

The Republican newspapers of the period, as expected, adhered more closely to Madison's views. For "Epsilon" of the *Washington National Intelligencer*, the constitution was not "a grant from the *states*, as sovereignties, but a grant of power by the *people* of all of the states." The state and national governments both derived their authority "from the people."<sup>76</sup> An editorial in the *Richmond Enquirer* in November 1814 fully endorsed the Madison formula:

No man, no association of men, no State or set of States, *has a right* to withdraw itself from this Union, of its own accord. The same power which knit us together can unknit. The same formality which formed the links of the Union is necessary to dissolve it. The *majority of States* which formed the Union must consent to the withdrawal of *any one* branch of it. Until that consent has been obtained, any attempt to dissolve the *Union*, or obstruct the efficacy of the constitutional laws, is treason—treason to all intents and purposes.<sup>77</sup>

Unlike the controversy during the Nullification Crisis, Madison, as president, resisted involving himself in a public debate with those who presumed to interpret what he had written in response to the Alien and Sedition Acts. In private correspondence, Madison questioned their motives and their loyalty. In his letter to Wilson Cary Nicholas in November of 1814, he lamented the level of dissent emanating from the "Eastern States," which he blamed on their leaders' thirst for political power, and which he characterized as akin to a "delusion scarcely exceeded by that recorded in the period of witchcraft."<sup>78</sup>

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<sup>76</sup>*Washington National Intelligencer*, December 7, 1814.

<sup>77</sup>*Richmond Enquirer*, November 1, 1814.

<sup>78</sup>James Madison to Wilson Cary Nicholas, November 25, 1814, quoted in Benjamin Wittes and Ritika Singh, "James Madison, Presidential Power, and Civil Liberties in the War of 1812," in *What So Proudly We Hailed: Essays on the Contemporary Meaning of the War of*

Jefferson, now retired to Monticello, shared his thoughts in letters to various friends. In a letter to Lafayette, Jefferson ridiculed the participants in the Hartford Convention as a compilation of “Outs” who wished to be “Inns,” “dupes” and “agitators.” In a March 1815 letter to Henry Dearborn, they were “venal traitors.”<sup>79</sup>

Federalists were under no illusion that the demands their commissioners would take to Washington, D. C. would sway the Republican-controlled Congress or the president but the process would keep those demanding more dramatic action towards secession or nullification (or a separate peace with Great Britain) at bay for the time being. If events in New England and throughout the nation deteriorated further, Congress’s expected rejection of all of the demands would provide a basis on which to take more dramatic action when the delegates planned to meet again in June.<sup>80</sup>

Ultimately, however, the fate of the *Report of Delegates*, and the reputations of the three commissioners who travelled to Washington to deliver it to Madison, were sealed by events outside of their control. As the commissioners arrived, including Otis, news of Andrew Jackson’s victory at the Battle of New Orleans reached Washington along with news that a treaty had been successfully negotiated at Ghent.<sup>81</sup> Republicans mocked the

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1812, Pietro S. Nivola and Peter J. Kastor, eds. (Washington, D.C., Brookings Institution Press, 2012), 97-121, 97.

<sup>79</sup>Thomas Jefferson to Lafayette, February 14, 1815, *Founders Online*, National Archives, <http://founders.archives.gov/documents/Jefferson/03-08-02-0210>; Thomas Jefferson to Henry Dearborn, March 17, 1815, *Founders Online*, National Archives, <http://founders.archives.gov/documents/Jefferson/03-08-02-0282>.

<sup>80</sup>Taylor, *The Civil War of 1812*, 416; Buel, *America on the Brink*, 226-29.

<sup>81</sup>While America appeared to be on the verge of splitting apart, serious negotiations in Ghent recommenced in October of 1814 after British commissioners in Ghent learned that peace negotiations to end the war in Europe had stalled in Vienna. Ironically, while many Americans feared that an end to the war with Napoleon might lead to an escalation of British army and navy forces in North America, the temporary breakdown in the Vienna negotiations reinforced the belief by British leaders that the current war with the United

commissioners as fools and traitors, and bestowed the derisive moniker, the “Wise Men of the East.” The commissioners, unable to gain an audience with Madison or the Congress, returned home in disgrace.<sup>82</sup>

The humiliation suffered by the Federalists carried over into state and national politics in the upcoming elections, even in New England. James Monroe easily won the presidency in 1816, while the Federalists lost a third of their seats in Congress. They would lose half of the little seats they had left in the mid-term elections two years later. “Never was there a more glorious opportunity,” Joseph Story boasted, “for the Republican party to place themselves permanently in power.”<sup>83</sup>

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States was an unnecessary and ill-advised distraction. The Duke of Wellington, after concluding that British forces could not win a decisive victory during the upcoming 1815 military campaign, advised that Britain should seek an immediate peace treaty with the Americans. Not surprising, the British dropped their demand for a buffer zone that had been promised to their Indian allies and settled for a watered-down provision that simply restored to the Indians “all the rights, privileges, and territories which they enjoyed in the year 1811.” Then in late November, British negotiators agreed to restore the prewar boundary between the United States and Canada and permit the United States to have forts and warships on the Great Lakes. Unbeknownst to the Federalists meeting in Hartford, as well as to the President Madison and the Congress, representatives of the United States and Great Britain signed the treaty on December 24, 1814, despite no resolution on the impressment and other maritime issues that had supposedly precipitated the conflict. Actual peace between the U.S. and Britain, however, would not cease until both governments had formally ratified the treaty. Parliament swiftly ratified the treaty but news of British ratification took six weeks to travel from London to America, when on February 11, an official copy of the treaty arrived in New York City. The treaty reached Washington, D.C. two days later, where Madison submitted the treaty to the Senate, which approved it on February 16. The next day, the war formally ended when Monroe exchanged ratified copies of the treaty with a newly arrived British diplomat. Taylor, *The Civil War of 1812*, 417-19; Hickey, *War of 1812*, 294-98.

<sup>82</sup>Fritz, *American Sovereigns*, 216; Taylor, *The Civil War of 1812*, 421; Buel, *America on the Brink*, 229-34; Hickey, *War of 1812*, 279-80 and 308-09.

<sup>83</sup>Taylor, *The Civil War of 1812*, 421; Fritz, *American Sovereigns*, 217.

Historian James M. Banner aptly summarized the Federalist philosophy during the first two decades of the nineteenth century, and their relation to a perpetual union, in language that was and would remain familiar to Republicans:

For the great majority of Massachusetts Federalists, theirs was a conditional unionism, avowed in prosperity, questioned in adversity, and always at odds with an abiding affection for the state. In any conflict between the two loyalties, wrote John Lowell, Jr., "it is our duty, our most solemn duty, to vindicate the rights, and support the interests of the state we represent."<sup>84</sup>

... While frowning upon the extreme of secession, however, the majority of Massachusetts Federalists did not give up the search for a defense of their minority interests. This they found in the more moderate course of state interposition. The Federalist theory of interposition, so widely held after 1808, was rooted in the premise that the nation was a collection of "several independent confederated republics," a "league" of equal and sovereign states which had surrendered only a portion of their authority to the central government under the Constitution. In constitutional arguments sharply reminiscent of the Virginia and Kentucky Resolutions which they had only a few years earlier rejected, Federalists declared that the Constitution was variously a "treaty," "contract," or "association." Each state was a free republic "united by a solemn compact under a federal government of limited powers." These sovereign republics, and not the people, had been represented at Philadelphia, and the nation's sovereignty derived directly from the sovereignty of the states.<sup>85</sup>

Regardless, delegates to the Hartford Convention and the Federalist Party of New England would forever be branded as disloyal to the Union and advocates of disunion. Years later, Otis's defense of actions of the delegates as a "constitutional & peaceable" assembly of citizens who questioned the respective powers of the state and federal governments evoked Jefferson's *Fair Copy*:

It was one of many questions which naturally arise in all confederated governments—A "*casus foederis*"—Of the same description with questions that were frequent before the Amphyctionic Councils in ancient times, and the Aulic Councils in modern times—analogous to controversies which have

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<sup>84</sup>Banner, *To the Hartford Convention*, 117.

<sup>85</sup>*Ibid*, 117-18.

arisen in Germany, Holland and Switzerland—And not different in reality from the dispute over the Missouri question.<sup>86</sup>

Otis seemed oblivious that his actions, and those of his Federalist colleagues, could have so easily employed used by later South Carolina nullifiers when their disdain for commercial and trade policies of the federal government generated their consideration of nullification and secession. But the nullifiers of the Palmetto State did not tether their theory of state nullification on disgraced and disloyal Federalists of New England. Instead, they continued the pattern evident throughout the early republic: when challenging the actions of federal government, the states and the *people* must invoke the names of Madison and Jefferson and the Virginia and Kentucky Resolutions.

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<sup>86</sup>*Otis's Letter in Defence of the Hartford Convention, And the People of Massachusetts* (Boston: Simon Gardner, 1824), 66, <https://ia800302.us.archive.org/26/items/otislettersindef1824otis/otislettersindef1824otis.pdf>.

In the late months of 1799, as the Virginia House of Delegates debated and finalized the *Report of 1800*, John Marshall, the “passionate moderate,” who in two short years would become Chief Justice of the United States, put the finishing touches on a report that represented the views of the Federalist minority in the Virginia legislature.<sup>1</sup> Marshall had been a member of the Virginia House for less than a year, but was well aware of the events that led to the passage of the Alien and Sedition Acts as a representative representing the United States in negotiations to end the Quasi-War with France. Now, Marshall confronted Madison’s compact theory of the Constitution on behalf of Federalists in Virginia.

Rather than put forth the politically unpopular position in Virginia that Congress was “wise” to enact the Alien and Sedition Acts, Marshall calmly posited the reasons *why*

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<sup>1</sup>*The address of the minority in the Virginia legislature to the people of that state; containing a vindication of the Constitutionality of the Alien and Sedition Acts* (Augustine Davis ed., 1799), *Eighteenth Century Collections Online*. Gale. Georgia State University, <https://find.galegroup.com.eproxy.gsu.edu/ecco/infomark.do?&source=gale&prodId=ECCO&userGroupName=atla29738&tabID=T001&docId=CW107956134&type=multipage&contentSet=ECCOArticles&version=1.0&docLevel=FASCIMILE> (hereinafter referred to as the “*Minority Report*”). The “passionate moderate” moniker was given by R. Kent Newmyer, in his *John Marshall and the Heroic Age of the Supreme Court*.

Controversy surrounds the authorship of the *Minority Report*. Originally attributed to Marshall by his biographer Albert Beveridge, more recent biographies ignored the issue or ascribed authorship to others, most prominently Harry Lee. Kurt T. Lash and Alicia Harrison challenged the decision to remove Marshall’s name from the *Minority Report* in their article, “*Minority Report: John Marshall and the Defense of the Alien and Sedition Acts*.” Marshall was the only person named at the time as the probable author, and Marshall had both reason and opportunity to draft the Address. The arguments contained in the *Minority Report*, concluded Lash and Harrison, “not only track Marshall’s views on the Constitution, they utilize constitutional arguments that were wholly unique at the time and would appear again, almost verbatim, in the future Chief Justice’s constitutional opinions.” The *Minority Report* contains three sections, two of which, according to Lash and Harrison, clearly appear to be the work of Marshall. I am persuaded by their analysis. Kurt T. Lash and Alicia Harrison, “*Minority Report: John Marshall and the Defense of the Alien and Sedition Acts*,” 68 *Ohio State Law Journal* No. 2 (2007): 435-516.

the citizens of any nation would desire that their government possess the powers conferred by the Acts. With respect to the Alien Act, Marshall asked, must not the federal government have the power to ferret out “the intrigues and conspiracies of dangerous aliens” threatening the national security of the country? “Does it argue love of country,” Marshall asked, “to paralyze means adopted for its defense?” Likewise, with respect to the Sedition Act, Marshall rhetorically asked whether the federal government *should* have the power to sanction “seditious libel” in the same manner afforded to state governments. “To contend,” Marshall lectured, “that there does not exist a power to punish writings coming within the description of the law, would be to assert the inability of our nation to preserve its own peace, and to protect themselves from the attempts of wicked citizens.” Marshall then parlayed this commonsensical inquiry into a simple explanation of how the *people* did just that when ratifying the Constitution. His only reference to the *Virginia Resolutions of 1798* was in asking whether Congress’ action had been so unreasonable so as to justify “proceedings which may sap the foundation of our union.” “Alike erroneous, and alike destructive of the common weal,” Marshall continued, “is the distorted construction of the Alien and Sedition Laws.”<sup>2</sup>

As Kurt Lash and Alicia Harrison concluded in their detailed analysis of the *Minority Report*, Marshall employed many of the trademark phrases and analysis that would define his long and influential tenure on the Supreme Court. Prior to laying out his arguments in any detail, he first counseled the reader as to the appropriate manner in which to analyze the Constitution:

It is necessary, in pursuing this inquiry, to bear in mind that we are investigating a constitution which must unavoidably be restricted in various

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<sup>2</sup>*Minority Report*, 5-6 and 11.

points to general expressions, making the great outlines of a subject, and not a law which is capable of descending to every minute detail.<sup>3</sup>

Thus, while conceding the Constitution delegated certain power and authorities to the federal government, and reserved the remainder to the states and to the *people*, reading the Constitution as one would read a statute would support the contention that the nation could not fortify its ports and harbors under the guise of providing for the common defense since no specific mention of fortifying ports and harbors was set forth in the Constitution. Such a strict interpretation, Marshall argued, necessarily ignored the necessary and proper clause of the Constitution as well as the Tenth Amendment.<sup>4</sup>

This may be the first instance where Marshall turned the generally accepted meaning of the Tenth Amendment on its head. For Anti-Federalists, and even many supporters of the Constitution, who feared a consolidation of governmental powers in the federal government through a broad and expansive reading of the delegated powers of the Constitution, the Tenth Amendment was to provide an extra layer of defense against such encroachment. The Tenth Amendment provides that the “powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” The amendment’s language was very similar to Article II of the Articles of Confederation, which provided, “[e]ach state retains its

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<sup>3</sup>*Minority Report*, 7. Marshall would make the same point in *McCulloch v. Maryland*, when he stated, “[W]e must never forget, that it is a *Constitution* we are expounding.” *McCulloch v. Maryland*, 17 U.S. 316 (1819), 407.

<sup>4</sup>*Ibid.* The “necessary and proper clause” of the Constitution is set forth in Article I, section 8, clause 18 of the Constitution, and provides: “The Congress shall have Power ... To make all Laws which shall be *necessary and proper* for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof. (Italics added). The Tenth Amendment provides: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”

sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled.”<sup>5</sup> The traditional interpretation of the Tenth Amendment was that the amendment reiterated the principle that Congress, for example, could only exercise those powers specifically delegated to it under Article I of the Constitution and that all other powers were retained by the state governments and the *people*. Marshall, in his comparison to the Articles of Confederation, highlighted the Tenth Amendment’s omission of the word “expressly.” Because, Marshall argued, the framers of the Constitution “wisely omitted” the word “expressly,” the powers of the federal government should be construed “fairly, but liberally.”<sup>6</sup> Thus, Marshall transformed a constitutional provision purporting to restrict the powers of the federal government into a provision that countenanced a broad interpretation of those powers.

When specifically addressing the Sedition Act and the meaning of the First Amendment, Marshall engaged in similar slights-of-hand. After extolling the virtues, if not the absolute necessity, of arming the federal government with the necessary powers to sanction “falsehood and malicious slander” as well as “some corrective” on licentious press, Marshall cited the necessary and proper clause of the Constitution and argued that given its explicit grant of power to the federal government to punish treason against the United States under Article III, it would be a “strange” and “unreasonable and improvident construction” of the Constitution for the government not to have the power to punish

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<sup>5</sup>“Articles of Confederation,” *Project: Documents in Law, History and Diplomacy*, Yale Law School, [http://avalon.law.yale.edu/18th\\_century/artconf.asp](http://avalon.law.yale.edu/18th_century/artconf.asp).

<sup>6</sup>*Minority Report*, 7.

expression that might lead to such treasonous conduct.<sup>7</sup> As for the First Amendment, rather than prohibiting Congress from regulating speech or the press, the amendment actually confirmed Congress' pre-existing right to regulate seditious speech and a licentious press so long as such regulation did not constitute an "abridgement" or an "infringement" on freedom of expression. The Sedition Act, Marshall continued, could not be considered an "abridgement" or "infringement" because Congress's regulation of seditious expression was more liberal than the common law of sedition currently existing in the several states. "The only question," he asked, was "whether the doctrines of the common law are applicable to libels against the government of the United States, as well as to libels against the government of the particular states. For such a distinction there seems to be no sufficient reasons."<sup>8</sup>

Marshall acknowledged the Constitution protected differences of opinion, but such differences of opinion must be maintained "with moderation and with decency." While minority opinion had value, "the will of the majority must prevail, or the republican principle is abandoned, and the nation is destroyed." Unlike Madison, who argued in his *Report of 1800* that an open and free debate on the conduct of the government and its elected representatives was fundamental to the establishment and sustainability of a representative republic, Marshall warned that unfettered criticism of the government and its leaders could be fatal to the nation:

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<sup>7</sup>Ibid, 11.

<sup>8</sup>Ibid, 11-14. In response for demands by some states for a federal Bill of Rights, including explicit protections for freedom of expression, Madison and James Wilson warned that others might use such amendments as evidence of a federal power to regulate in those areas in exactly the manner Marshall now used it. Advocates for a Bill of Rights, who interpreted such warnings as reflecting Madison and Wilson's relative disinterestedness on such matters, generally the warnings.

If upon every constitutional question which presents itself, or on every question we choose to term constitutional, the constructions of the majority shall be forcibly opposed, and hostility to the government excited throughout the nation, there is an end of our domestic peace, and we may for ever bid adieu to our representative government.<sup>9</sup>

Marshall again cautioned against overzealous advocacy by opponents to Congress' action, noting that certain laws passed by the Virginia legislature were later held violative of the state constitution without such laws, in the interim, being deemed a threat to the survival of the commonwealth. Like Virginia, the United States was blessed with judges "as independent as the judges of the state of Virginia" with no "reason to believe them less wise and less virtuous." These federal judges, Marshall assured the Virginia House, would, if required, perform their duty to construe the Constitution and the laws of the nation "faithfully and truly," "unwarped by political debate" and "uninfluenced by party zeal." Opponents of the legislation, he duly noted, also had recourse to the ordinary political remedies provided under the Constitution, such as elections or seeking yet another amendment to the Constitution.<sup>10</sup>

The *Minority Report* largely refrained from discussing Madison's contention that the Constitution was a compact between the *people* of the several states, which law professor Kurt Lash and fellow-author Alicia Harrison characterized as the "first great debate over constitutional interpretation." This distinction was "crucial," Lash and Harrison argued, because of its potential impact on "the ground rules of interpretation" of the Constitution going forward:

If the Constitution was adopted as a kind of compact between the several peoples of the states, then it must be interpreted in a manner preserving the independent sovereignty of those people, for they could not be presumed to

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<sup>9</sup>Ibid, 14.

<sup>10</sup>Ibid.

have bargained away their own existence. On the other hand, if the Constitution was created by a single national people who just happened to live in several states, then the document must be interpreted in a manner best serving the needs of that national people, regardless of the impact on the states.<sup>11</sup>

Law professor Martin Flaherty expressed similar sentiments after a review of Marshall's legal opinions and other writings, when he concluded, "[c]ommon sense and intuition indicate that although a sovereign may not be compelled to create a regime in its own image, chances are it will. . . . The popular sovereignty question can never replace further analysis of a particular issue, yet it remains a vital foundational inquiry nonetheless."<sup>12</sup>

In the opening paragraphs of the *Minority Report*, Marshall referred to the Constitution as "our federal pact," and shortly thereafter referred to three foundational principles that buttressed the Constitution, the second of which was that "the *compact* [was] amendable" by the *people*. Later, he referred to the Constitution as "the sacred

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<sup>11</sup>Lash and Harrison, "Minority Report," 496-97.

<sup>12</sup>Flaherty, "John Marshall, *McCulloch v. Maryland* and 'We the People,'" 1354. In conversations with Flaherty, legal scholar Larry Kramer cautioned that, in Flaherty's words, the "determining the nature of the popular sovereign that created this new constitutional order is not the same thing as determining the nature of the order itself." For example, a theory of the Constitution that concluded that the parties were the states or the *people* of the several states could conclude that such parties "ordained a consolidated national government" with broad implied powers as Chief Justice Marshall would identify over the next three decades. Likewise, the American people, acting *en masse*, could have created the federal Constitution and decided that the power of this newly reformed national government should be very limited to those powers specifically set forth in the Constitution. Flaherty, "John Marshall, *McCulloch v. Maryland* and 'We the People,'" 1353-54. For recent monographs exploring the role of the *people* as ultimate sovereigns under the Constitution, see, for example, Fritz, *American Sovereigns*; Kramer, *The People Themselves*; Bruce Ackerman, *We the People: Volume 1, Foundations*. (Cambridge: Belknap Press of Harvard University Press, 2005); and Akhil Reed Amar, *America's Constitution: A Biography* (New York: Random House, 2005).

charter” and twice referred to it as an “instrument.”<sup>13</sup> As for whether the Constitution was the creation of a single *people* or the *people* of the several states, the *Minority Report* was ambiguous. Marshall referred to the ratification process only in grand, general terms. Thus, the Constitution was the result of “the people of the united America” exchanging “their first political association for that now existing” and “the will of the majority produced, ratified, and conducts it.” Marshall refers to the “people of the United States” numerous times but only in the context of expressing their collective desires for effective government and for remedies in the face of disloyal aliens and licentious speech. In his single statement regarding the origin of the Union, Marshall did implicitly reject the notion that the Constitution was a compact between the state governments or was created by a compact between the state governments and the federal government. Marshall was clear that the “origin” of the Constitution was the *people*, but in terms that did not reject the notion that it was the *people* of the several states:

Since the general and state governments equally represent the people, and are alike dependent on them for their origin and their continuance, and are alike accountable to them for their misconduct, those powers which are essential to our happiness and protection, may, with equal safety, as to their abuse, be trusted to the one or to the other.<sup>14</sup>

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<sup>13</sup>*Minority Report*, 2. 5, 12 (Italics added.)

<sup>14</sup>*Minority Report*, 2 and 6. In another passage, during Marshall’s advocacy for a federal common law of sedition, he stated: “The government of the United States is for certain purposes as entirely the government of each state, chosen by the people thereof, and cloathed with their authority, as the government of each particular state is the government of every sub-division of that state . . .” *Minority Report*, 14. Both passages refer to the “people” in broad, generic terms. The quote contained herein could be interpreted as meaning that one mass of people chose “the government of the United States,” but that is clearly not the case. As anticipated, the dominant branch of the federal government during the early republic was clearly the legislative branch and the representatives in the House were chosen by discrete groups of people determined by districts within each state. As for senators, the people had no direct role in their election. Even the president and vice president, who are the only federal positions in any branch that are “chosen” by all of the

Regardless, the central issue of the founding of the Union simply was not critical to his defense of the Alien and Sedition Acts. While a member of the political minority within his own state, Federalists were enjoying their greatest legislative majorities in the national legislature. Marshall either calculated that a direct engagement with Madison's compact theory of the Constitution was uncalled for or, more simply, he agreed with Madison. Despite his initial hesitancy to squarely engage Madison in the great debate of Constitutional interpretation as a member of the Virginia legislature, John Marshall's almost thirty-five year struggle with the meaning and understanding of the Principles of '98 had begun. As Chief Justice of the United States, he proceeded more boldly, and directly challenged Jefferson's compact theory of the Constitution, almost a full decade before the South Carolina nullifiers invoked the Principles of '98 in support of state nullification and secession.

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When Marshall ascended to the position of Chief Justice of the United States in 1810, the judiciary was the weakest of the three federal branches. The rendering of important decisions, which are almost daily occurrences during the end of the current Court's term, averaged less than two a year. A number of those important decisions involved state resistance to Court decisions that favored federal law over state law, beginning from the inception of the Court with the case of *Chisholm v. Georgia*.<sup>15</sup> In 1793, the Court ruled in favor of Robert Farquar, a citizen of South Carolina, who was sued the state of Georgia for

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American people, were done so only indirectly, through the Electoral College, with electors chosen by a process determined by the respective state legislatures.

<sup>15</sup>*Chisholm v. Georgia*, 2 U.S. 419 (1793).

payments owed him for goods that Farquhar had provided Georgia during the evolutionary War. Georgia refused to appear before the Court, arguing that as a sovereign state, it could not be sued in federal court by a citizen of another state without its consent. Georgia threatened to use force to prevent the enforcement of the decision when it passed a bill providing that those attempting to enforce the Court's decision would "suffer death, without benefit of clergy, by being hanged." Serendipitously, the Eleventh Amendment was ratified in 1795, providing states with protection from such lawsuits, which rendered Court's decision moot.<sup>16</sup>

The Supreme Court dramatically butted heads with a state again in 1809 in *U.S. v. Peters*,<sup>17</sup> the first Supreme Court decision to strike down a state law. The byzantine set of facts in *Peters* compelled law professor Gary D. Rowe to begin his law review article on the case with the observation: "The strangeness of the past is easy to underestimate."<sup>18</sup> The facts in *Peters* not only reflected a complicated legal case that took over thirty years to resolve but also illustrated myriad interpretations of the Constitution over the power of the federal government, the proper role of the Supreme Court, the power retained by the state governments, and the role of the *people* in constitutional interpretation. In many respects, the facts in *Peters* epitomized Madison's theory of state interposition in action.

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<sup>16</sup>Newmyer, *John Marshall and the Heroic Age of the Supreme Court*, 151; James H. Read and Neal Allen, "Living, Dead, and Undead: Nullification Past and Present," *American Political Thought*, Vol. 1, No. 2 (Fall 2012): 263-297, 278-79; see also Randy E. Barnett, "The People of the State?: Chisholm v. Georgia and Popular Sovereignty," Inaugural Address as Carmack Waterhouse Professor of Legal Theory, Georgetown University Law Center, Washington, D.C., 93 *Virginia Law Review* (2007): 1729-1758.

<sup>17</sup>*U.S. v. Peters*, 9 U.S. 115 (1809).

<sup>18</sup>Gary D. Rowe, "Constitutionalism in the Streets," 78 *University of Southern California Law Review*, Issue 2 (2005): 401-454. The description the facts of the case and the analysis of the decision herein are based on Rowe's article and the opinion of the Supreme Court.

The origins of the case occurred in 1779, when Gideon Olmsted, a privateer during the Revolutionary War, was captured by the British, put on a sloop and then used by the British Navy to assist it in navigating the sloop to New York City, which was then under British control. During the voyage, Olmsted and his fellow captives gained control of the sloop and headed for New Jersey until they were captured again, this time by a naval vessel under the command of Captain John Underwood, and which belonged to the state of Pennsylvania. Both Olmsted and Underwood claimed the British sloop and its cargo as a “prize,” entitling them to the value of the claimed goods. The Pennsylvania state admiralty court awarded Olmsted and his shipmates only a one-quarter share of the proceeds from the sale of the boat and cargo due to Olmsted being a privateer, clearly ignoring the resolutions of the Continental Congress that encouraged privateers to seize British ships in exchange for prizes. Olmsted petitioned Congress and then appealed the state court decision to the federal court of commissioners of appeal in prize cases. The federal court of commissioners reversed the decision of the Pennsylvania admiralty court and awarded the entire proceeds to Olmsted and his comrades.

Unfortunately for Olmsted, the admiralty judge refused to comply with the order and placed the remaining proceeds of the sale with David Rittenhouse, the Pennsylvania state treasurer. Rittenhouse retained the proceeds until his death in 1796, at which time Rittenhouse’s estate took possession and control of the funds. After years of legal wrangling, in 1803, U.S. District Court Judge Richard Peters ruled that the Rittenhouse estate should pay over the proceeds to Olmsted. Before any transfer could be made, however, the Pennsylvania legislature passed a special bill claiming the money for the state of

Pennsylvania and authorized the governor to resist, including the use of force, any attempt by the federal district court to take possession of the funds.

In 1808, Olmsted obtained a court order from the U.S. Supreme Court ordering Judge Peters to order the Rittenhouse estate to transfer the funds to Olmstead. Fearing a confrontation between with the state militia—the governor was ready to call out 1,400 men—and the federal government—federal marshals were arming a posse of approximately 2,000 men—, Peters hesitated to issue the order without a further order from the Supreme Court. The Supreme Court issued its opinion on February 20, 1809, upholding the ruling of the federal district court. Undeterred, when the local federal marshal attempted to serve Rittenhouse’s two living daughters, the governor called out the militia, who confronted the marshal and his two deputies with rifles armed with fixed bayonets. The marshal bravely stood his ground and commanded the soldiers to lay down their arms. The commander of the state militia, General Michael Bright, refused to back down. The standoff persisted into April, but gradually, the members of the local population and the militia increasingly refused to support the governor and the commander’s continued desire to defy the federal government. President Madison ordered the preparation of federal indictments against Bright and certain officers for treason, which were subsequently issued and acted upon on April 7 with the arrest of Bright and six of his men. The standoff eventually fizzled out on April 15, when the federal marshal, disguised with a new set of clothes and hat snuck into the Rittenhouse residence from a back entrance and arrested the Rittenhouse daughters. Fortunately for all, the Pennsylvania attorney general persuaded the governor to back down and the militia was withdrawn.

While not as exciting as the events surrounding the battle of “Fort Rittenhouse,” Marshall’s opinion was his first confrontation with the Principles of ‘98 since he authored the *Minority Report* ten years previous. Subsequent opinions by Marshall would elucidate his theory on the nature of the Constitution, the retained power and authority of the state legislatures and other branches of state governments, but for now, Marshall was content with devoting only three paragraphs to the federalist aspects of the case, striking down the Pennsylvania law that defied Judge Peters’s initial ruling and almost ended in bloodshed. The Chief Justice got quickly to the point:

If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery; and the nation is deprived of the means of enforcing its laws by the instrumentality of its own tribunals. So fatal a result must be deprecated by all; and the people of Pennsylvania, not less than the citizens of every other state, must feel a deep interest in resisting principles so destructive of the union, and in averting consequences so fatal to themselves.<sup>19</sup>

Marshall acknowledged that Pennsylvania did not claim the “universal right of the state to interpose in every case whatever,” but only the right to interpose in case where it deemed the federal courts as having no jurisdiction. Marshall concluded, however, that the Constitution did not grant the states the “ultimate right to determine the jurisdiction of the courts of the union” and ruled that the state of Pennsylvania possessed no constitutional right to resist Judge Peters’s order.<sup>20</sup>

Gary Rowe’s analysis of the rationale behind Pennsylvania’s actions, and of Marshall’s opinion, far exceeded the length of the opinion. For Rowe, Pennsylvania’s governor and the majority in the legislature believed that the “Principles of ‘98” “justified

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<sup>19</sup>*U.S. v. Peters*, 9 U.S. 115, 136.

<sup>20</sup>*Peters*, 141.

resistance to a judiciary that claimed the sole authority to interpret the Constitution,” and having interposed, “they expected their fellow Jeffersonians,” including President Madison, “to rally to their cause.” In fact, the governor, Rowe noted, had been so confident the *Resolves* had been vindicated by Jefferson’s election in 1800, that he did not hesitate to write Madison directly, and praised the president for being “so intimately acquainted with the principles of the Federal constitution” and solicited his support in the crisis. The governor must have been crestfallen when Madison’s reply meekly informed him that the president was not only unauthorized to interfere with an order of the Court but also “enjoined by Statute, to carry into effect any such decree, where opposition may be made to it.” Critical to Madison’s unqualified support for federal supremacy might have been the growing unrest in New England over the embargo and enforcement acts. Madison had to fear “that the Republic as they understood it was in danger of coming apart.” From Marshall’s perspective, Rowe interpreted his opinion as “self-consciously aimed as much at the Virginia and Kentucky vision of constitutionalism as at Pennsylvania’s particular resistance to the district court’s order.” Rowe was particularly struck by Marshall’s direct appeal to the people to resist “principles so destructive of the union.”<sup>21</sup>

In the *Peters* case, Madison, the grandmaster of interposition, sided with his Chief Justice. Nonetheless, as Rowe concluded, “in cases involving federalism, Chief Justice Marshall’s claim to authority *was* questioned, continually, and was deeply contingent on his ability to persuade and generate the support both of the executive and of the broader populace.” *Peters* also highlighted what Rowe characterized as the “urgent foundational question” of the early nineteenth century: “how radical and capacious an understanding of

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<sup>21</sup>Rowe, “Constitutionalism in the Streets,” 438-40, 437.

the Virginia and Kentucky Resolutions, with their reliance on state legislatures to debate constitutional questions, would govern once the Jeffersonian Republicans had become firmly entrenched in power.”<sup>22</sup>

Marshall’s next major confrontation with the Principles of ‘98 came not in his role as chief justice but as an interested party in the case of *Martin v. Hunter’s Lessee* (1816). The origins of the case were as complicated and as controversial as in *Peters*, and like *Peters*, could be traced back to the American Revolution. In summary, *Martin* involved a dispute over the legal ownership of five million acres of land in the state of Virginia that had originally been owned by Lord Thomas Fairfax, a British subject, who died in 1781. Fairfax bequeathed the property to his nephew Denny Martin, also a British subject, but before Martin could take possession, the state of Virginia enacted legislation during the Revolutionary War that gave the state the authority to confiscate lands of British subjects and loyalists.<sup>23</sup>

In 1786, Virginia began selling the undeveloped portions of the land despite Martin’s claims to continued ownership based on the 1783 peace treaty between the United States and Great Britain, which prohibited the confiscation of lands that had been held by loyalists during the war. Virginia, in turn, questioned the legitimacy of the treaty in light of British noncompliance with other material provisions of the treaty, one of which was the requirement to compensate slave owners for slaves taken by the British during the conflict. The case became further complicated when some of the land fell into the hands of

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<sup>22</sup>Ibid, 455.

<sup>23</sup>The facts related to *Martin’s v. Hunter’s Lessee* are drawn from the Supreme Court’s opinion and from Richard E. Ellis, *Aggressive Nationalism: McCulloch v. Maryland the Foundation of Federal Authority in the Young Republic* (New York: Oxford University Press, 2007), Kindle location 313-320.

land speculator, David Hunter, who then rented certain parcels to various tenants. Martin challenged Hunter's rightful ownership and, a state district court found in Martin's favor. Hunter appealed the decision to the Virginia Court of Appeals, but before the appeals court issued its decision, Martin sold 160,000 acres to group of speculators that included none other than John Marshall and his brother James. The Court of Appeals, Virginia's highest court, reversed the lower court's decision and ruled in favor of Hunter. Martin and the speculators appealed to the U.S. Supreme Court, which reversed the Court of Appeals decision and remanded the case back to Virginia to enter a judgment for Martin. The Virginia Court of Appeals balked at enforcing the decision of the Supreme Court, based on the assertion that the U.S. Supreme Court did not have the requisite authority to overrule a decision of Virginia's highest court. Before the tug of war between the Supreme Court and the Virginia Court of Appeals was resolved, the parties to the case reached a settlement in 1796 and the matter appeared to be closed.

Despite the settlement, the case was revised fifteen years later in 1809 when the Virginia Court of Appeals inexplicably issued a ruling overruling the lower court decision, formally and effectively ignoring the earlier order of the Supreme Court.<sup>24</sup> The Supreme Court issued its second ruling on the case in 1813, in an opinion written by Justice Joseph

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<sup>24</sup>The exact reasons for the revival of the *Martin* case are unknown. Richard Ellis speculated that Spender Roane, a former Anti-Federalist, who was then a judge on the Court of Appeals, revived the case based on the desire to "see the fundamental constitutional and other legal issues raised by the case resolved in Virginia's favor." Ellis, *Aggressive Nationalism*, Kindle location 332-34. Considering the settlement, Roane had to anticipate that Martin and the speculators would, once again, appeal to the Supreme Court. On why Roane believed the Supreme Court might be more sympathetic this time, Ellis did not guess. Since Marshall was now chief justice, and still had a personal interest in the case, maybe Roane thought Marshall's likely recusal might tip the balance in Virginia's favor. Considering the Supreme Court's subsequent rulings on the case, Roane clearly guessed wrong. Marshall and Roane would butt heads for years to come on the meaning of the Constitution.

Story.<sup>25</sup> Although not specifically addressed in Story's opinion, other than in passing, at issue in the case was the constitutionality of the controversial Section 25 of the Judiciary Act of 1789, which granted the Supreme Court the authority to review state court decisions involving an interpretation of the Constitution, federal law or treaties. Combined with Supremacy Clause of the Constitution, Section 25 effectively gave the Supreme Court the authority to strike down decisions rendered by the highest courts of the states. Story's opinion, joined by all members of the Court but one, held that the case was properly before the Court under Section 25, and that the peace treaty between the United States and Great Britain superseded the Virginia law that had permitted confiscation of the property.

Roane and the Virginia Court of Appeals refused to yield. Following the end of the War of 1812, the Virginia Court of Appeals issued its unanimous decision in *Hunter v. Martin, Devises of Fairfax*,<sup>26</sup> striking down Section 25 of the Judiciary Act as unconstitutional because it unduly "interconnected" the federal government with the state governments. If Martin and the group of speculators wanted the protection of the federal courts, the opinion contended, they should have filed the initial lawsuit in federal, and not state, court. Once the case entered the state judicial system, the Court of Appeals concluded, the state courts, carrying out their own oath and obligation to uphold the Constitution, had the power to rule on the constitutionality of a federal law, and Congress' grant of jurisdiction to the Supreme Court to review the decision under Section 25 was improper and, therefore, unconstitutional.<sup>27</sup>

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<sup>25</sup>*Fairfax Devisee v. Hunter's Lessee*, 11 U.S. 603 (1813).

<sup>26</sup>*Hunter v. Martin, Devisee of Fairfax*, 4 Munford (Va.) 1 (1814).

<sup>27</sup>*Ibid.*

Equally stubborn, the Supreme Court's issued its response a year later in *Martin v. Hunter's Lessee*. The Court's opinion was drafted by Justice Joseph Story. Once again Marshall recused himself from the case, however, Story later confirmed that the chief justice had "concurred in every word of it."<sup>28</sup> In his decision, Story strenuously defended the constitutionality of Section 25 of the judiciary Act of 1789 and the right of the U.S. Supreme Court to review the final judgments of state courts that impacted on the powers of the federal government. In opposition to a state compact theory of the Constitution, Story argued that the Constitution was created not by the states but by the *people*, the ultimate source of political and constitutional authority. He cited the Supremacy Clause and argued that "the Constitution has presumed . . . that State attachments, State prejudices, State jealousies and State interests, might sometimes obstruct, or control . . . the regular administration of justice." Since state prejudices had undermined the central government under the Articles of Confederation, state courts could not be allowed to be the final interpreters of the Constitution, for different judgments could be given in different states, and "these jarring and discordant judgments" would inevitably undermine the federal government and the Union. Uniformity, Story believed, was absolutely essential for the future well-being of the nation, and this could only be assured through federal judicial review of state actions.<sup>29</sup>

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<sup>28</sup>Joseph Story to George Ticknor, January 22, 1831, William W. Story, ed., *Life and Letters of Joseph Story, Associate Justice of the Supreme Court of the United States, and Dane Professor of Law at Harvard University*, Volume II (Boston: Charles C. Little and James Brown, 1851), 49, <https://archive.org/details/lifeandlettersj07storgoog>. Story was writing Ticknor in the context of the latest efforts in Congress to repeal Section 25 of the Judiciary Act, which had remained the target of states' rights advocates. Later, Calhoun's *South Carolina Exposition* targeted Section 25 as one of the major threats to state sovereignty. See Chapter 8.

<sup>29</sup>*Martin v. Hunter's Lessee*, 14 U.S., 304, 347-48.

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Marshall's confrontation with the various interpretations of the Principles of '98 reached its apex with the case of *McCulloch v. Maryland* in 1819, a year Kent Newmyer characterized as "the high point . . . of Marshall's career as chief justice." Best known for the constitutional principle that the federal government possessed a host of *implied powers* in addition to those specifically enumerated in the Constitution, *McCulloch* also contained, up to that time, Marshall's fullest explication on the nature of the Union and the creation of the Constitution. *McCulloch* involved Congress' power to establish a national bank, and the right of the states to tax branches of the national bank operating within its borders. The creation of the First National Bank of the United States was one of the great controversies in the 1790s and was a major contributor to the creation of what would become the Republican and Federalist parties. Hostility to the First National Bank of the United States was best illustrated by Thomas Jefferson's reaction to the proposed plan to open a branch in the state of Virginia in 1792, a prospect even Alexander Hamilton, the First Bank's chief advocate, opposed due to his fear that establishing branches in the state would generate open hostility from local banking interests. Such was Jefferson's disdain for a national bank, that his comments, in a letter to James Madison, bordered on hysterical:

For any person to recognize a foreign legislature in a case belonging to the state itself, is an act of *treason* against the state, and whosoever shall do any act under colour of the authority of a foreign legislature whether by signing notes, issuing or passing them, acting as a director, cashier or in any other office relating to it shall be adjudged guilty of high treason & suffer death accordingly, by the judgment of the state courts. This is the only opposition worthy of our state, and the only kind which can be effectual.<sup>30</sup>

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<sup>30</sup>Newmyer, *John Marshall and the Heroic Age of the Supreme Court*, 291; Mark R. Killenbeck, *M'Culloch v. Maryland: Securing a Nation* (Lawrence: University of Kansas Press, 2006), 32; Thomas Jefferson to James Madison, October 1, 1792, *Founders Online*, National Archives, <http://founders.archives.gov/documents/Jefferson/01-24-02-0392>.

In an ironic twist, eighteen years after Jefferson's outburst, James Madison, as president of the United States, favored the renewal of the charter for the First Bank. Although adamantly opposed to the establishment of the national bank during the 1790s, Madison's secretary of the treasury, Albert Gallatin, persuaded the president that a national bank was a necessary for the nation's financial health. Madison's support for the renewal of the First Bank's original charter generated a slew of protests from opponents of the bank. Typical were the comments of "From Tammany," printed on April 18, 1810, in the Baltimore *Whig*, who chastised Madison for betraying his earlier position on the bank and for abandoning the principles set down in the *Report of 1800*:

JM "once thought and spoke differently." Time has not changed the validity of JM's earlier arguments on the bank question, and he is "committed in a thousand ways" on the subject; his speeches are "before the world" as his report in the Virginia legislature. Should the present bank bill pass Congress and JM give it his sanction, his "fame will be blasted forever." No excuses about the question being "settled" will conceal his inconsistency or save him from "eternal odium and reproach." His change of opinion, moreover, could not be attributed to ignorance but only to "corruption's soul-dejecting arts."<sup>31</sup>

Congressional efforts to renew the charter failed, and the First National Bank closed its doors in 1811. Chastened by the experience of conducting the War of 1812 without a national bank, and the need to create a uniform national currency, in April of 1816, Congress passed, and Madison signed into law a bill creating the Second National Bank of the United States. Although constitutional strict constructionists such as John Taylor of Caroline remained vehement in their constitutional objection to a national bank, Madison

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Note Jefferson's reference to the Congress as a "foreign legislature" and his application of the concept of "treason" against a state when the Constitution clearly recognized treason only at the national level.

<sup>31</sup>To James Madison from "Tammany," April 18, 1810, *Founders Online*, National Archives, <http://founders.archives.gov/documents/Madison/03-02-02-0386>.

considered the constitutionality of the bank as settled precedent in light of the First Bank's original charter and Congress' acquiescence to its existence.<sup>32</sup> Unfortunately for supporters of the Second Bank, many states still viewed a national bank with great hostility and interpreted the existence of state branches as a violation of state sovereignty. Many states and local financial interests also feared that the Second Bank would unfairly compete with the plethora of state banks that had been established after the demise of the First Bank.<sup>33</sup>

*McCulloch* was decided in the aftermath of the War of 1812, amidst an era of significant social and economic change. Population growth and the rapid economic development, especially in the urban centers of the nation, characterized many communities east of the Mississippi River. Louisiana, Indiana, Mississippi, Illinois and Alabama entered the Union, with the admission of Missouri and Maine soon to come. With the anxiety created by this economic change, any popular support for the Second Bank crumbled by the summer of 1818 amidst accusations of mismanagement and corruption as the Panic of 1819 commenced. A growing number of states, along with their citizens, feared that powerful financial and commercial interests were increasingly the architects of the growing power and authority of the federal government. As a result, many states renewed their desire to protect the local financial and commercial institutions within their own borders. As Richard Ellis concluded, "the states were not so much attacking the [Second Bank] as they were defending themselves from it."<sup>34</sup>

State efforts to ward off the power of the Second Bank began in 1816 when Indiana included a provision in its first state constitution prohibiting banks from doing business in

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<sup>32</sup>Killenbeck, *M'ulloch v. Maryland*, 44; Ellis, *Aggressive Nationalism*, Kindle location, 121-23.

<sup>33</sup>Ellis, *Aggressive Nationalism*, Kindle location 515-72.

<sup>34</sup>Ibid. Kindle location 123-24.

the state without first being chartered by the state. Illinois passed a similar provision in 1818. Maryland, Georgia and Tennessee each imposed state taxes on out-of-state banks in 1817, with North Carolina following in 1818. In 1819, Kentucky and Ohio followed suit and imposed their own taxes on the bank. Not to be outdone, Pennsylvania proposed an amendment to the Constitution that would restrict the operation of the Second Bank to the District of Columbia, which garnered the support of Illinois, Indiana, Ohio and Tennessee. Whether the state of Maryland had the constitutional power to tax the branches of the Second Bank came before the Supreme Court in February of 1819.<sup>35</sup>

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Marshall's unanimous opinion in *McCulloch v. Maryland*<sup>36</sup>, issued only three days after the completion of oral arguments, ruled Congress had the power to incorporate the bank and Maryland's tax was an impermissible infringement on an instrument of the national government created pursuant to Article I, Section 8, Clauses 1 and 18 of the Constitution. Although completely unnecessary to reaching a decision in the case, Marshall took the opportunity to address the two major issues prominently raised by the Virginia and Kentucky Resolutions. First, who created the Constitution of the United States and, second, was the Constitution a "compact"? Why Marshall chose to address these two additional issues is unclear. Richard Ellis concluded questions "were issues to which [Marshall] had given considerable thought and about which he had strong feelings," but had not had an opportunity to discuss them before *McCulloch v. Maryland*. Ellis also speculated Marshall might have been anticipating future challenges to federal initiatives,

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<sup>35</sup>Ibid, [Kindle 760-766].

<sup>36</sup>*McCulloch v. Maryland*, 17 U.S. 316 (1819).

such as the constitutionality of internal improvements that might likely would come before the Court. Marshall biographer Kent Newmyer offered little explanation other than to simplistically characterize Maryland's argument in favor of the right to tax all businesses within the state as a "states' rights issue," thus inviting the Chief Justice to pick up "the ideological gauntlet thrown down by counsel for Maryland."<sup>37</sup> A review of oral arguments in the case clearly refutes Newmyer's contention. In fact, despite protestations to the contrary, legal counsel for the state of Maryland and one of the advocates for the Second Bank, William Pinkney, described the founding sovereigns in terms similar to Madison's *Report of 1800*: the Constitution was created by the *people* of the several states. Legal counsel differed, however, on the consequences such founding had on constitutional interpretation. Like Madison, Maryland's legal counsel interpreted the *people* of the several states as being fairly frugal in expanding the powers of the national government except those expressly delegated in the Constitution. Pinkney, in contrast, saw the *people* of the several states as doing more than just tinkering with the governmental powers allocated among the state and federal governments, and interpreted the Constitution as a dramatic expansion in the power of the federal government. Only Daniel Webster, the first advocate to address the Court, appeared to adopt a nationalist version that the *people*, acting *en*

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<sup>37</sup>Ellis, *Aggressive Nationalism*, Kindle location 1209-1214; Newmyer, *John Marshall and the Heroic Age of the Supreme Court*, 297. Regardless of the reasoning behind Marshall's decision to engage some of the principles expressed in the Virginia and Kentucky Resolutions almost twenty years after avoiding them in the *Minority Report*, he and the federal government clearly were the beneficiaries of a rather friendly "adversary." The state of Maryland cooperated with the Second Bank in getting its case heard before other legal challenges to states taxes on the Second Bank could make their way to the Supreme Court. Unlike the other states who had imposed taxes on branches of the national bank, the Second Bank reached an agreement with Maryland that the state would not challenge the Supreme Court's jurisdiction in the case and would comply with the decision of the Court. Ellis, *Aggressive Nationalism*, Kindle location 879-882.

*masse*, created the Constitution, which Webster naturally interpreted as supporting a broad interpretation of the powers conferred on Congress.

Oral arguments in the case began on February 22, 1819, with Webster rising first to defend the constitutionality of the Second Bank and condemn Maryland's attempt to tax it. Webster's role would prove significant when the Court issued its opinion only a few days later because some of the more memorable passages from the unanimous opinion first appeared in Webster's oral argument. In addition, Webster's formulation of the constitutional issues set the agenda for the remainder of oral arguments and for the Court's opinion. According to Webster, Congress had the clear authority to establish a national bank, based on precedent and based on the Necessary and Proper Clause of the Constitution. Furthermore, Maryland's tax on the Baltimore branch was a clear violation of the Constitution because "[a]n unlimited power to tax involves, necessarily, a power to destroy." Webster only indirectly addressed the issue as to the creation of the Constitution:

The people of the United States have seen fit to divide sovereignty, and to establish a complex system. They have conferred certain powers on the state governments, and certain other powers on the national government. As it was easy to foresee that question must arise between these governments thus constituted, it became of great moment to determine, upon what principle these questions should be decided, and who should decide them. The constitution, therefore, declares, that the constitution itself, and the laws passed in pursuance of its provisions, shall be the supreme law of the land, and shall control all state legislation and state constitutions, which may be incompatible therewith.<sup>38</sup>

And like the Federalist-controlled legislatures that first objected to the Virginia and Kentucky Resolutions, Webster argued that the *people* of the United States confided to the court "the ultimate power of deciding all questions arising under the constitution and laws

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<sup>38</sup>*McCulloch*, 326-27.

of the United States.”<sup>39</sup> William Wirt, the second advocate to speak on behalf of the Second Bank largely repeated the two major arguments set forth by Webster.<sup>40</sup>

Following Webster, attorney Joseph Hopkinson was the first to rise on behalf of the state of Maryland. Hopkinson proffered a novel twist on Webster’s contention that Congress’ creation of the bank was a valid exercise of its legislative authority under the Necessary and Proper Clause. Rather than argue for a strict interpretation of the clause, Hopkinson cleverly argued that while a national bank may have been “necessary and proper” in the early 1790s, due to the proliferation of state banks after the 1790s, a national bank was no longer “necessary,” as proven during the period between the expiration of the First Bank and the establishment of the Second Bank. Hopkinson’s remaining arguments were equally skillful. He questioned Webster’s ominous description of the state’s power to tax the bank, citing the concurrent ability of the federal and state governments to tax, among a number of items, alcohol and real property. The right to raise revenue by taxing property within a state, argued Hopkinson, “was the highest attribute of sovereignty.” Even if Congress had the power to create a national bank, that power should not negate the sovereign right of the state of Maryland to tax the Maryland branch. Hopkinson made no mention as to the nature of the Union or the creation of the Constitution. Hopkinson made only passing reference to the creation of the Constitution, referring to the Constitution as being “received and adopted by the people of the United States.” Hopkinson expressed his belief that the “people of the United States” had been assured that the Constitution did not undermine the existing right of the states to raise revenue with the exception of duties on imports and exports, and his concurrent belief that

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<sup>39</sup>Ibid.

<sup>40</sup>Ibid, 327, 352-62.

the people ratifying the Constitution would not have further inhibited the fundamental right of the states to raise revenue without an express grant of exclusive power to the federal government.<sup>41</sup>

Following William Wirt, Walter Jones, on behalf of Maryland, was the fourth attorney to address the Court. Jones rebutted Webster's contention that the constitutionality of a national bank was well settled, noting that such constitutionality had never been ruled on by the judiciary. Jones's principle argument was that neither the Constitution nor the *Federalist Papers* granted Congress the unfettered discretion to adopt any means it deemed necessary to raise revenue. Granting such power to Congress under the Necessary and Proper clause effectively made "the implied powers" of the federal government "greater than those which are expressly granted." After all, as Hopkinson first pointed out in his oral argument, the Second Bank was hardly an agency of the federal government; the federal government was a stockholder with no control over the bank's direction or management. The Second Bank, Jones argued, was little more than "a commercial institution, a partnership incorporated for the purpose of carrying on the trade of banking."<sup>42</sup>

Although not central to his argument on the constitutionality of the Second Bank, Jones, alone among the three advocates for Maryland, spoke directly to the creation of the Union. Adopting the Madisonian compact theory of the Constitution, Jones argued that such formulation necessarily implied that *people* of the several states jealously guarded the retained power and authority of the state governments, and delegated to the federal government only those powers and authorities expressly set forth in the Constitution:

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<sup>41</sup>Ibid, 330-351.

<sup>42</sup>Ibid, 340-72.

It is insisted, that the constitution was formed and adopted, not by the people of the United States at large, but by the people of the respective states. To suppose that the mere proposition of this fundamental law threw the American people into one aggregate mass, would be to assume what the instrument itself does not profess to establish. It is, therefore, a compact between the states, and all the powers which are not expressly relinquished by it are reserved to the states.<sup>43</sup>

Luther Martin was the last counsel to speak on behalf of Maryland, as the state's attorney general. Martin had been a delegate at the Constitutional Convention but did not approve of the final version provided to the states for ratification and voted against its adoption at Maryland's ratifying convention. Martin's chief complaint with the arguments on behalf of the federal government was its reliance on the Tenth Amendment for an expansive reading of Congress' power under the Constitution. Luther reminded the Court that "the enemies of the constitution" had maintained the draft constitution contained "a vast variety of powers, lurking under the generality of its phraseology, which would prove highly dangerous to the liberties of the people, and the rights of the states, unless controlled by some declaratory amendment, which should negative their existence." Addressing such concern, according to Martin, was the principal purpose of the Tenth Amendment; a proverbial belt-and-suspenders "to provide an assurance against the possibility of its occurrence." Now, Martin continued, the government was doing exactly that, applying "a theory of interpretation which was then rejected by the friends of the new constitution," granting the federal government powers "which were disclaimed by them, and which, if they had been fairly avowed at the time, would have prevented its adoption." Martin made no allusion to any compact theory of the Constitution.<sup>44</sup>

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<sup>43</sup>*McCulloch*, 363.

<sup>44</sup>*Ibid*, 372-73.

William Pinkney was the last advocate to address the Court, appearing on behalf of the Second Bank and James McCulloch. Pinkney first addressed the “question which ought not to have been forced into the argument”—“whether the act of congress establishing the bank was consistent with the constitution?—and distinguished the Articles of Confederation with the Constitution, the latter as being different “as light from darkness.” The nation under the Articles, Pinkney intoned, was “a mere federative league; an alliance offensive and defensive between the states,” and possessed “no power of coercion but by arms.” In contrast, the Constitution:

acts directly on the people, by means of powers communicated directly from the people. No state, in its corporate capacity, ratified it; but it was proposed for adoption to popular conventions. It springs from the people, precisely as the state constitution springs from the people, and acts on them in a similar manner. It was adopted by them in the geographical sections into which the country was divided. The federal powers are just as sovereign as those of the states. The state sovereignties are not the authors of the constitution of the United States. They are preceding in point of time, to the national sovereignty, but they are postponed to it, in point of supremacy by the will of the people.<sup>45</sup>

According to Pinkney, the constitutionality of a national bank was not a “doubtful case.” Congress, he argued, “may expound the nature and extent of the authority under which it acts,” and this “practical interpretation” had become incorporated into the Constitution from the beginning. This principle was entitled to great respect, argued Pinkney, because this was a “contemporaneous construction” of the instrument and such construction was made by many of the “authors” of the Constitution themselves. Furthermore, the constitutionality of the bank had been debated and decided upon time and again since 1791, and Congress, being “*prima facie* a competent judge of its own constitutional powers,” debated the constitutionality of a national bank and consistently

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<sup>45</sup>Ibid, 377.

affirmed its power to do so, supported by the executive and judicial branches of the government and “confirmed by the constant acquiescence of the state sovereignties, and of the people, for a considerable length of time.”

As for the right of Maryland to tax the national bank, Pinkney seconded the sentiments expressed by Daniel Webster: “

if the power of taxation be applied to the corporate property, or franchise, or property of the bank, and might be applied in the same manner, to destroy any other of the great institutions and establishments of the Union, and the whole machine of the national government might be arrested in its motions, by the exertion, in other cases, of the same power which is here attempted to be exerted upon the bank: no other alternative remains, but for this court to interpose its authority, and save the nation from the consequences of this dangerous attempt.<sup>46</sup>

Marshall’s opinion for the Court was announced three days after Pinkney completed his remarks. Adopting the analysis of Webster and Pinkney, the Court upheld Congress’ power to incorporate a bank and struck down Maryland’s right to tax the Baltimore branch. As for the nature of the Constitution, Marshall mistakenly or purposely mischaracterized Jones’s description of the constitutional compact, which counsel for Maryland had described in Madisonian terms as “formed and adopted, not by the people of the United States at large, but the people of the respective states.” Marshall mischaracterized Jones’s compact theory in Jeffersonian terms, thusly:

[C]ounsel for the state of Maryland have deemed it of some importance, in the construction of the constitution, to consider that instrument, not as emanating from the people, but as the act of sovereign and independent states. The powers of the general government, it has been said, are delegated by the states, who alone are truly sovereign; and must be exercised in subordination to the states, who alone possess supreme dominion. It would be difficult to sustain this proposition. The convention which framed the constitution was indeed elected by the state legislatures. But the instrument, when it came from their hands, was a mere proposal, without obligation, or

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<sup>46</sup>*McCulloch*, 400.

pretensions to it. It was reported to the then existing congress of the United States, with a request that it might “be submitted to a convention of delegates, chosen in each state by the people thereof, under the recommendation of its legislature, for their assent and ratification.” This mode of proceeding was adopted; and by the convention, by congress, and by the state legislatures, the instrument was submitted to the people. They acted upon it in the only manner in which they can act safely, effectively and wisely, on such a subject, by assembling in convention. It is true, they assembled in their several states and where else should they have assembled? No political dreamer was ever wild enough to think of breaking down the lines which separate the states, and of compounding the American people into one common mass. Of consequence, when they act, they act in their states. But the measures they adopt do not, on that account, cease to be the measures of the people themselves, or become the measures of the state governments.<sup>47</sup>

This would not be the last time that Marshall would mischaracterize the views of his ideological opponents on this particular topic. But, in fairness, Marshall’s ideological opponents consistently mischaracterized Marshall’s views on the nature of the founding, so persistently, in fact, that scholars, and even current Supreme Court justices, accept as fact that Marshall rejected Madison’s formulation of the nation’s founding sovereigns. Newmyer, for example, accepted Marshall’s characterization of Jones’s argument apparently without reading it, portraying Marshall as fighting back the forces of states’ rights who advocated for the supremacy of the state governments over the federal government, an argument Newmyer described as going “back to the Anti-Federalists at the time of ratification, back to the Virginia and Kentucky Resolutions, back to Thomas Jefferson.” None of the arguments proffered by legal counsel for Maryland advocated any

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<sup>47</sup>Ibid, 402-3. As evidenced by his decision in *McCulloch* and confirmed in his series of anonymous essays (as “Friend to the Union” and “A Friend of the Constitution”) published later that same year, Marshall’s views on the founding were very similar to Madison’s, i.e., the Constitution was created by the *people of the several states*. Like the dispute between Pinkney and counsel for Maryland, where Marshall and Madison materially differed was how the founding sovereigns had reallocated power among the federal and state governments.

such thing. Hopkinson referred to the Constitution as being “received and adopted by the people of the United States. Jones claimed that the Constitution was “formed and adopted, not by the people of the United States at large, but the people of the respective states.” No fair reading of Luther Martin’s oral argument supports such a conclusion. Martin, when discussing the Tenth Amendment, stated that it “could be considered as nothing more than declaratory of the sense of the people as to the extent of the powers conferred on the new government.” No advocate for Maryland argued that the states *qua* states created the Constitution or argued that the state governments were supreme over the federal government. Their arguments, fairly summarized, simply argued that the states had retained enough sovereignty so as to justify taxing a bank branch operating within its borders.<sup>48</sup>

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<sup>48</sup>Ibid. Newmyer, *John Marshall and The Heroic Age of the Supreme Court*, 297. Justice Anthony Kennedy, in his concurrence in *U.S. Term Limits, Inc. Thornton*, 514 U.S. 779 (1995), described the nation’s founding “as being well settled that the whole people of the United States asserted their political identify and unity of purpose when they created the federal system” and cited as support Marshall’s opinion in *McCulloch* that the “government of the Union, then . . . is, emphatically, and truly, a government of the people. In form and substance it emanates from them.” *U.S. Term Limits v. Thornton*, 514 U.S. 779, 839. Justice Clarence Thomas’s dissent rejected Kennedy’s formulation, and Kennedy’s interpretation of Marshall’s opinion of *McCulloch*. Kennedy, like Newmyer, equated Madison’s formulation that the *people* of the sovereign states created the Constitution with a states’ rights theory that the state governments retained a substantial portion of the governmental sovereignty they held under the Articles of Confederation. Likewise, Thomas’s interpretation of Madison’s formulation meant that the states retained greater governmental powers than nationalists would admit.

*states*. For Marshall as well as Madison, the *people* acting in convention were critical to their interpretation of the Constitution. Marshall described it as follows:

From these conventions, the constitution derives its whole authority. The government proceeds directly from the people; is 'ordained and established,' in the name of the people; and is declared to be ordained, "in order to form a more perfect union, establish justice, insure domestic tranquility, and secure the blessings of liberty to themselves and to their posterity." The assent of the states, in their sovereign capacity, is implied, in calling a convention, and thus submitting that instrument to the people. But the people were at perfect liberty to accept or reject it; and their act was final. It required not the affirmance, and could not be negated, by the state governments. The constitution, when thus adopted, was of complete obligation, and bound the state sovereignties.<sup>49</sup>

For Marshall, the *people*, when ratifying the Constitution, were not the "American people" acting as "one common mass," but rather as acting in their respective states. Thus, Marshall did not disagree with the claim that the *people* of the several states created the Constitution. What he objected to was the notion that such action of the *people* somehow was transformed into the "measures of the state governments."

Marshall, like Pinkney, interpreted the actions of the *people* of the several states to be far more ambitious than advocates of traditional states' rights theories. He interpreted the Constitution as an aggressive transfer of sovereign authority from the state government to the federal government, implicitly interpreting the Constitution as being a major and significant break from the Articles of Incorporation. As much as the federal government was answerable to the *people*, so were the state governments, and he flatly rejected the notion that the *people* of the several states had transferred power to the federal government in a grudging manner. Marshall continued this line of thought in a manner far more eloquent than Madison:

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<sup>49</sup>*McCulloch*, 403-4.

Much more might the legitimacy of the general government be doubted, had it been created by the states. The powers delegated to the state sovereignties were to be exercised by themselves, not by a distinct and independent sovereignty, created by themselves. To the formation of a league, such as was the confederation, the state sovereignties were certainly competent. But when, "in order to form a more perfect union," it was deemed necessary to change this alliance into an effective government, possessing great and sovereign powers, and acting directly on the people, the necessity of referring it to the people, and of deriving its powers directly from them, was felt and acknowledged by all. The government of the Union, then (whatever may be the influence of this fact on the case), is, emphatically and truly, a government of the people. In form, and in substance, it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.<sup>50</sup>

Richard Ellis, like Newmyer, interpreted these passages as advocating "a nationalist theory of the origins and nature of the union, and rejecting the claim made in the RESOLVES that the federal government was a product of a compact between the states and had only specifically granted and limited powers."<sup>51</sup> I disagree. Marshall actually made no mention of a "compact" or any suggestion that a compact did not exist in his *McCulloch* opinion. Only Jones mentioned a "compact between the states" but did so in terms consistent with Madison's formulation of the founding sovereigns in terms Marshall appeared to adopt as well. Marshall's language in *McCulloch*, like Madison's *Report of 1800*,

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<sup>50</sup>*McCulloch*, 404-05.

<sup>51</sup>Ellis, *Aggressive Nationalism*, Kindle location 1131-33. Other scholars accepting this characterization of Marshall's views in *McCulloch* are Albert J. Beveridge, *The Life of John Marshall* (Boston; New York: Houghton Mifflin, 1916-1919), 292; Edward S. Corwin, *John Marshall and the Constitution, A Chronicle of the Supreme Court* (New Haven: Yale University Press, 1919), 130-31; Leonard Baker, *John Marshall: A Life in Law* (New York: Macmillan Publishing Company, Inc., 1974), 594; R. Kent Newmyer, "John Marshall, *McCulloch v. Maryland*, and the Southern States' Rights Tradition," 33 *John Marshall Law Review* 875, 897 (2000). For scholars who disagree, and interpret *McCulloch* as setting forth the Madisonian proposition that the Constitution was the act of the *people of the several states*, see G. Edward White, *The Marshall Court and Cultural Change* (abridged edition) (New York: Oxford University Press, 1988), 545. For an excellent article that analyzes Marshall's vision of the creation, see Flaherty, "John Marshall, *McCulloch v. Maryland*, and 'We the People,'" 1339-1397.

speaks to the *people of the several states acting in their highest sovereign capacity*. Both believed that the Constitution reflected the judgment of the *people* that certain sovereign power and authority previously granted to the states under their state constitutions were being transferred to the newly constituted federal government.

Marshall's opinion in *McCulloch* did make it clear that he rejected Jefferson's compact theory of the Constitution. Whatever the Constitution was, it certainly was not a compact made between the states *qua* states as many advocates of states' rights theory had done in the ensuing thirty years after ratification. Undoubtedly, Marshall interpreted the Constitution as granting the federal government far greater power and authority than Madison. Madison deemed the grant of power as being far more limited, as evidenced by his presidential veto of the Bonus Bill in 1817, but Madison also recognized that the *people's*, along with the court's acquiescence, with the establishment of a national bank should be respected as some form of constitutional action. Marshall's opinion in *McCulloch* with respect to the founding sovereigns of the nation clearly was not directed at the state of Maryland, but to advocates of Jeffersonian states' rights found close to home.

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Although Virginia had no apparent quarrel with the Second Bank (after all, it had not yet even passed a special law taxing the branch located in Richmond), Marshall's opinion was unacceptable to certain leaders in the state. On March 23, 1819, the *Richmond Inquirer* published the decision, and Thomas Ritchie, editor of the paper, immediately condemned the decision as an affront to the Virginia Resolutions and called on "Republicans of the Old

School” to “rally around the banners of the constitution, defending the rights of the states against federal usurpation.”<sup>52</sup>

A week later, the first of two essays by Virginia state judge William Brockenbrough, under the pseudonym “Amphictyon,” appeared in the *Enquirer*:

There are two principles advocated and decided by the supreme court, which appear to me to endanger the every existence of states rights. The first is the denial that the powers of the federal government were delegated by the states,; and second is, that the grant of powers to that government, and particularly the grant of powers “necessary and proper” to carry out the other powers into effect, ought to be construed in a liberal, rather than a restricted sense.<sup>53</sup>

As to the first principle, “that the powers of the federal government are not delegated by the states, or in other words that the states are not parties to the compact,” Brockenbrough queried as to the Court’s purpose for even addressing the issue, correctly noting that the Court’s ruling was not dependent upon such issue. As for Brockenbrough’s own theory of constitutional creation, his arguments were at times perceptive and at times confused. For example, while he closed his first essay with extensive quotations from those portions *Report of 1800* setting forth Madison’s compact theory of the Constitution, he

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<sup>52</sup>Ellis, *The Union at Risk*, 115-17.

<sup>53</sup>“Amphictyon Essay I,” in Gerald Gunther, ed., *John Marshall’s Defense of McCulloch v. Maryland* (Stanford: Stanford University Press, 1969), 52-64, 54-55. The first “Amphictyon” essay appeared in the *Enquirer* on March 30, 1819, with the second following shortly thereafter on April 2, 1819. The “Amphictyon” essays and subsequent essays in this Chapter are taken from Gerald Gunther, ed., *John Marshall’s Defense of McCulloch v. Maryland* (Stanford: Stanford University Press, 1969). Brockenbrough claimed that the defenders of the Alien and Sedition Acts and opponents of the Virginia and Kentucky Resolutions denied that the states were parties to the constitutional compact. If he is referencing the response of the Federalist-controlled states in 1799, Brockenbrough is incorrect. Only two of the states took issue with Jefferson claim that the Constitution was a compact between the state governments; none challenged Madison’s formulation. The main thrust of their disagreement with Virginia and Kentucky was whether it was appropriate for the state legislatures to judge the constitutionality of a federal law. Most states argued that such power resided in the federal courts. Marshall’s *Minority Report* was similar in this regard.

clearly was unable or unwilling to recognize the import of Madison's clarifications, including his implicit rejection of Jefferson's creation theory. For Brockenbrough, whether the compact was between the state governments or between the *people* of the several states made little difference, for purposes of determining the powers of the federal government, they acted one in the same:

The federal convention of 1787 was composed of delegates appointed by the respective state legislatures; and who voted by states; the constitution was submitted on their recommendation, to conventions elected by the people of the several states, that is to say, to the states themselves in their highest political, and sovereign authority; by those separate conventions, representing, not the whole mass of the population of the United States, but the people only within the limits of the respective sovereign states, the constitution was adopted and brought into existence. The individuality of the several states was still kept up when they assembled in convention: their sovereignty was still preserved, and the only effect of the adoption of the constitution was to take from one set of their agents and servants, to wit, the state governments, a certain portion of specified powers, and to delegate that same portion to another set of servants and agents, then newly created, namely the federal government.<sup>54</sup>

If, somehow, the *people* of the several states and the state governments were not joined at the proverbial hip, Brockenbrough oddly warned, the state legislatures would not have the right to "sound the alarm" against federal encroachments and would not "have the right to canvas the public measures of the Congress, or of the president, nor to remonstrate against the encroachments of power, nor to resist the advances of usurpation, tyranny and oppression." Clearly forgetting Madison's (and Hamilton's) distinct role for the state governments, not to mention Madison's explicit descriptions of the right and duty of state legislatures to protest unconstitutional actions of the national government in the *Report of*

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<sup>54</sup>"Amphictyon Essay I," 56.

1800, Brockenbrough's rather confused attack on *McCulloch's* first principle mercifully came to an end.<sup>55</sup>

In his second essay, Brockenbrough focused his critique on the second principle in *McCulloch*, and generally mimicked the line of argument presented by counsel for Maryland. He as much conceded that Congress' establishment of a national bank was constitutional—"because it has been repeatedly argued before Congress, and not only in 1791, but in 1815 was solemnly decided in favor of the measure—, but, Brockenbrough complained, "it is against the *principles* which brought it into life in the year 1791, and those by which it is supported now by the supreme court." Chief among the objectionable principles Marshall used to support the constitutionality of the bank was the broad interpretation of the Necessary and Proper Clause, the clause that had been the major objection of Anti-Federalists during the ratification process:

Those who opposed the constitution always apprehended, that the powers of the federal government would be enlarged so much by force of implication as to sweep away every vestige of power from the state governments. The progress of the government from the commencement of it to this day, proves that the fears are not without foundation. To counteract that irresistible tendency in the federal government to enlarge their own dominion, the vigilance of the people and state governments should be constantly exerted.<sup>56</sup>

Marshall's decision, he asserted, was a direct assault on the rights and powers of the states, undercutting the original purpose of the Constitution, which was to "protect us from foreign nations and from internal dissensions." Instead, he continued, "the federal government embarked on a course of procuring "almost unlimited powers."

Brockenbrough concluded his second essay by harkening back to Virginia's history of

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<sup>55</sup>Ibid, 58-64.

<sup>56</sup>"Amphictyon Essay II," Gunther, ed., *John Marshall's Defense of McCulloch v. Maryland*, 64-77, 64.

monitoring the actions of the federal government and, as was typical of the day, added an implied threat of violence:

When unconstitutional laws are passed, this state calmly passes her resolutions to that effect; she endeavors to convince the public mind of the baneful effects of usurped powers' she endeavors to unite and combine the moral force of the states against usurpation, and she never will employ force to support her doctrines, till other measures have entirely failed. . . . I do most ardently hope that this decision of the supreme court will attract attention of the state legislatures, and that Virginia will, as heretofore, do her duty.<sup>57</sup>

Marshall anticipated the attacks on the *McCulloch* decision. After all, his opinion ventured into areas of the constitutional founding that we were not required to reach a decision in the case. His conclusion that the states *qua* states had no meaningful role in the creation of the Constitution and, therefore, no meaningful role in constitutional interpretation, was sure to draw the ire of advocates of the Madisonian and Jeffersonian interpretation of the compact, many of whom resided in his home state of Virginia. On March 24, even before the *Enquirer* published the first Amphictyon essay, Marshall wrote to his colleague, Joseph Story, and informed him that “[o]ur opinion in the Bank case has roused the sleeping spirit of Virginia,” and further, that because *McCulloch* likely would be “undefended” in public and in the newspapers, he had drafted essays of his own in its defense.<sup>58</sup>

The two Marshall essays in response to Brockenbrough, under the pseudonym “A Friend of the Union,” appeared in parts in the *Alexandria Gazette* on May 15, 17 and 18, 1819. Directly taking up the critique posed by Amphictyon, Marshall characterized the Amphictyon essays as an attempt to inflict “deep wounds on the constitution through a

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<sup>57</sup>“Amphictyon Essay II,” 67.

<sup>58</sup>G. Edward White, *The Marshall Court and Cultural Change, 1815-1835* (New York: Oxford University Press, 1991), 555.

misrepresentation” of the *McCulloch* decision and part of a concerted effort by some in Virginia to transform the *McCulloch* decision into an “occasion for once more agitating the publick mind, and reviving those unfounded jealousies by whose blind aid ambition climbs the ladder of power.”<sup>59</sup>

Marshall’s rebuttal directly responded to two principles of Amphictyon deemed so offensive, namely, the alleged role of state governments in the creation of the Constitution and the Union, and the meaning of the Necessary and Proper Clause. Marshall’s first essay flatly rejected the argument *McCulloch* denied that the “powers of the federal government were delegated by the states”:

This assertion is not literally true. –The court has not, in terms, denied “that the powers of the federal government were delegated by the states,” but has asserted affirmatively that is “is emphatically and truly a government of the people,” that it “in form and in substance emanates from them.”

If Amphictyon chuses to construe the affirmative assertion made by the court into a negative assertion that “the powers of the government were not delegated by the states,” I shall not contest the point with him unless he used the word “states” in a different sense from that which a great part of this argument imports. In what sense, let me ask, does he use the word? Does he mean the people inhabiting that territory which constitutes a state? Or does he mean the government of that territory? If the former, the controversy is at an end. He concurs with the opinion he arraigns. The Supreme Court cannot be mistaken. It has said, not indeed in the same words, but in substance, precisely what he says. The powers of the government were delegated, according to that opinion, by the people assembled in convention in their respective states, and deciding, as all admit, for their respective states.<sup>60</sup>

Marshall then cited the *Preamble*, which also referenced the people, and compared the Constitution to the Articles of Confederation. Adopted the characterization Pinkney used in his oral argument in *McCulloch*, Marshall branded the Articles of Confederation as

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<sup>59</sup>“A Friend to the Union Essay I,” in Gunther, ed., *John Marshall’s Defense of McCulloch v. Maryland*, 78-91, 78.

<sup>60</sup>*Ibid*, 84-85.

the “act of the sovereign states” and a “mere alliance offensive and defensive.” The Constitution, in stark contrast, was “a government acting on the people, and purports to be, what it was intended to be,—the act of the people.” Marshall then moved to Madison’s *Report of 1800*, which he called “that remarkable commentary,” and quoted from the applicable passages where Madison made it clear that the parties to the compact were “the *people* in their highest sovereign capacity.” Marshall was not finished. A few paragraphs later he drove his point home once again by making it clear that the “argument which is denied by the court” was the argument that “the constitution did not emanate from the people, but was the act of sovereign and independent states; clearly using the term ‘states’ in a sense distinct from the term ‘people.’” “[T]he constitution was submitted to conventions of the people in their respective states,” Marshall reiterated, and from “these conventions the constitution derives its whole authority.” This, according to Marshall, was exactly the way the Court had described the creation of the Constitution in *McCulloch*, and he again denied that the Court’s formulation suggested that the *people* were acting as one “single mass completely separated from state boundaries”:

And who has ever advanced the contrary opinion? Who has ever said that the convention of Pennsylvania represented the people of any other state, or decided for any other state, than itself? Who has ever been so absurd as to deny that “the individuality of the several states was still kept up?” Not the Supreme Court certainly. Such opinions may be imputed to the judges, by those who, finding nothing to censure in what is actually said, and being determined to censure, create odious phantoms which may be very proper objects of detestation, but which bear no resemblance to any thing that had proceeded from the court.<sup>61</sup>

In his second “A Friend to the Union” essay, Marshall turned to his defense of the Court’s reading of the Necessary and Proper Clause, which he denied reflected a “liberal” or

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<sup>61</sup>*Ibid*, 87-90, 89.

“latitudinous” reading. Rather, the opinion in *McCulloch* was a “fair construction which gives to language the sense in which it is used, and interprets an instrument according to its true intention.”<sup>62</sup>

With Amphictyon taken care of, Marshall girded for his next fight, which predicted in a letter to fellow justice Bushrod Washington:

It is understood that this subject is not to drop. A very serious effort is undoubtedly making to have it taken up in the next legislature. It is said that some other essays written by a very great man are now preparing & will soon appear.<sup>63</sup>

On May 27, Marshall informed Joseph Story of a movement among critics of *McCulloch* to have the Virginia legislature “take up the subject & to pass resolutions not very unlike those which were called forth by the alien & sedition law in 1799. Whether the effort will be successful or not may perhaps depend in some measure on the sentiments of our sister states.”<sup>64</sup>

As predicted, the first essay by “Hampden” appeared in the *Enquirer*, picking up the verbal cudgel that had been laid down by Amphictyon earlier in the month. “Hampden” was

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<sup>62</sup>“A Friend to the Union Essay II,” Gunther, *John Marshall’s Defense of McCulloch v. Maryland*, 91-105, 92. Interestingly, Brockenbrough accused the Court in *McCulloch* of giving the Necessary and Proper clause a “liberal and latitudinous construction,” which Amphictyon blamed directly on the “Chief Justice and, before him by Mr. Secretary Hamilton.” The reference to Marshall, and a “liberal” construction of the powers delegated to the federal government may not have only been about *McCulloch*. Recall, that in the *Minority Report*, Marshall argued that the Tenth Amendment’s omission of the word “expressly” meant that the powers of federal government should be “liberally” construed. This may be what Brockenbrough was alluding to. See discussion of *Minority Report*, 232-42.

<sup>63</sup>John Marshall to Bushrod Washington, May 6, 1819, Charles Hobson, ed., *The Papers of John Marshall Digital Edition* (Charlottesville: University of Virginia Press, Rotunda, 2014), <http://rotunda.upress.virginia.edu/founders/JNML-01-08-02-0090>.

<sup>64</sup>John Marshall to Joseph Story, May 27, 1819, Charles Hobson, ed., *The Papers of John Marshall Digital Edition* (Charlottesville: University of Virginia Press, Rotunda, 2014), <http://rotunda.upress.virginia.edu/founders/JNML-01-08-02-0092.s>

none other than Spencer Roane, a cousin of Thomas Ritchie, unofficial head of the Republican Party in Virginia, and currently a judge on the Virginia Court of Appeals. Marshall, anxious to reply, arranged with Washington to have his rebuttal published in the *Gazette*. Before Roane and Marshall would lay down their pens, Roane had drafted an additional three essays and Marshall nine.<sup>65</sup>

Roane's first essay cited *McCulloch* as further evidence of the Supreme Court's willingness to extend the power of Congress everywhere and to draw "all power into its impetuous vortex." Roane criticized the grant of *implied* powers to Congress via the Necessary and Proper Clause in terms similar to counsel for the state of Maryland and Brockenbrough, stating that there was "no earthly difference" between "an *unlimited* grant of power" to the Congress and "a grant limited in its terms, but accompanied with unlimited means of carrying it into execution." Of course, Roane followed that indictment with the charge that such unfettered power would obliterate the reserved rights of the states and the people.<sup>66</sup>

After the predictable critique of the Court's interpretation on the Necessary and Proper Clause, Roane discussed the origins of the Constitutional compact. Perpetuating what was becoming a familiar pattern in the aftermath of *McCulloch*, critics of the decision and the Chief Justice each claimed to rely on Madison's formulation in the *Report of 1800*. Like Madison, Roane described the Constitution as a compact, and like both Madison and Marshall (in *McCulloch* and in the "A Friend to the Union" essays) concluded that the creator of the Constitution was not the work of "one people." Roane's description of the

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<sup>65</sup>White, *The Marshall Court and Cultural Change*, 558.

<sup>66</sup>"Hampden Essay I," Gunther, John Marshall's Defense of *McCulloch v. Maryland*, 107-114.

parties to the compact quoted from Madison's *Federalist No. 39*, which described the Constitution as emanating from "the assent and ratification of the several States, derived from the supreme authority in each State, the authority of the people themselves." Roane then attacked the notion that the Supreme Court should be the final arbiter in a dispute between the federal government and a state, relying on Madison's discussion of judicial review in his *Report of 1800*. Roane, as with most opponents of recent decisions of the Supreme Court, did not point out Madison's conclusion that the primary concern over the Sedition Act did not involve a dispute between the federal government and the states, but rather an attack by the federal government on the right of the ultimate sovereign, the *people*, to monitor the actions of the government they created and to ultimately judge their constitutionality. In this instance, Roane offered no alternative tribunal other than the courts for deciding constitutional questions between the federal government and the states.<sup>67</sup>

The three additional essays by Roane and most of the arguments contained in the nine essays penned by Marshall did little to advance the debate. Some of the language was colorful, with Roane implying that Marshall, or someone ascribing to his constitutional theories, was a "deplorable idiot." Marshall's essays took aim at a his own special band of deplorable idiots in his home state of Virginia, who he claimed had not abandoned their Anti-federalist banner:

The zealous and persevering hostility with which the Constitution was originally proposed cannot be forgotten. The deep rooted and vindictive hate, which grew out of unfounded jealousy, and was aggravated by defeat, though suspended for a time, seems never to have been appeased. The desire to strip the government of those effective powers, which enable it to accomplish the objects for which it was created; and by constriction,

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<sup>67</sup>Ibid.

essentially to reinstate that miserable confederation, where incompetency to the preservation of our union, the short interval between the Treaty of Paris and the meeting of the general convention in Philadelphia, was sufficient to demonstrate, seems to have recovered all its activity.<sup>68</sup>

Hampden's fourth essay accused *McCulloch* as describing the national government in terms suggesting that it was a *consolidated*, and not a *federal*, government, i.e., "one which acts only on individuals, and in which other states and governments are not known." Hampden, by this time clearly aware of the back-and-forth debate with Amphyctyon and A Friend to the Union, reiterated his position on the founding:

The constitution of the United States was not adopted by the people of the United States, as one people. It was adopted by the several states, in their highest sovereign character, that is, by the people of said states, respectively; such people being competent, and *they* only competent, to alter the pre-existing governments operating in the said states.<sup>69</sup>

Hampden also cited Madison's assurances in Virginia's ratifying convention that "the people are parties to the government, but not the people as composing one great body, but as composing *thirteen* sovereignties: that were the act of the former, the assent of a majority would be sufficient, and that that assent being already obtained (by the previous adoptions of the other states), we need not now deliberate upon it."<sup>70</sup>

In response to Hampden's claim of consolidation, Marshall's sixth "A Friend of the Constitution" essay revisited the founding and the claim that *McCulloch's* major principles effectively made the government of the United States a consolidated government.

Pretending to be a distant spectator to the oral arguments in *McCulloch*, Marshall once again affirmed his theory of the creation:

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<sup>68</sup>"A Friend of the Constitution I," Gunther, *John Marshall's Defense of McCulloch v. Maryland*, 155-61, 155.

<sup>69</sup>"Hampden Essay IV," Gunther, *John Marshall's Defense of McCulloch v. Maryland*, 138-154, 140.

<sup>70</sup>*Ibid*, 141.

The counsel for the state of Maryland, we are told, contended that the constitution was the act of sovereign states, as contradistinguished from the people. In opposition to this proposition, the court maintained that the constitution is not the act of the state governments, but of the people of the states. In the course of this argument, the term—*the people*—without any annexation, is frequently used; but never in a sense excluding the idea that the people were divided into distinct societies, or indicating the non-existence of the states.<sup>71</sup>

Marshall's eighth "A Friend of the Constitution" essay revisited the founding for the last time and identified a significant point of departure from Madison's formulation of the founding, namely, Marshall's clear rejection of the principle that the Constitution was a "compact" or even a "compact" between the *people* of the several states. In his *Minority Report*, Marshall largely avoided any discussion of the founding. Marshall referred to the Constitution as a "compact," but only once and only in passing reference to the *people's* ability to amend the Constitution. In his eighth "A Friend of the Constitution" essay, however, written by Marshall to rebut Hampden's rather ineffective argument that the Supreme Court lacked jurisdiction to decide *McCulloch*, Marshall identified the source of Hampden's faulty analysis as proceeding from a "the fundamental error" in Hampden's understanding of the Constitution, which Hampden suggested was an "alliance" or a "league," similar to the Articles of Confederation. Marshall mocked this "unaccountable delusion" as well as his reliance on quotations from Vattel's *Law of Nations*, which described the use of a foreign nation as a neutral umpire in disputes between the government of a union and its member states. Marshall flatly rejected any notion that the

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<sup>71</sup>"A Friend of the Constitution Essay VI," Gunther, *John Marshall's Defense of McCulloch v. Maryland*, 191-96, 194.

general concepts derived from the law of nations applied to disputes between the federal government and the states under the Constitution.<sup>72</sup> Marshall schooled Hampden:

[T]he constitution of the United States is not an alliance, or a league, between independent sovereigns; nor a compact between the government of the union, and those of the states; but is itself a government, created for the nation by the whole American people, acting by convention assembled in and for their respective states. . . . A league is formed by the sovereigns who become members of it; our constitution is formed by the people themselves, who have adopted it without employing, in that act, the agency of the state legislatures.<sup>73</sup>

What did Marshall mean by the “whole American people.” While he consistently rejected the notion that the Constitution was a compact between the state governments, was the Constitution, according to Marshall, a compact between the people of the several states? Apparently not, Marshall continued:

A contract is an agreement on sufficient consideration to do or not do a particular thing. There must be parties. These parties must make an agreement, and something must proceed to and from each. Our constitution is not a compact. It is the act of a single party. It is the act of the people of the United States, assembling in their respective states, and adopting a government for the whole nation.<sup>74</sup>

How do we reconcile Marshall’s comments unequivocally rejecting a constitutional compact with his previous comments where he appeared to have adopted Madison’s formulation that the Constitution was the creation of the *people* of the several states? And why did Marshall now define the Constitution as an act of a *single* party and not the action of thirteen parties, each party being the sovereign *people* of a state as he implied time and

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<sup>72</sup>“A Friend of the Constitution VIII,” Gunther, *John Marshall’s Defense of McCulloch v. Maryland*, 200-207. Spencer Roane argued that because the Constitution was a compact between, on the one hand, the federal government and, on the other hand, the state governments, and because the Supreme Court was a part of the federal government, it would be inappropriate for the Supreme Court to decide a dispute between the two parties to the compact. Only a neutral arbiter would suffice.

<sup>73</sup>Ibid, 202.

<sup>74</sup>Ibid, 203.

time again in his earlier essays? Recall that in his response to Amphyctyon, Marshall unequivocally endorsed, by quoting verbatim from Madison's *Report of 1800*:

The report continues: "Whatever different constructions of the term 'states' in the resolution may have been entertained, all will at least concur in that last mentioned" (the people composing those political societies in their highest sovereign capacity) "because," the report proceeds, "in that sense the constitution was submitted to the 'states.' In that sense the states ratified it; and in that sense they are consequently parties to the compact from which the powers of the federal government result."<sup>75</sup>

Similar to scholars' claims of two Madisons, were there two Marshalls?

Law professor Martin Flaherty, who analyzed all of Marshall's writings on the topic, attempted to reconcile them:

All things considered, the most plausible reconciliation must be that Marshall means no more than his repeated assertions that no compact exists among the various governments, state and national. The Constitution is in no way a *governmental* compact. More daringly, it is the act of a single party when considering governments as the only potential candidates for entering the contract. From this governmental perspective, neither those parties, nor the resulting contract, exists. What does exist is the single party of the American people. But from the perspective not of governments, but of founding sovereigns, what was the single party, the people of the United States, becomes a different sort of party, better understood as multiple: the people of the different states meeting in convention expressing the highest sovereignty of those states.<sup>76</sup>

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<sup>75</sup>"A Friend to the Union Essay I," 87-88.

<sup>76</sup>Flaherty, "John Marshall, *McCulloch v. Maryland*, and 'We the People'," 1378-79. Flaherty was the first scholar I found who fully identified the nuance in Marshall's writings on the topic. Flaherty concluded that previous scholars unduly relied on the Marshall's "It is the act of a single party" statement, and when combined with his consistent characterization of the Constitution as not being a "compact," these sentiments appeared to explain the ideological underpinnings of Marshall's *nationalist* opinions during this era. Previous scholars largely ignored the vast number of statements made by Marshall in which he adopts the Madisonian formulation and, thus, they never attempted to reconcile it. See Flaherty, "John Marshall, *McCulloch v. Maryland*, and 'We the People'," especially 1370-1379.

As Flaherty fairly concluded, “the choice then becomes to privilege a single sentence over page upon page of clear and close analysis.”<sup>77</sup>

Previous scholars and Justice Kennedy, for example, largely reconciled the conflicting statements by largely ignoring Marshall’s consistent adoption of Madison’s theory of the founding, or strained to interpret Marshall theory as meaning something completely different. Despite the absence of any meaningful discussion of Madison’s compact theory of the Constitution contained in the *Minority Report*, Lash and Harrison concluded that “[b]oth the *Minority Report* and the later opinions of Chief Justice Marshall declare that the Constitution originated from a single people.”<sup>78</sup> Implicit in this conclusion is that Marshall also rejected any compact theory of the Constitution, whether a compact between the state governments, a compact between the *people* of the several states, or a compact between the state and federal governments. A fair reading of the *Minority Report* suggests otherwise.<sup>79</sup>

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<sup>77</sup>Ibid, 1379.

<sup>78</sup>Lash and Harrison, “*Minority Report*,” 497.

<sup>79</sup>Lash and Harrison’s judgment regarding the *Minority Report* likely was prejudiced by recent scholarly treatment of Marshall’s opinions as Chief Justice, which have often been characterized as evidencing Marshall’s theory that a single American people created the Constitution, and his rejection of a compact theory of the Constitution. See, for example, Leonard Baker, *John Marshall: A Life in Law* (New York: Macmillan Publishing Company, Inc., 1974), 594; Henry Monaghan, “We the People[s], Original Understanding, and Constitutional Amendment,” 96 *Columbia Law Review* 121 (1996), 135, n.85; Newmyer, “John Marshall, *McCulloch v. Maryland*, and the Southern Rights Tradition,” 33 *John Marshall Law Review* 875 (2000), 897. For the view that Marshall rejected a compact theory of the Constitution but believed the Constitution was created by the *people* of the several states, see G. Edward White, *The Marshall Court & Cultural Change*, esp. 485-594. For the view that Marshall believed that the *people* of the several states created the Constitution and was ambivalent with compact theory, see Flaherty, “John Marshall, *McCulloch v. Maryland* and ‘We the People,’” 1362-1388; and Gunther, *John Marshall’s Defense of McCulloch v. Maryland*. In fact, as I argue, the fairest reading of Marshall’s views of the nature and origin of the Union align with the views expressed by Madison in his *Report of 1800* and during the Nullification Crisis: the Constitution was formed by the *people* of the

The most glaring example of a strained interpretation was the “geographical necessity” argument put forth by Marshall biographer Leonard Baker. Baker concluded Marshall’s numerous acknowledgements of the state ratification conventions “was explained by Marshall as a fact of *geographical necessity*.” Kent Newmyer adopted this explanation, concluding that ratification in state conventions was the “only practical and convenient way to proceed, since the American people could not ratify *en masse*. Law professor Christopher Eisgruber even went so far as to characterize the ratifying conventions as having the following practical meaning:

The Constitution was, according to Marshall, neither an agreement among the states nor an agreement among the peoples of the several states. Instead, it was the American people who voted to ratify the Constitution once in Delaware, and then again in Pennsylvania, in New Jersey, and so on. The multiple ratifications acquired importance not as signs of agreement among separate bodies, but as evidence that the Constitution was indeed “the authoritative language” of a single body, “the American people.”<sup>80</sup>

Presumably, Eisgruber was unaware of Marshall’s rejection of such a formulation in his first “A Friend to the Union” essay, in which he again denied that the Court’s formulation suggested that the *people* were acting as one “single mass completely separated from state boundaries”:

Who has ever said that the convention of Pennsylvania represented the people of any other state, or decided for any other state, than itself? Who has ever been so absurd as to deny that “the individuality of the several states

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several states, not the state governments, and not one great American “people.” As I also argue, while Marshall referred to the Constitution as a “compact” in the *Minority Report*, he subsequently steered away from such conclusions in his “nationalist” decisions such as *McCulloch*, which, I believe, were likely the result of his fear that certain legal and constitutional remedies might be implied by the application of legal rules of interpretation generally applicable to compacts, contracts and treaties.

<sup>80</sup>Baker, *John Marshall*, 594; Newmyer, “John Marshall, *McCulloch v. Maryland*, and the Souther States’ Rights Tradition,” 897; Christopher L. Eisgruber, “The Fourteenth Amendment’s Constitution,” 69 *Southern California Law Review*, No. 1 (November 1995): 47-104, 67.

was still kept up?" Not the Supreme Court certainly. Such opinions may be imputed to the judges, by those who, finding nothing to censure in what is actually said, and being determined to censure, create odious phantoms which may be very proper objects of detestation, but which bear no resemblance to any thing that had proceeded from the court.<sup>81</sup>

Eisgruber also claimed Marshall's theory of the founding was an "entirely different view of the ratification process from Madison's, as set forth in *Federalist No. 39*. There, Madison described the Constitution as being ratified "by the people, not as individuals composing one entire nation, but as composing the distinct and independent States to which they respectively belong." In fact, Marshall described Madison's *Federalist No. 39* in his sixth "A Friend to the Constitution" essay as "a work now acknowledged by all to be a clear and a just exposition of the constitution."<sup>82</sup>

While not endorsing geographic *necessity*, Justice Kennedy adopted a "geographic convenience" argument when he opined that it was "well settled that the whole people of the United States asserted their political identity and unity of purpose when they created the federal system," by quoting Marshall's proposition in *McCulloch* that:

The Convention which framed the constitution was indeed elected by the State legislatures. But the instrument . . . was submitted to the people. . . . It is true, they assembled in their several States—and where else should they have assembled? No political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass. Of consequence, when they act, they act in their States. But the measures they adopt do not, on that account, cease to be the measures of the people themselves, or become the measures of the State governments.<sup>83</sup>

Putting aside whether or not Marshall was only arguing geographic *necessity* or *convenience* when acknowledging the existence of the state ratifying conventions, the

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<sup>81</sup>"A Friend to the Union Essay I," 89.

<sup>82</sup>Eisgruber, "The Fourteenth Amendment's Constitution," 67, *n48*; "A Friend to the Constitution Essay VI," 194.

<sup>83</sup>*U.S. Term Limits v. Thornton*, 514 U.S. 779, 840 (Kennedy, J concurring).

argument is preposterous. State legislatures elected delegates to attend the Philadelphia convention. Under the Constitution constructed in Philadelphia, state legislatures and the *people* would be electing, respectively, representatives to the Senate and House of Representatives who would travel to the nation's capital on an annual basis. To somehow suggest that a meeting of delegates chosen by the *people* of the respective states could not have reconvened in Philadelphia to ratify, *en masse*, the Constitution because it was geographically impossible or challenging simply defies the history of the period. Various delegations from the colonies (and then the states) routinely convened at great inconvenience to take up the important work of the country. Such was the solemn nature of the work of a representative republic.

While a verdict on Marshall's theory of the constitutional founding based on a reading of the *Minority Report, McCulloch* and the essays written in defense thereof cannot be definitive, the evidence clearly favors the conclusion Marshall accepted Madison's formulation that the Constitution had been ratified by the *people* of the respective states.<sup>84</sup> What unduly undermines this conclusion was Marshall's clear rejection of the claim that the Constitution was a "compact." Well versed in international law, the laws of nations and general rules of construction, Marshall knew that if the Constitution was viewed as being a "compact" between thirteen sovereign *peoples*, the same rights and remedies that Jefferson had ascribed to the state governments could be ascribed to the individual *people* of the several states. In other words, if Madison had applied Jefferson's rules of interpretation to the constitutional compact, a breach by the *people* of Massachusetts and the other New

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<sup>84</sup>Lash and Harrison, "Minority Report," 497, citing the *Minority Report*, 6 and *McCulloch v. Maryland*, 17 U.S. 316, 405; Newmyer, *John Marshall and the Heroic Age of the Supreme Court*, 295-96.

England states, would entitle the *people* Kentucky and the *people* of Virginia to ignore the law in their own respective jurisdictions, thereby nullifying it. Furthermore, if breaches of the constitutional compact continued and were sufficiently egregious, the *people* Kentucky and the *people* of Virginia could terminate the compact and walk away. The fear of that “natural” interpretation, I submit, was the reason Marshall chose to pick up the “ideological gauntlet” of states’ rights in *McCulloch* and why he verbally battled so vociferously with Brockenbrough and Roane in his two sets of essays. Marshall goes to great lengths to characterize the Constitution as an “instrument” but never in terms that might call for the application of principles of interpretation that are commonly applied to a contract or treaty. In this respect, despite the different use of language, he was a kindred spirit with Madison.

Recall that in his *Report of 1800*, Madison stressed the differences between a “constitutional compact” and a more general compact or treaty between nations:

Even in the case of ordinary conventions between different nations, where, by the strict rule of interpretation, a breach of a part may be deemed a breach of the whole, every part being deemed a condition of every other part and of the whole, it is always laid down that the breach must be both willful and material to justify an application of the rule. But in the case of an intimate and constitutional union, like that of the United States, it is evident that the interposition of the parties, in their sovereign capacity, can be called for by occasions only, deeply and essentially affecting the vital principles of their political system.<sup>85</sup>

Madison clearly rejected applying strict rules of interpretation and construction typically applied to contracts or treaties. Remember also, the conditions Madison imposed as prerequisites for the *people’s* invocation of the right of interposition: the “occasion” must not only be one “deeply and essentially affecting the vital principles of their political

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<sup>85</sup>Ibid.

system” but also be one arising from the federal government’s “deliberate, palpable and dangerous exercise” of power not delegated to it and of a nature “*dangerous* to the great purposes for which the Constitution was established.”<sup>86</sup> Marshall solved the problem posed by a Jeffersonian formulation of the constitutional compact by denying that a compact existed between the *people* of the several states; Madison solved the same problem by composing a series of imposing preconditions to any exercise of remedies outside the four corners of constitutional compact. Madison never suggested that a breach of the constitutional compact entitled any one of the thirteen distinct *peoples* to simply walk away from the agreement. That is what the South Carolina nullifiers would argue.

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<sup>86</sup>*Report of 1800.*

## 8      ANDREW JACKSON CONFRONTS THE PRINCIPLES OF '98

On December 3, 1828, the members of the Electoral College met to cast their votes in the country's eleventh presidential election. The national politics of the country appeared to have changed very little since Thomas Jefferson's election in 1800. The incumbent president, John Quincy Adams, won the same states—Delaware, New Jersey and the New England states—his father, President John Adams, had won in his failed reelection campaign in 1800. The younger Adams added the electoral votes of Maryland to his side of the ledger but it was not enough, as Andrew Jackson garnered the remaining electoral votes from the remaining nineteen states of the Union. Jackson's overwhelming victory must have been sweet vindication for the president-elect after winning a plurality of the electoral votes in the presidential election of 1824 only to see the House of Representatives hand the presidency to John Quincy Adams.

Even before Jackson took the oath of office, however, events were taking place in South Carolina that ultimately would result in a tumultuous multi-year debate over the nature of the Union and the respective power and authority of the federal government, the states and the *people*. On December 19, 1828, the South Carolina legislature met in Columbia to consider a formal response to the Tariff of 1828, which Congress passed in May of that year. The Tariff of 1828 was principally designed to protect manufacturers in the North from having to compete with lower priced imports from Great Britain, but the tariff also had deleterious effects on the South. Not only did Southerners pay more for certain imported goods, but the tariff effectively reduced the level of imports from Great Britain, which adversely affected Britain's ability to purchase cotton produced in the South.

In advance of the coming legislature session, in November of 1828, William Campbell Preston asked John C. Calhoun, sitting Vice President of the United States under Adams, and soon to be Vice President under Andrew Jackson, to draft an analysis of the constitutionality of the tariff for the benefit of the legislators who would be meeting in Columbia the following month. Calhoun agreed so long as his authorship would remain secret. The South Carolina legislature did not formally adopt the long essay on the nature of the Union, including its conclusion that the protective tariff was unconstitutional, but the legislature clearly endorsed its findings when it authorized the publication and distribution of 4,000 copies.<sup>1</sup>

Calhoun's essay, which soon became known as the *South Carolina Exposition*,<sup>2</sup> and the subsequent public debate over the constitutionality of the tariff, raised many of the same constitutional issues unresolved since the adoption of the Virginia and Kentucky Resolutions. Much of Calhoun's analysis of the allocation of governmental sovereignty between the federal and state governments, the nature of the compact between the states, and the right of the state legislatures and *people* to judge the actions of the federal government, was familiar to anyone knowledgeable of the constitutional arguments that had swirled around the passage of the Alien and Sedition Acts and the events leading to the Hartford Convention. The remedy proposed by Calhoun, the single state veto, however, appeared to be truly radical. Calhoun's *Exposition* argued that not only could a single state such as South Carolina nullify a federal law deemed unconstitutional and prevent its

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<sup>1</sup>Freehling, *Prelude to Civil War*, 158, 167-68.

<sup>2</sup>"Rough Draft of What is Called the South Carolina Exposition," John C. Calhoun, *Union and Liberty: The Political Philosophy of John C. Calhoun*, ed. Ross M. Lence (Indianapolis: Liberty Fund, 1992), [http://oll.libertyfund.org/titles/683#lf0007\\_head\\_007](http://oll.libertyfund.org/titles/683#lf0007_head_007) (hereinafter referred to as the "*Exposition*" or "*Calhoun's Exposition*").

enforcement within the state, but also implied that such nullification applied nationwide. Recall that Jefferson's *Draft and Fair Copy* described state nullification as a remedy that would permit a single state to prevent the enforcement of an unconstitutional law within its respective territory.<sup>3</sup> Calhoun was going a step further. Not only would nullification of the tariff authorize state officials from preventing the collection of duties within the state of South Carolina, but other states, without taking any formal governmental or constitutional action on their own, could *constitutionally* prevent enforcement of the tariff within their territories. Why Calhoun ventured beyond the better-known theory of state nullification is unclear. Prior to 1828, Calhoun largely had been identified as a Southern nationalist due to his support of a national bank, the tariff of 1816 and internal improvements, not to mention being vice president for the prior four years under John Quincy Adams. In a private letter written in August of 1827, however, Calhoun clearly possessed deep anxiety and concern with the relative power of the South and the apparent ability of the federal Congress to increase tariff rates for the benefit of one part of the nation at the expense of another:

It is indeed a portentous sign of the times, and must be followed with the most marked consequences. To the reflecting mind, it clearly indicates the weak part of our system, and the corruption to which it must lead, unless speedily corrected. The part least guarded, requires the strongest guards. The freedom of debate, the freedom of the press, the division of power into the three branches, with responsibility, afford, in the main, efficient security to the constituents against rulers, but in an extensive country with diversified and opposing interests, another and not less important remedy is required, the protection of one portion of the people against another.<sup>4</sup>

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<sup>3</sup>Jefferson's *Draft and Fair Copy*, 8<sup>th</sup> resolution.

<sup>4</sup>John C. Calhoun to Littleton Waller Tazewell, August 25, 1827, copy of letter from John C. Calhoun Collection, Manuscript Division, Library of Congress, <http://civilwarcause.com/calhoun/caltaz1.html>. See also Clyde N. Willson and W. Edwin Hemphill, eds., *The Papers of John C. Calhoun: 1825-1829* (Columbia: University of South Carolina Press, 1977), Vol. 10, 301.

What “remedy” Calhoun had in mind took shape in response to his real fear of the growing influence of “combinations,” i.e., political and business coalitions that could unduly influence the federal government on particular issues. The formation of “despotic combinations” would “end in despotism, as complete, as that of a single, and irresponsible ruler,” and would, in time, “become so firmly established, as to supersede virtually the forms of the Constitution itself.” “After much reflection,” he continued, “the despotism founded on combined geographical interest, admits of but one effectual remedy, a veto on the part of the local interest, or under our system, on the part of the States.”<sup>5</sup>

By the fall of the following year, Calhoun was able to quickly respond to Preston’s request with his draft. Similar to Jefferson’s lament when he delivered his *Fair Copy* to the state of Kentucky, Calhoun claimed that his draft *Exposition* had been written “in great haste, and under perpetual interruption,” but like Jefferson, it also was clear that Calhoun had devoted much thought in the previous months to the issue.<sup>6</sup> Calhoun’s *Exposition* directly attacked the constitutionality of a protective tariff based on the contention that Congress’ taxing power under Article I of the Constitution only authorized tariffs solely for the purpose of raising the revenue necessary to replenish the federal treasury. Applying

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<sup>5</sup>Calhoun to Tazewell, August 25, 1827. Similar to Spencer Roane in his “Hampden” essays, Calhoun identified Section 25 of the Judiciary Act of 1789, which granted federal courts appellate jurisdiction over state court determinations as to the meaning of the Constitution, as the greatest legal impediment to effectuating such a remedy. Without Section 25, Calhoun believed, the federal government would have no effective legal recourse to stop a state veto. In his letter to Tazewell, he solicited Tazewell’s opinion as to argument that Section 25 of the Judiciary Act was unconstitutional. *Ibid.*

<sup>6</sup>“Calhoun’s *Exposition*,” Freehling, *Prelude to Civil War*, 158-59. The *Exposition* and the “Protest” were separate documents although often referred to as if they were one. Calhoun’s *Exposition* was slightly modified by the House of Representatives, which combined the modified draft with the “Protest” resolutions adopted by the House, for publishing and distribution to the masses. Lacy K. Ford, *The Origins of Southern Radicalism: The South Carolina Upcountry, 1800-1860* (New York: Oxford University Press, 1991), 135, n. 95.

this standard, the Tariff of 1828 was not authorized under Article I because it imposed “protective or prohibitory duties” that had the effect of “rearing up one industry of one section of the country on the ruins of another.”<sup>7</sup>

After a lengthy indictment of the tariff and its negative effects on South Carolina and the South, Calhoun set forth his theory regarding the origins and meaning of the Constitution. He acknowledged that the powers expressly delegated to the federal government were within the federal government’s “sole and separate control, and the states could not, without violating the constitutional compact, “interpose their authority to check, or in any manner to counteract its movements, so long as they are confined to the proper sphere.” Likewise, with respect to the “peculiar and local powers reserved to the States,” the federal government could not interfere without violating the Constitution. For Calhoun, the federal government had skillfully adopted measures to prevent the states from encroaching on the authority of the federal government with the enactment of Section 25 of the Judiciary Act of 1789, which gave the Supreme Court the power to effectively nullify acts of state legislatures if the Court deemed such action in conflict with the Constitution, the laws of the United States, or with treaties entered into by the federal government.<sup>8</sup> This granting of appellate jurisdiction, according to Calhoun, contributed to

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<sup>7</sup>Calhoun’s *Exposition*.

<sup>8</sup>Ibid. Section 25 provides, in relevant part, that “a final judgment or decree in any suit, in the highest court of law or equity of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favour of such their validity, or where is drawn in question the construction of any clause of the constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed by either party, under such clause of the said

“a strange misconception of the nature of our system” among the members of the Supreme Court and other federal judges, leading the federal judges to act as if they not only had the power to judge attempted encroachments of the states on the expressed powers of the federal government but also the power to decide the constitutionality of encroachments by the federal government on the reserved power of the states. Granting the federal judiciary such a right, Calhoun continued, mistakenly placed the authority of the federal judiciary above the parties who created the constitutional compact, divesting “the people of the States of the sovereign authority, and clothe that department with the robe of supreme power.”<sup>9</sup>

To buttress his contention that such a theory could not be more “false and fatal,” Calhoun cited Madison’s discussion of judicial supremacy in his *Report of 1800*. While Madison clearly recognized the duty of the Supreme Court to interpret the Constitution during the course of deciding particular cases and that it might be the last word vis-à-vis the executive and legislative branches of the federal government, the Court could not supersede the ultimate right of the *people* of the several states, the parties to the constitutional compact, to interpret the Constitution. For Madison, there was no tribunal higher than the *people* of the several states, when acting in their highest sovereign capacity, and it is the *people* who must “themselves decide, in the last resort, such questions as may be sufficient magnitude to require their interposition.” As additional support, Calhoun

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Constitution, treaty, statute or commission, may be re-examined and reversed or affirmed in the Supreme Court of the United States. “The Judiciary Act of 1789,” September 24, 1789, [http://www.constitution.org/uslaw/judiciary\\_1789.htm](http://www.constitution.org/uslaw/judiciary_1789.htm).

<sup>9</sup>Ibid.

made specific references to similar thoughts expressed by Thomas Jefferson in his *Fair Copy* and other specific passages from the Virginia and Kentucky Resolutions.<sup>10</sup>

As to how a state may exercise the “high purpose” of interposition, interestingly, Calhoun adopted Madison’s theory that a state legislature did not have the power to exercise the ultimate right of interposition—a veto or nullification of the offending act—on its own authority and endorsed the necessity of a formal convention of the *people*, which would decide whether the actions of the federal government constituted a violation “so deliberate, palpable, and dangerous, as to justify the interposition of the State to protect its rights”:

[T]he checking or veto power never has, in any country, or under any institutions, been lodged where it was less liable to abuse. The great number, by whom it must be exercised, of the people of a State—the solemnity of the mode—a Convention specially called for the purpose, and representing the State in her highest capacity—the delay—the deliberation—are all calculated to allay excitement—to impress on the people a deep and solemn tone, highly favorable to calm investigation and decision. Under such circumstances, it would be impossible for a mere party to maintain itself in the State, unless the violation of its rights be palpable, deliberate, and dangerous. The attitude in which the State would be placed in relation to the other States—the force of public opinion which would be brought to bear on her—the deep reverence for the General Government—the strong influence of all public men who aspire to office or distinction in the Union—and, above all, the local parties which must ever exist in the State, and which, in this case, must ever throw the powerful influence of the minority on the side of the General Government—constitute impediments to the exercise of this high protective right of the State, which must render it safe. So powerful, in fact, are these difficulties, that nothing but truth and a deep sense of oppression on the part of the people of the State, will ever sustain the exercise of the power—and if it should be attempted under other circumstances, it must speedily terminate in the expulsion of those in power, to be replaced by others who would make a merit of closing the controversy, by yielding the point in dispute.<sup>11</sup>

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<sup>10</sup>Ibid.

<sup>11</sup>Ibid.

On its face, Calhoun's *Exposition* was a reasonable synthesis of the main points of Madison's Virginia Resolutions with Jefferson's Kentucky Resolutions. It had combined Madison's need for the *people* of a state to meet in convention in order to exercise the ultimate right of sovereignty under the constitutional compact with Jefferson's contention that a single state, as one of the parties to the constitutional compact, could nullify a federal law. Calhoun obviously rejected the notion that the veto, the highest form of interposition, required the approval of the *people* from a majority of the states or the approval of states representing a majority of the *people*. At this point, South Carolina perceived itself as the most aggrieved member of the Union and it was less than pleased with the actions of the majority. Calhoun acknowledged that the tariff was supported by a majority of the country but "[n]o government based on the naked principle, that the majority ought to govern . . . ever preserved its liberty, even for a single generation." "Only those governments," Calhoun lectured, "which provide checks, which limit and restrain with proper bounds the power of the majority, have had a prolonged existence, and been distinguished for virtue, power and happiness." Rather than simply rest on the precedent of Madison's and Jefferson's Virginia and Kentucky Resolutions, and despite America's growing affinity with democracy and elements of majority rule, Calhoun claimed that the fundamental purpose of a constitution was to "impose limitations and checks upon the majority." "Constitutional government," he claimed, "and the government of the majority, are utterly incompatible" without such checks. Thus, for Calhoun, the actions of a majority of the *people* of a single state should be sufficient to veto an unconstitutional action of the federal government.<sup>12</sup>

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<sup>12</sup>Ibid.

The nation had little to fear from this constitutional remedy of the sovereign, Calhoun reasoned in his closing paragraphs, for in addition to the sobering effect that general reverence for the federal government and the force of public opinion would have on the *people* of a state who are considering exercising their highest remedy of sovereignty, the Constitution provided its own check on the actions of the *people*. If three-fourths of the states disagreed with a particular state veto, they could collectively amend the Constitution under Article V and make constitutional that which was heretofore unconstitutional.<sup>13</sup>

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Historian Richard E. Ellis, in his book-length study of Jacksonian politics and the Nullification Crisis, correctly chose to “de-emphasize” the constitutional issues surrounding the crisis as a “struggle between the advocates of nationalism and of states’ rights,” and instead chose to focus on the more significant debate “between those advocates of *states’ rights* who believed in a perpetual Union and decentralization of power as the best way to fulfill the democratic promise of the American Revolution . . . and those who advocated that a state had a constitutional right to withdraw from the Union and believed the doctrine of *states’ rights* provided the best way to protect the rights of the minority from the tyranny of the majority.” While Ellis’s emphasis on the differences between “states’ rights” advocates was unique, his assessment of the Virginia and Kentucky Resolutions, and on Madison and Jefferson’s respective compact theories of the Constitution, was not. Thus, the Virginia and Kentucky Resolutions, though “loosely conceived,” reflected Madison and Jefferson’s adoption of “an extreme states’ rights position” and “added new elements to the states’

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<sup>13</sup>Ibid.

rights argument” to which not even the Antifederalists of the 1790s would have ascribed, namely, that the Union was not necessarily perpetual.<sup>14</sup>

While Ellis never articulated the actual principles espoused by Madison and Jefferson in response to the Alien and Sedition Act and, therefore, failed to identify a single difference between their two distinct theories of the Constitution, he was skillful in identifying two distinct camps of Republican states’ rights constitutionalism that evolved during the 1820s, both of which claimed the Virginia and Kentucky Resolutions as their inspiration. The first, the “Old Republicans,” descended from the Anti-Federalists, were the earliest proponents of states’ rights. While subscribing to a compact theory of the Constitution, they rejected nullification or secession as a proper *constitutional* remedy and interpreted the divided sovereignty under the Constitution as granting the federal government supreme authority over those areas specifically delegated to it. They did, however, acknowledge that the *people* always retained the revolutionary right to throw off the yoke of oppression if “the evil suffered is extreme and palpable, and indeed, more intolerable and dangerous than the dissolution of the Government itself.”<sup>15</sup> Among proponents of this classic strain of states’ rights, Ellis counted none other than Andrew Jackson, Thomas Ritchie, the influential editor of the Richmond *Inquirer*, and most importantly, James Madison. Ellis claimed this “Old Republican” interpretation of the Principles of ‘98 was “grounded in the same majoritarian sentiment that had made the

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<sup>14</sup> Ellis, *The Union at Risk*, ix., 4-5 and 9.

<sup>15</sup>“Speech of Mr. Woodbury, of New Hampshire [February 23, 1830],” in *Speech . . . in the Senate . . . Feb. 23, 1830, on Mr. Foot’s resolution, proposing an inquiry into the expediency of abolishing the office of Surveyor General of Public Lands, etc.*, <http://play.google.com/books/reader?id=XSFcAAAACAAJ&printsec=frontcover&output=reader&hl=en&pg=GBS.PP1>.

Antifederalist persuasion attractive to so many advocates.”<sup>16</sup> Ellis’s recounting of the “Old Republican” states’ rights theory ignored Madison’s contention that the *people* representing a majority of the states, or a sufficient number of states representing a majority of the *people*, could, outside the amendment process of the Article V, *constitutionally* negate an unconstitutional action of the federal government. Likewise, Ellis did not highlight Breckinridge’s changes to Jefferson’s *Fair Copy*, the legislative history to the *Kentucky Resolutions of 1798* or the right of nullification set forth in the *Kentucky Resolutions of 1799*, which required the agreement of a majority of the state legislatures before a federal law could be nullified under the Constitution.

A second strain of states’ rights theory, not majoritarian in nature, also explicitly invoked the Virginia and Kentucky Resolutions as a device to protect political minorities. This second strain advocated the *constitutional* right of a single state to nullify an act of Congress not authorized under the Constitution and the *constitutional* right (as opposed to the *people’s* right of revolution) to secede from the Union if the breach of the federal Constitution was sufficiently deliberate and palpable. This second, more destructive, strain, Ellis argued, traced its direct lineage from the Virginia and Kentucky Resolutions because Madison and Jefferson formulated:

their states’ rights position in terms of a legal procedure or “rightful remedy” by which the states could “interpose” or “nullify” an act of Congress, and by formulating the compact theory of the Constitution in such a way that it could be used (as it eventually was by a later generation) to argue the unqualified sovereignty of the states and their right to withdraw from the Union.<sup>17</sup>

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<sup>16</sup>Ellis, *The Union at Risk*, 4.

<sup>17</sup>*Ibid*, 4-5.

Counted among advocates of this theory of the nature of the Union were the New England Federalists during the War of 1812 and, of course, the South Carolina nullifiers. Thus, according to Ellis, the Federalist embrace of the Principles of '98 preceding and during the War of 1812 did not reflect a legitimate interpretation of the constitutional compact in response to overreach by the federal government but a temporary tool to "thwart rather than fulfill the idea of majority rule."<sup>18</sup> Likewise, Calhoun's embrace of the Resolves, and his unique theory of nullification in his *Exposition*, was in service of an attempt to avoid "political annihilation" at home and craft a theory of the Constitution that would "protect the rights of a minority from the tyranny of a numerical majority."<sup>19</sup>

In addition to these competing notions of states' rights theory, Ellis identified a third major theory of the constitutional founding that took hold during the 1820s and 1830s, and which bore no relation to the Virginia and Kentucky Resolutions. This was the *nationalist* theory of the Union, best articulated by Joseph Story and Daniel Webster. The nationalists rejected the compact theory of the Constitution and claimed that one great *people* of the United States, acting *en masse*, created the Constitution. Typical among recent scholars, John Marshall was erroneously included in this group, although his theory equally empowered the federal government. Nationalists consistently rejected any notion of the *people's* right or the right of a state legislature to nullify or veto actions of the federal government, and rejected the *constitutional* right of a state to secede from the Union without consent. In addition, the ultimate interpreter of the meaning of the Constitution was a role specifically reserved for the Supreme Court and the lower federal courts; there

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<sup>18</sup>Ibid.

<sup>19</sup>Ellis, *The Union at Risk*, 8-9; see also Peterson, *Jefferson Image*, 51-59.

was simply no meaningful role for the *people* or the states in constitutional interpretation. If the *people* or the state legislatures had difficulty with the actions of the federal government, they could appeal to the political process or to the courts, or amend the Constitution under Article V.<sup>20</sup>

As with the divisiveness during the Sedition Act crisis and the War of 1812, the controversy over the protective tariff was not limited to South Carolina. Other southern states, such as Georgia, Virginia, North Carolina and Alabama, expressed dissatisfaction and concern with the federal government's actions. In Virginia, citizens of Orange County, Virginia assembled within five miles of Madison's Montpelier plantation and declared the tariff as unconstitutional.<sup>21</sup> Even before the increase in duties in 1828, Virginia, Georgia, North Carolina and Alabama lodged protests with the federal government. Virginia's legislature, explicitly reaffirming its belief in the *Virginia Resolutions of 1798* and the *Report of 1800*, passed resolutions protesting the imposition of "additional duties on foreign articles, for the promotion of American manufactures" as an "unconstitutional exercise of power."<sup>22</sup> Georgia's legislature, as "the guardian of the rights of the people from the encroachments of the General Government, offered its opinion that an increase in the tariff duties "will and ought to be RESISTED by all legal and constitutional means, so as to avert the crying injustice of such an unconstitutional measure." The North Carolina legislature issued a report stating that while Congress had the right to "lay imposts . . . for the purpose of revenue, . . . that any other use of the power is usurpation on the part of Congress."

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<sup>20</sup>Curiously, Ellis fails to note Webster's advocacy of states' rights during the War of 1812. See Chapter 6.

<sup>21</sup>Fritz, *American Sovereigns*, 218-19.

<sup>22</sup>"Resolutions of Virginia, March 6, 1827," in Ames, *State Documents on Federal Relations*, 142.

Possibly alluding to its silence during the Alien and Sedition Act controversy, the North Carolina legislature noted that it “seldom expressed a legislative opinion upon the measures of the General Government,” but in this instance the tariff system put in place by the federal government struck “at the very foundation of the Union” and was “fatal to the happiness, the morals, and the rights, of a large portion of common country.” Alabama followed with its own protestation against the “allied powers of avarice, monopoly and ambition” and considered the latest increase in tariff duties as “a species of oppression little less than legalized pillage on the property of her citizens . . . until the constitutional means of resistance shall be exhausted.”<sup>23</sup>

Despite the repeating harangue in the South over the disproportionate burdens suffered under the tariff, the end of decade saw no relief for its critics. With Andrew Jackson’s election in 1828, Southern states suffering under the protective tariff prayed that the executive branch would reestablish a commitment to states’ rights and a halt in the growth in the power of the federal government. Old Hickory’s election, it was hoped, would usher in a complete rejection of the policies of John Quincy Adams and the National Republicans that had become known as the “American System”—the Second National Bank, protective tariffs, and never-ending internal improvements. But national politics during the 1820s had produced a complicated amalgamation of Northern, Western, and Southern sectional interests within Jackson’s Democratic Party, and within the country at large. No single event or individual epitomized the fluid and unpredictable nature of the political

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<sup>23</sup>“Extract from the Report of Georgia on the Tariff and Internal Improvements, December 24, 1827,” in Ames, *State Documents on Federal Relations*, 146-47; “Extract from Report of North Carolina on the Tariff, January 28, 1830,” in Ames, *State Documents on Federal Relations*, 148-49; “Remonstrance of Alabama, January 15, 1828,” in Ames, *State Documents on Federal Relations*, 150.

situation of the late 1820s and early 1830s more than Jackson's vice president, John C. Calhoun. Calhoun had served as vice president under John Quincy Adams, who had assumed the presidency with the aid of the "Corrupt Bargain" after garnering only 31% of the popular vote. Jackson, the alleged victim of the "Corrupt Bargain," achieved his political revenge against Adams in the election of 1828. Calhoun, who had drifted away from his nationalist leanings during his vice-presidency under Adams, became a champion of state sovereignty and joined the winning Democratic coalition forged by Jackson in time to be reelected as vice president on the Jackson ticket. It was after the 1828 election, and before he would be sworn in as vice president under President-elect Jackson, that Calhoun drafted his *Exposition* in protest against the tariff.<sup>24</sup>

Just as the nation's first great debate on slavery had erupted unexpectedly in 1819 in response to an amendment from an otherwise innocuous congressman, the nation's first great debate on the nature and origins of the Union arose under similar circumstances. On January 19, 1830, an unplanned Senate debate over the nature of the Union commenced between Senator Robert Y. Hayne of South Carolina and former Federalist Daniel Webster of Massachusetts. The series of event that would become known to posterity as the "Webster-Hayne Debate" began innocently enough on December 30, 1829, with a resolution by Senator Samuel A. Foot of Connecticut concerning the federal government's policy toward the sale of public lands. Foot's resolution proposed that the committee on public lands inquire into the expediency of abolishing the office of Surveyor General and temporarily limiting the sale of public lands to those lands already on the market. Western

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<sup>24</sup>Herman Belz, foreword to *Daniel Webster, The Webster-Hayne Debate on the Nature of the Constitution: Selected Documents*, edited by Herman Belz (Indianapolis: Liberty Fund, 2000), [http://oll.libertyfund.org/titles/1557#Webster\\_0099\\_25](http://oll.libertyfund.org/titles/1557#Webster_0099_25).

senators viewed the resolution as a hostile measure intended to stop the population growth of Western states by keeping Eastern workers from moving west, thereby ensuring a labor supply for New England manufacturers. Senator Thomas Hart Benton of Missouri immediately attacked Foot's resolution. He attracted the support of Senator Hayne of South Carolina, who, on behalf of Southern interests, saw an opportunity, through cooperation with Western senators, to shift federal tax policy away from the use of high protective tariffs passed by Congress.<sup>25</sup>

Historian Herman Belz characterized the debate, which had been waged off and on since ratification of the Constitution, as signaling "an alarming turn." For the first time, Belz concluded, the debate:

moved beyond the exchange of alternative views on how to administer the federal government to accusations and recriminations about the destruction of the federal government and the Union. States' rights and nationalist positions, which previously were adopted without regard to a consistent pattern of sectional identification or alignment, were defined in a way that portended political violence between irreconcilably opposed sections. . . . From a historical point of view, the Webster-Hayne debate provides a case study of the tendency inherent in pre-Civil War federal-system politics toward instability and violence.<sup>26</sup>

Hayne entered the debate on the Foot resolution on January 19, 1830, in the hope of forging a stronger and more effective political alliance with the western senators against the New England states, whose constituencies had been the strongest advocates for the protective tariff. By the time the debate ended, seven senators would speak at some length as to the nature and origins of the Union, whether the Constitution was a compact between the states *qua* states, a compact between the *people* of the several states or whether the

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<sup>25</sup>"Foreword," in *Daniel Webster, The Webster-Hayne Debate on the Nature of the Constitution*.

<sup>26</sup>*Ibid.*

Constitution evidenced a nation forged by one great American people. These senators also discussed their respective belief in, or rejection of, various theories of nullification and secession. At no time prior to the Civil War would the country have the benefit of hearing such a wide range of interpretations on the nature of the Union and the meaning of the Constitution. And, as the debate was about to commence, ironically, it was Vice President Calhoun, fulfilling his odd constitutional role as part of the legislative branch, who presided over the debate as president of the Senate.<sup>27</sup>

Hayne gave three speeches and Webster two between January 19 and January 27, 1830, and Webster's second reply to Hayne, containing the appeal to "Liberty *and* Union, now and forever, one and inseparable," was regarded by one historian as the "most powerful and effective speech ever given in an American legislature."<sup>28</sup> But the speeches by senators from Louisiana, New Hampshire, Delaware, Kentucky and Missouri, long forgotten, and long ignored by most historians, are just as revealing. They reflected the overwhelming familiarity political leaders had with the arguments contained in the Virginia and Kentucky Resolutions, the conflicting and often ambiguous understanding of the meaning of the Constitution, the precarious nature of the Union and the willingness of political leaders to hurl insults, threaten force, and question another's honor whenever national politics was not to their liking.

Senator Hayne's first address was, broadly speaking, limited to the issue at hand—whether the federal government should suspend the surveying of Western lands until the land already on the market was sold. That the mover of the resolution to suspend further land surveys was Senator Foot of Connecticut was not a surprise. Foot's resolution was but

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<sup>27</sup>Ibid.

<sup>28</sup>Ibid.

the latest manifestation of New England's perpetual concern with the westward expansion of the United States since the Louisiana Purchase, and the practical political concern that the South and West would act in concert on the great political questions of the day and isolate the Northeast. Hayne rose, not in opposition or support of the specific resolution, but to "offer a few remarks" regarding the federal government's land policy toward the West. Hayne identified with the view of the western senators that the government's current land policy favored northeastern interests at the expense of western settlers, who were often left straddled with debt through loans from northeast banking interests. Hayne expressed a kinship with these westerners, he explained, because "the present condition of the Southern States," under the Tariff of 1828, "has served to impress more deeply on my own mind, the grievous oppression of a system by which the wealth of a country is drained off to be expended elsewhere." Hayne then expressed concern that the current public land policy might provide the federal government with a source of permanent revenue, which Hayne feared would be turned into a "fund for corruption," enabling Congress and the president to exercise undue control over the "great interests in the country, nay, even over corporations and individuals." Hayne's concern with a large federal treasury didn't stop there:

It would be equally fatal to the sovereignty and independence of the States. Sir, I am one of those who believe that the very life of our system is the independence of the States, *and that there is no evil more to be deprecated than the consolidation of this Government.* It is only by a strict adherence to the limitations imposed by the constitution on the Federal Government, that this system works well, and can answer the great ends for which it was instituted. I am opposed, therefore, in any shape, to all unnecessary extension of the powers, or the influence of the Legislature or Executive of the Union over the States, or the people of the States; and, most of all, I am opposed to those partial distributions of favors, whether by legislation or appropriation, which has a direct and powerful tendency to spread corruption through the land; to create an abject spirit of dependence; to sow

the seeds of dissolution; to produce jealousy among the different portions of the Union, and finally to sap the very foundations of the Government itself.<sup>29</sup>  
(Italics added)

Webster rose the next day, not to speak directly on the Foot resolution but to reply to the opinions expressed by Senator Hayne. The main thrust of his first and second replies to Hayne had been thought out in detail long before Hayne rose to speak the previous day. Webster's principal goal during the debates was to head off a growing political alliance between the South and the West, and against New England, by recasting New England as defender of the Union and isolate Hayne and his sympathizers as advocates of disunion and possible civil war. While the senator from South Carolina's invocation of consolidation was not in service of cries for disunion, or arguments for the right of nullification, Webster seized on Hayne's cry of "consolidation" as an opportune moment to address the theories of nullification and disunion emanating from South Carolina over the previous two years. In doing so, he switch the nature of the debate away from the federal government's treatment of the West and towards the disunionists of South Carolina.<sup>30</sup>

Before directly challenging Hayne's contention that federal land policy had hurt the western states, describing such policy as being "liberal and enlightened," Webster defended the honor of New Englanders and credited the region as being the principal mover behind the passage of the Northwest Ordinance, which Webster credited as ensuring that much of the West would not suffer the ill-effects of "involuntary servitude." Although his indirect condemnation of slavery did not mention South Carolina or Senator Hayne, it is unlikely,

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<sup>29</sup>"Speech of Mr. Hayne, of South Carolina [January 20, 1830]," in Belz, *Daniel Webster, The Webster-Hayne Debate on the Nature of the Constitution*, [http://oll.libertyfund.org/titles/1557# Webster\\_0099\\_54](http://oll.libertyfund.org/titles/1557#Webster_0099_54).

<sup>30</sup>"Speech of Mr. Webster, of Massachusetts [January 20, 1830]." For a discussion of Webster's preparation, especially the assistance received from Edward Everett, see Sheidley, "The Webster-Hayne Debate," 20-25.

given the remainder of the speech, that Hayne did not interpret it as an attack on the South. Webster saved some of his most colorful oratory for a defense of “the East,” “the obnoxious, the rebuked, the always reproached East!” whose honor, Webster claimed, Hayne had indicted “with the air and tone of a public prosecutor.” Webster denied the existence of any hostility towards the West. And as for the tariff, Webster claimed that the East had no ownership of that policy, referencing the Tariff of 1816 during the War of 1812, which the majority of New England vehemently opposed.<sup>31</sup>

In the major portion of his address, Webster derided Hayne’s concern with the corrupting influence of a large federal treasury, accusing Hayne of wishing to “see the time when the Government should not possess a shilling of permanent revenue.” Webster then launched into a concerted attack on Hayne invocation of “consolidation,” “that perpetual cry, both of terror and delusion,” and bemoaned the penchant of some South Carolinians and others of like-mind “to calculate the value of the Union” and to “enumerate, and to magnify all the evils, real and imaginary, which the Government under the Union produces.”<sup>32</sup>

Before Hayne offered his reply to Webster, Senator Thomas Hart Benton of Missouri rose in the Senate chamber to challenge Webster’s claim of Eastern benevolence toward the West, which Benton said had been “so little expected, and so much in conflict with what I had considered established history.” Exhibit “A” of any such indictment of the East was, in fact, the Foot resolution itself, which Benton claimed discouraged emigration to the Western states and surrendered “large portions of Western territory to the use and dominion of wild beasts.” This resolution, according the Benson, epitomized “the relative

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<sup>31</sup>Ibid.

<sup>32</sup>Ibid.

affection which the two Atlantic sections of the Union bear to the West," a relationship which Benson believed was characterized by the Northeast promoting policies antithetical to the West, and with such policies being "resisted by the South." Benton likened Webster to a commander of an army at *Caudine Forks*, who upon seeing his army being surrounded on both sides, attempted to "extricate his friends from a perilous position."<sup>33</sup>

Benson's attack grew nastier when comparing the citizens of the South with New Englanders. The citizens of the South, Benton informed the Senate, "were with us in '98, and in the late war, whose grief and joy rose and sunk with ours in the struggle with England." As for the population of New England, Benson ridiculed their conduct during the late war with England, for thinking "it unbecoming a moral and religious people to celebrate the triumphs of their own country over its enemy, but quite becoming the same people, to be pleased at victories of the enemy, over their country."<sup>34</sup> Benson then quoted from a letter written by John Quincy Adams, "a son of New England," to bolster his claims of New England hostility toward the West, especially over emigration:

If New England loses her influence in the Councils of the Union, it will not be owing to any diminution of her population, occasioned by these emigrations: it will be from the *partial, sectarian*, or as Hamilton called it, *clannish spirit*, which makes so many of her *political leaders jealous and envious of the west and South*. This spirit is in its nature *narrow and contracted*; and it always works *by means like itself*. Its natural tendency is to *excite and provoke* a counteracting spirit of the same character; and it has actually produced that effect in our country. It has combined the Southern and Western parts of the United States, not in a league, but in a concert of political views adverse to

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<sup>33</sup>"Speech of Mr. Benton, of Missouri, [January 20 and 29, February 1 and 2, 1830]," in Belz, *Daniel Webster, The Webster-Hayne Debate on the Nature of the Constitution*, [http://oll.libertyfund.org/titles/1557#Webster\\_0099\\_398](http://oll.libertyfund.org/titles/1557#Webster_0099_398). The Battle of Caudine Forks (in 321 BC), between the Romans and the Samnites, was a battle with no actual fighting or casualties, and ended with the Romans trapped by the Samnites and negotiating an honorable surrender. *Caudine Forks*, in *Encyclopædia Britannica* (2010), <http://www.britannica.com/EBchecked/topic/100380/Caudine-Forks#ref129396>.

<sup>34</sup>"Speech of Mr. Benton, of Missouri, [January 20 and 29, February 1 and 2, 1830]."

those of New England. The fame of all the great Legislators of antiquity is founded upon their contrivances to strengthen and multiply the principles of attraction in civil society:—*Our legislators seem to delight in multiplying and fomenting the principles of repulsion.*"<sup>35</sup>

The remainder of Benton's speech on January 20 was of a like temper. He provided a litany of issues since the Revolution, such as the Northwest Ordinance, navigation on the Mississippi, and the various Indian wars, in which, in Benton's opinion, New Englanders consistently exhibited hostility towards the interests of the West.<sup>36</sup>

Hayne's reply to Webster came on January 25. A tedious discussion of recent New England and Southern viewpoints regarding federal land policy and internal improvements drifted into a discussion of the relative merits of slavery, and its supposed effects on "the national wealth and prosperity." Hayne challenged Webster's suggestion that "involuntary servitude" had a deleterious effect on the character of the Southerner: "[T]here can be no doubt that it has never yet produced any injurious effects on individual or national character." "Where," Hayne continued, "are there to be found brighter examples of intellectual and moral greatness, then have been exhibited by the sons of the South?"<sup>37</sup>

Hayne then revisited the issue of "consolidation" by summarizing the history of the two great political rivalries of the previous forty years, now represented by Webster's "national republicans" versus Hayne's "democratic republicans." According to Hayne, the national republicans, the successors to the Federalists of '98, "have always been animated by the same principles, and have kept steadily in view a common object—the consolidation

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<sup>35</sup>Ibid.

<sup>36</sup>Ibid.

<sup>37</sup>"Speech of Mr. Hayne, of South Carolina [January 25, 1830]," in Belz, *Daniel Webster, The Webster-Hayne Debate on the Nature of the Constitution: Selected Documents*, <http://oll.libertyfund.org/titles/1557> #Webster\_0099\_113.

of Government.” The democratic republicans, the political heirs of the “Anarchists, anti-federalists, and revolutionists,” have remained consistent as well:

True to their political faith, they have always, as a party, been in favor of limitations of power; they have insisted that all powers not delegated to the Federal Government are reserved, and have been constantly struggling, as they are now struggling, to preserve the rights of the States, and prevent them from being drawn into the vortex, and swallowed up by one great consolidated Government.<sup>38</sup>

As for Webster’s rebuke of the South and its penchant to “calculate the value of the Union,” Webster had hoped a debate on the nature of the Union would draw attention away from the continued antagonism between New England and the West, and Hayne readily accepted the bait. Prefacing his remarks with a reminder to his Senate colleagues that Webster’s attack on Southern honor was “unprovoked and uncalled for,” Hayne was compelled to respond because Webster had rhetorically “crossed the border,” “invaded the State of South Carolina,” “making war upon her citizens,” and “endeavoring to overthrow her principles and her institutions.” In the face of such “invasion,” Hayne, now in full lather, was ready to give his last full measure:

If God gives me strength, I will drive back the invader discomfited. Nor shall I stop there. If the gentleman provokes the war, he shall have war. Sir, I will not stop at the border; I will carry the war into the enemy’s territory, and not consent to lay down my arms, until I shall have obtained “indemnity for the past, and security for the future.”<sup>39</sup>

Hayne’s linguistic counter-offensive recounted the hardships and valor of South Carolina during the American Revolution, which he compared favorably to New England’s. But the “fruits of the Revolution of ‘76” would have all been lost had it not been for the “political revolution” of 1798, in which the South, aided by the Northwest, “restored the

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<sup>38</sup>“Speech of Mr. Hayne, of South Carolina [January 25, 1830].”

<sup>39</sup>Ibid.

constitution, rescued the liberty of the citizen from the grasp of those who were aiming at its life.” Hayne moved to the events of 1812, characterizing Southern participation in that war as an honorable defense of the “Northern shipping and New England seamen,” and ridiculed Webster at length for his actions, and that of the Federalist Party, during the conflict, which “were of such a character, that [the Massachusetts] Legislature, but a few years ago, actually blotted them out from their records, as a stain upon the honor of the country.”<sup>40</sup>

Satisfied with recounting this litany of Federalist shame, Hayne defended what he and Webster would sometimes refer to as the “*Carolina doctrine*,” first articulated in the *South Carolina Exposition and Protest* in 1828. According to Hayne, the South Carolina doctrine was nothing more than the “good old Republican doctrine of ‘98, the doctrine of the celebrated ‘Virginia Resolutions,’ of that year, and Madison’s *Report of 1800* and then quoted, verbatim from the *Virginia Resolutions of 1798*:

The General Assembly doth explicitly and peremptorily declare, that it views the powers of the Federal Government as resulting from the compact to which the States are parties, as limited by the plain sense and intention of the instrument constituting that compact, as no further valid than they are authorized by the grants enumerated in that compact; and that, in case of a *deliberate, palpable, and dangerous exercise of other powers not granted by the said compact*, the States who are parties thereto, *have the right, and are in duty bound, to interpose, for arresting the progress of the evil*, and for maintaining within their respective limits, the authorities, rights and liberties appertaining to them.<sup>41</sup>

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<sup>40</sup>Ibid.

<sup>41</sup>Hayne’s most effective rebuttal to Webster would have been a detailed recitation of the statements and actions of the Federalists, including Daniel Webster, in reaction to the various embargoes, and enforcement acts, beginning in 1809, and during the subsequent war with Great Britain, but Hayne made only a rather brief reference to them. Instead, he kept coming back to the “republican doctrine of ‘98,” which he claimed “was first promulgated by the Fathers of the Faith.” Ibid.

After several New England states dissented to the *Virginia Resolutions of 1798*, Hayne noted the Virginia legislature reaffirmed each of their principles in “Madison’s Report,” “which deserves to last as long as the Constitution itself” and “which stamped the character of Mr. Madison as the preserver of that Constitution.” Hayne then quoted numerous paragraphs from the *Report of 1800*, which defended the rights of the States who are parties to the constitutional compact, “to interpose for arresting the progress of the evil”:

It appears to your committee to be a plain principle, founded in common sense, illustrated by common practice, and essential to the nature of compacts, that, where resort can be had to no tribunal, superior to the authority of the parties, *the parties themselves must be the rightful judges* in the last resort, whether the bargain made has been pursued or violated. The constitution of the United States was formed by the sanction of *the States*, given by each in its sovereign capacity. It adds to the stability and dignity, as well as to the authority of the Constitution, that it rests upon this legitimate and solid foundation. The States, then, being the parties to the Constitutional compact, and in their sovereign capacity, it follows of necessity, that there *can be no tribunal above their authority*, to decide, in the last resort, whether the compact made by them be violated; and, consequently, that, as the parties to it, they must themselves decide, in the last resort, such questions as may be of sufficient magnitude to require their interposition.<sup>42</sup>

Hayne then cited the *Kentucky Resolutions of 1798 and 1799*, and the conclusion of the Kentucky legislature in 1799 that if the federal government continued to exercise power and authority not authorized under the Constitution, “an annihilation of the State Governments, and the erection, upon its ruins, of a general *consolidated* Government, will be the inevitable consequence,” and that “the several States who formed that instrument, being sovereign and independent, have the unquestionable right to judge of its

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<sup>42</sup>*Report of 1800*, as quoted in “Speech of Mr. Hayne of South Carolina [January 25, 1830],” [http://oll.libertyfund.org/titles/1557#Webster\\_0099\\_150](http://oll.libertyfund.org/titles/1557#Webster_0099_150).

construction, and that the *nullification by those sovereignties, of all unauthorized acts, done under color of that instrument, is the rightful remedy.*"<sup>43</sup>

Hayne then cited Jefferson's 1825 draft resolutions of protest (against tariffs and internal improvements) for the Virginia legislature, in which Jefferson described recent actions of the federal government as "mere interpolations into the compact, and direct infractions of it." Just as he did in his *Draft and Fair Copy*, Jefferson declared the offending acts of the federal government as "*null and void.*" Although Virginia would consider a dissolutions of the Union "as among the greatest calamities that could befall them," it was not the greatest. "There is yet one greater, submission to a government of unlimited powers."<sup>44</sup>

But Hayne was not done evoking Jeffersonian threats of disunion and quoted from Jefferson letter to William B. Giles, written shortly after Jefferson's *Draft Declaration* was submitted to the Virginia legislature. Hayne could have included the entirety of Jefferson's long recitation of the evils of the "three ruling branches," but he focused on that portion, which lamented the "advance" of the federal government "towards the usurpation of all the rights reserved to the States, and the consolidation in itself of all powers, foreign and domestic." Disunion, even at force of arms, concluded Jefferson, "must be the last resource" but, he warned, if the "sole alternatives left are a dissolution of our Union with them, or

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<sup>43</sup>*Kentucky Resolution of 1799*, as quoted in "Speech of Mr. Hayne of South Carolina [January 25, 1830]," [http://oll.libertyfund.org/titles/1557#Webster\\_0099\\_155](http://oll.libertyfund.org/titles/1557#Webster_0099_155).

<sup>44</sup>"Draft Declaration and Protest of Virginia 1825 on the Principles of the Constitution of the United States of America, and on the Violations of them, December 1825," Yale Law School, *The Avalon Project: Documents in Law, History and Diplomacy*, [http://avalon.yale.edu/19th\\_century/jeffdec1.asp](http://avalon.yale.edu/19th_century/jeffdec1.asp).

submission to a Government without limitation of powers, . . . when we must make a choice, there can be no hesitation.”<sup>45</sup>

Webster’s second reply to Hayne began by addressing a number of topics addressed in speeches by Senator Benton and Senator Hayne, including the history of (and proper credit for) the Northwest Ordinance, the merits and evils of slavery, the federal government’s public land policy, internal improvements, tariffs and even the merits of allusions to Shakespeare’s respective ghosts in *Macbeth* and *Hamlet*. Webster again revisited the issue of *consolidation*. He explained the difference between a consolidation, or strengthening, of the *Union*, which Webster believed should be promoted, and a consolidation of governmental “powers properly belonging to the States” into the hands of the federal governments, which Webster agreed should not be countenanced. Webster argued that a strengthening of the Union was the primary purpose of the founders and drafters of the Constitution, which is why he supported internal improvements.<sup>46</sup>

Rather than move on from this clarification of favorable *consolidation* into a discussion of the nature of the Union, Webster paused to defend the honor of the New England during the late war, whose behavior he deemed no worse than the behavior of Republicans: “There were presses on both sides, popular meetings on both sides, aye, and pulpits on both sides, also.” As for the barrage of cries for nullification and disunion from town petitions, local newspapers and state politicians, as well as secret envoys sent to

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<sup>45</sup>“Thomas Jefferson to William B. Giles,” December 26, 1825, as quoted in “Speech of Mr. Hayne of South Carolina [January 25, 1830],” [http://oll.libertyfund.org/titles/1557#Webster\\_0099\\_157](http://oll.libertyfund.org/titles/1557#Webster_0099_157). Letter also set forth in *Founders Online*, National Archives (<http://founders.archives.gov/documents/Jefferson/98-01-02-5771>).

<sup>46</sup>“Speech of Mr. Webster, of Massachusetts [January 26 and 27, 1830],” Belz, *Daniel Webster, The Webster-Hayne Debate on the Nature of the Constitution*, [http://oll.libertyfund.org/titles/1557#Webster\\_0099\\_165-228](http://oll.libertyfund.org/titles/1557#Webster_0099_165-228).

inquire of a separate peace with Britain, Webster implied that the activities of New England Federalists during the “late war” was no worse than what was currently emanating from the South:

It is enough for me to say, that if, in any part of this, their grateful occupation; if, in all their researches, they find any thing in the history of Massachusetts, or New England, or in the proceedings of any legislative, or other public body, disloyal to the Union, speaking slightly of its value, proposing to break it up, or recommending non-intercourse with neighboring States, on account of difference of political opinion, then, sir, I give them all up to the honorable gentleman’s unrestrained rebuke; expecting, however, that he will extend his buffetings, in like manner, *to all similar proceedings, wherever else found.*<sup>47</sup>

Webster continued to re-write recent history by denying the Hartford Convention had been held for any “disloyal” purpose, which Webster defined as “assembled for any such purpose as breaking up the Union, or to consult on that subject, or *to calculate the value of the Union.*” Once again, without characterizing exactly what did happen at the Hartford Convention, Webster denied anything had been amiss, but if there had been, had not South Carolina’s recent actions been similar.

Sir, there never was a time, under any degree of excitement, in which the Hartford Convention, or any other Convention, could maintain itself one moment in New England, if assembled for any such purpose as the gentleman says would have been an allowable purpose. To hold conventions to decide questions of constitutional law!—to try the binding validity of statutes, by votes in a convention! Sir, the Hartford Convention, I presume, would not desire that the honorable gentleman should be their defender or advocate, if he puts their case upon such untenable and extravagant grounds.<sup>48</sup>

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<sup>47</sup>“Speech of Mr. Webster, of Massachusetts, [January 26 and 27, 1830].”

<sup>48</sup>Ibid. Interestingly, the text of “Webster’s Second Reply to Hayne” that exists in posterity is different in some respects from the actual speech given that day. Joseph Gales of the *National Intelligencer* recorded Webster’s speech in short-hand, which would be revised for immediate publication. Adopting a practice typical of the day, Webster revised the speech, including several references to the Hartford Convention and the problematic actions of New Englanders during the War of 1812, which implicitly acknowledged the disunionist aspects of Federalist actions. The published text belief no defensiveness or shame for his actions or for the actions of other Federalists that resembled that which he

Finally, Webster came to his “most grave and important duty,” to state “the true principles of the Constitution under which we are here assembled.” First, Webster laid out the principles, as he understood it, of the *Carolina doctrine*, which, he fairly and accurately summarized as follows:

1. The right of the State Legislatures to interfere with the operation of the laws of the United States “whenever, in their judgment, this Government transcends its constitutional limits.”

2. This right exists “*under* the Constitution” and is not based on the “right of revolution.”

3. The ultimate power of judging of the extent of the federal government’s powers under the Constitution “is not lodged exclusively in the General Government, or any branch of it; but that, on the contrary, the States may lawfully decide for themselves, and each State for itself, whether, in a given case, the act of the General Government transcends its power.”

4. If, in the opinion of a state government, the exigency of a particular case requires it, such government may, “by its own sovereign authority, annul an act of the General Government, which it deems plainly and palpably unconstitutional.”<sup>49</sup>

Webster then turned to Hayne’s specific reliance on Madison’s Virginia Resolutions and queried whether Hayne’s interpretation was the correct one. As for the doctrine of

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condemned from Hayne and the South Carolina nullifiers. Sheidley, “The Webster-Hayne Debate,” 11, 22-24.

<sup>49</sup>Ibid. At this point, Hayne interrupted Webster’s speech “for the purpose of being clearly understood.” Rather than rebut Webster’s summary of the *Carolina doctrine*, Hayne quoted from the *Virginia Resolutions of 1798*. Of course, simply quoting from the *Virginia Resolutions of 1798* clarified nothing. Considering the number of other instances that Webster’s rhetoric might have brought Hayne to his feet, Hayne’s interruption of Webster in this instance seems odd if Hayne did not, in some material way, disagree with it. Neither the *Virginia Resolutions of 1798* nor the *Report of 1800* had, in fact, explicitly advocated nullification, although the logic of the more detailed *Report of 1800* supported nullification by the *people* of the several states. The *Kentucky Resolutions of 1799* specifically mentioned nullification but not in terms suggesting that a single state could nullify a federal law. Calhoun’s *Exposition* clearly and explicitly supported the right of a single state to nullify or veto actions of the federal government. Ibid.

interposition, for example, rather than support for state nullification, Webster argued, the Virginia Resolutions meant no more than that the *people* could resist “usurpation, and relieve themselves from a tyrannical government.” In other words, Madison’s Virginia Resolutions were nothing, more or less, than a restatement of the “right of revolution,” which Webster acknowledged as not only “to be just in America, but in England also.” “Blackstone admits as much,” Webster continued, “in theory, and practice, too, of the English Constitution.” Webster flatly denied Hayne’s contention that a *constitutional* middle ground existed between the obligation of the *people* to submit to the laws of the nation, once pronounced constitutional, and the *people’s* right of the revolution.<sup>50</sup>

Webster attributed Hayne’s confusion as to the rights of the states and the *people* to his equal misunderstanding of the “origin of this Government, and the source of its power.” For Webster, the Constitution was not created by the several state legislatures or even the *people* of the several states but by the *people* of the United States, acting *en masse*: “It is, sir, the People’s Constitution, the People’s Government; made for the People; made by the People; and answerable to the People. The People of the United States have declared that this Constitution shall be the Supreme Law.”<sup>51</sup>

Webster then described the relative relationship between the *people*, the states and the federal government, in terms not at all successful:

The States are, unquestionably, sovereign, so far as their sovereignty is not affected by this supreme law. But the State Legislatures, as political bodies, however sovereign, are yet not sovereign over the People. So far as the People have given power to the General Government, so far the grant is unquestionably good, and the Government holds of the People, and not of the State Governments. We are all agents of the same supreme power, the People. The General Government and the State Governments derive their

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<sup>50</sup>Ibid.

<sup>51</sup>Ibid.

authority from the same source. Neither can, in relation to the other, be called primary, though one is definite and restricted, and the other general and residuary. The National Government possesses those powers which it can be shown the People have conferred on it, and no more. All the rest belongs to the State Governments or to the People themselves. So far as the People have restrained State sovereignty, by the expression of their will, in the Constitution of the United States, so far, it must be admitted, State sovereignty is effectually controlled.<sup>52</sup>

So what happens, according to Webster, when the “National Government,” a body Webster admits was “definite and restricted,” and which derived its authority from the *people*, ignores such restrictions and exercises power and authority not granted by the *people*? Possibly because he lacked an effective answer to a rather obvious question, Webster delayed providing an answer and instead immediately changed the subject back to his interpretation of the *Carolina doctrine* and discussed how the *people’s* Constitution restrained the sovereign right of the states to exercise certain fundamental powers of sovereignty—to make war, to coin money, and enter into treaties.<sup>53</sup>

Identifying the principle weakness of Hayne’s *Caroline doctrine* and Calhoun’s *Exposition*—it effectively placed the nation back into a governmental relationship akin to the Articles of Confederation—Webster inquired as to how the nation could function if South Carolina, for example, determined that a tariff “designed to promote one branch of industry at the expense of another” was a “dangerous, palpable, and deliberate usurpation of power” but the States of Pennsylvania and Kentucky disagreed. Following that logic, South Carolina could nullify the tariff and refuse to pay the duties while Pennsylvania and Kentucky would pay the duties. “And yet,” Webster pointed out, “we live under a Government of uniform laws, and under a Constitution, too, which contains an express

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<sup>52</sup>Ibid.

<sup>53</sup>Ibid.

provision, as it happens, that all duties shall be equal in all the States! Does not this approach absurdity?”<sup>54</sup>

Webster, for the moment, resisted answering his own question and spent the next portion of his speech revisiting topics he had addressed earlier, pointing out the inconsistent and hypocritical positions of South Carolina going back to the Revolution, most recently with respect to the relative constitutional merits of the various embargoes and tariffs, and defending the honor of New England during the Madison administration. As evidence of the “inherent . . . futility” of granting individual states the right to nullify federal law, Webster cited Madison’s own conclusion that enacting the tariff was a legitimate exercise of federal power, and not a “clear and palpable violation” as South Carolina concluded. “One of two things is true,” Webster concluded, “either the laws of the Union are beyond the discretion, and beyond the control of the States; or else we have no Constitution of General Government, and are thrust back again to the days of the Confederacy.”<sup>55</sup>

Ignoring the fact that Federalists in New England, including Webster himself, had espoused a doctrine of state nullification consistent with Jefferson’s *Draft and Fair Copy*, and with Hayne’s (but not Madison’s own) interpretation of the *Virginia Resolutions*,

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<sup>54</sup>Ibid. Whether intentional or not, Webster’s interpretation and criticism of the *Carolina doctrine* suggested that he equated the *Caroline doctrine* with Jefferson’s notion of the right of an individual state to nullify a federal law and constitutionally resist its enforcement within its boundaries. Other than alluding to the Articles of Confederation, Webster did not address the relative merits of Calhoun’s theory of a State veto, which, following Webster’s example, not only would have granted South Carolina the right to resist the tariff within its own borders but also would have prevented the enforcement of the tariff across the entire nation unless three-fourths of the states overrode South Carolina’s veto. Thus, in Webster’s example, after South Carolina’s veto, Pennsylvania and Kentucky would not have been legally bound to pay their duties under the tariff even if they independently believed that such tariff was constitutional. Calhoun’s state veto rendered the federal law a nullity for the entire nation.

<sup>55</sup>Ibid.

Webster claimed that if New England had been “under the influence of that heresy of opinion, as I must call it, which the honorable member espouses, this Union would, in all probability, have been scattered to the four winds.” Webster then challenged Hayne to render a judgment on the right of New England to nullify the embargoes during the late war, exclaiming, “Sir, I deny the whole doctrine. It has not a foot of ground in the Constitution to stand on. No public man of reputation ever advanced it in Massachusetts, in the warmest times, or could maintain himself upon it there at any time.”<sup>56</sup>

In one of the most authentic paragraphs of his speech, Webster expressed his own doubts as to the meaning of the Virginia Resolutions—“I cannot undertake to say how these resolutions were understood by those who passed them. Their language is not a little indefinite”—but regardless of the ambiguity, Webster interpreted Madison as having one of two opinions:

It may mean no more than that the States may interfere by complaint and remonstrance; or by proposing to the People an alteration of the Federal Constitution. This would all be quite unobjectionable; or, it may be, that no more is meant than to assert the general right of revolution, as against all Governments, in cases of intolerable oppression. This no one doubts; and this, in my opinion, is all that he who framed the resolutions could have meant by it: for I shall not readily believe, that he was ever of opinion that a State, under the Constitution, and in conformity with it, could, upon the ground of her own opinion of its unconstitutionality, however clear and palpable she might think the case, annul a law of Congress, so far as it should operate on herself, by her own legislative power.<sup>57</sup>

Webster again revisited the nature of the Union, and “the foundation on which it stands”:

I hold it to be a popular Government, erected by the People; those who administer it responsible to the People; and itself capable of being amended and modified, just as the People may choose it should be. It is as popular, just

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<sup>56</sup>Ibid.

<sup>57</sup>Ibid.

as truly emanating from the People, as the State Governments. It is created for one purpose; the State Governments for another. It has its own powers; they have theirs. There is no more authority with them to arrest the operation of a law of Congress, than with Congress to arrest the operation of their laws. We are here to administer a Constitution emanating immediately from the People, and trusted, by them, to our administration. It is not the creature of the State Governments. It is of no moment to the argument, that certain acts of the State Legislatures are necessary to fill our seats in this body. That is not one of their original State powers, a part of the sovereignty of the State. It is a duty which the People, by the Constitution itself, have imposed on the State Legislatures; and which they might have left to be performed elsewhere, if they had seen fit.<sup>58</sup>

As he did earlier, Webster alluded to the role of the federal judiciary as the final judge of the meaning of the Constitution and the limits of the federal government. And this time he laid out the case that the *people* had chosen the federal judiciary as the proper interpreter of “this grant of the People.” Rejecting a government that should be “obliged to act through State agency, or depend on State opinion and State discretion,” the *people* “wisely provided, in the Constitution itself, a proper, suitable mode and tribunal for settling questions of constitutional law.”<sup>59</sup>

Where did Webster discover this grant of judicial supremacy? The first evidence, Webster contended, was the Supremacy Clause in Article VI, paragraph 2, of the Constitution—“the Constitution and the laws of the United States, made in pursuance thereof, shall be the supreme law of the land, any thing in the Constitution or laws of any State to the contrary notwithstanding.” The second and last relevant provision was Article III, Section 2, Clause 1’s dictate that “that the Judicial power shall extend to all cases arising under the Constitution and Laws of the United States.” According to Webster, “[t]hese two provisions, sir, cover the whole ground. They are, in truth, the key-stone of the arch. With

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<sup>58</sup>Ibid.

<sup>59</sup>Ibid.

these, it is a Constitution; without them, it is a Confederacy.”<sup>60</sup> As was typical of advocates for judicial supremacy, Webster offered no counsel as to the controversies that, by their nature, could not come before the federal courts or to the Supreme Court, under either its original or appellate jurisdiction.

Webster finally came to the most effective portion of his second reply to Hayne, providing a detailed example to illustrate the problems that would arise from a practical application of the *Carolina doctrine*. Employing facts reminiscent of the contentious battle between Pennsylvania and the federal government in the *Peters* case, Webster supposed that the legislature of South Carolina nullified the tariff, declaring the tariff “null and void, so far as they respect South Carolina, or the citizens thereof”? The “Collector” of the tariff, therefore, “must be stopped” by officers of the state of South Carolina. In that case, the Collector would be required to seize goods subject to the tariff in satisfaction of the duties not paid pursuant to the tariff. South Carolina then would “undertake their rescue,” including employing the state militia and marching it to the customs house to demand cessation of collection efforts. The Collector and his agents would inquire as to the authority of the militia and its state leaders and ask the nullifiers “whether it was not somewhat dangerous to resist a law of the United States.” From the Collector’s perspective, would not the actions of the nullifiers be treasonous? If the nullifiers and their militia did not back down, and the Collector was unwilling to yield, would not civil war be the natural result:

Direct collision, therefore, between force and force, is the unavoidable result of that remedy for the revision of unconstitutional laws which the gentleman contends for. It must happen in the very first case to which it is applied. Is not this the plain result? To resist, by force, the execution of a law, generally, is

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<sup>60</sup>Ibid.

treason. Can the Courts of the United States take notice of the indulgences of a State to commit treason? The common saying, that a State cannot commit treason herself, is nothing to the purpose. Can she authorize others to do it? If John Fries had produced an act of Pennsylvania, annulling the law of Congress, would it have helped his case? Talk about it as we will, these doctrines go the length of revolution. They are incompatible with any peaceable administration of the Government. They lead directly to disunion and civil commotion; and, therefore, it is, that at their commencement, when they are first found to be maintained by respectable men, and in a tangible form, I enter my public protest against them all.<sup>61</sup>

The proper recourse in the face of unconstitutional acts of the federal government, according to Webster, was for the *people* to exercise the various tools at their disposal under the Constitution, including frequent elections, the amendment process and reliance on a “disinterested” and “independent” judiciary. Of course, what Webster did not say is that his theory was just as impractical and equally fraught with danger. If the federal government was, as Webster consistently conceded, a government of limited and delegated powers, but such government also was the only entity entrusted with the power and authority to define the limits of those powers, this effectively gave the federal government the power to unilaterally amend the Constitution at its discretion. In that instance, the state legislatures would have no recourse, argued Webster, except that of protest or seeking an amendment to the Constitution. The *people’s* recourse would be equally limited. It could protest or petition its representatives, await the next election in the hopes that a reconstituted legislature would repeal the offending legislation, or seek an amendment to the Constitution that would act as a veto on the assumption of power by the federal government. Thus, the federal government could expand its powers based on a simple majority of the House and Senate, with the acquiescence by the president, and if need be, the federal courts. The *people*, on the other hand, as the ultimate sovereigns, could only

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<sup>61</sup>Ibid.

undue such constitutional mischief by instigating a series of constitutional conventions in at least two-thirds of the states and ultimately obtaining ratification of the proposed amendment in three-fourths of the state conventions.<sup>62</sup> Thus, the federal government could effectively amend the Constitution and the only recourse of the *people* would be to seek the approval from three-fourths of states for a repeal. Under Webster's formulation, such was the meager power of the ultimate sovereign.

Webster closed his second reply to Hayne by recounting the *people's* strong attachment to the Constitution and its "vital and essential importance to the public happiness." Webster then delivered a short and solemn invocation, calling on the power of the divine to ensure that the "sun in Heaven" would not shine down on "the broken and dishonored fragments of a once glorious Union; on States dissevered, discordant, belligerent; on a land rent with civil feuds, or drenched, it may be, in fraternal blood!" In Webster's prayer, he envisioned a different result, one beholding the "gorgeous Ensign of the Republic," floating "over the sea and over the land, in every wind under the whole Heavens," bearing the motto: "Liberty *and* Union, now and forever, one and inseparable!"<sup>63</sup>

Apparently unmoved by Webster's appeal for a heavenly benediction, Hayne's final speech on January 27 largely was a regurgitation of arguments and insults presented in his previous remarks. As for the nature of the Union, he quoted once again from the Virginia Resolutions and lectured Webster and the Senate on the "origin of the Federal Government," its delegated and limited powers as reinforced by the 10<sup>th</sup> Amendment, and the nature of the constitutional compact between the states. Hayne's previous speeches

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<sup>62</sup>None of the twenty-seven amendments to the Constitution were proposed by constitutional convention.

<sup>63</sup>"Speech of Mr. Webster, of Massachusetts [January 26 and 27, 1830]."

appeared to rely on the Jeffersonian formula for determining the parties to the compact: each state was an independent sovereign before the creation of the Constitution, each state became a party to compact with the ratification of the Constitution and, as a party to the compact, delegated certain express powers to the federal government. Under such a compact, quoting Madison's *Report of 1800*, "where resort can be had to no common superior, the parties to the compact must, themselves, be the rightful judges whether the bargain has been pursued or violated." In his third speech, however, Hayne modified his description of the parties to the compact. Possibly the result of re-reading Madison's *Report of 1800* in anticipation of taking the Senate floor once again, Hayne now adopted Madison's formulation:

I deny that the Constitution was framed by the People in the sense in which that word is used on the other side, and insist that it was framed by the States acting in their sovereign capacity. When, in the preamble of the Constitution, we find the words "we, the People of the United States," it is clear, they can only relate to the People as citizens of the several States, because the Federal Government was not then in existence.

... To show, that, in entering into this compact, the States acted in their sovereign capacity, and not merely as parts of one great community, what can be more conclusive than the historical fact, that, when every State had consented to it except one, she was not held to be bound. A majority of the people in any State bound that State, but nine-tenths of all the people of the United States could not bind the people of Rhode Island, until Rhode Island, as a State, had consented to the compact. It cannot be denied, that, at the time the Constitution was framed, the people of the United States were members of regularly organized governments, citizens of independent States; and, unless these State governments had been dissolved, it was impossible that the people could have entered into any compact but as citizens of these States.<sup>64</sup>

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<sup>64</sup>"Speech of Mr. Hayne of South Carolina [January 27, 1830]," in Belz, *The Webster-Hayne Debate on the Nature of the Constitution*, [http://oll.libertyfund.org/titles/1557#lfWebster\\_head\\_024](http://oll.libertyfund.org/titles/1557#lfWebster_head_024).

Hayne then quoted from Madison's *Report*, with emphasis on the definition of the term "states," but went no further in his analysis. If Hayne had otherwise modified his thinking during the course of preparing his opening remarks and rebuttals to Webster, it was not evident. Whether Hayne's parties to the constitutional compact were the states *qua* states, represented by their legislatures, or whether it was the majority of the people of each state, each party to the compact had the independent right to judge the limits on the power of the federal government.<sup>65</sup>

As for the Supreme Court, Hayne thought it was ill-suited to determine questions of competing sovereignties, for the questions of sovereignty "are much too large, and of too delicate a nature, to be brought within the jurisdiction of a Court of Justice. Courts, whether supreme or subordinate, are the mere creatures of the sovereign power, designed to expound and carry into effect its sovereign will." Hayne, as Jefferson had before, looked to the law of nations as a guide:

No independent state ever yet submitted to a Judge on the bench the true construction of a compact between itself and another sovereign. All Courts may incidentally take cognizance of treaties, where rights are claimed under them, but who ever heard of a Court making an inquiry into the authority of the agents of the high contracting parties to make the treaty,—whether its terms had been fulfilled, or whether it had become void, on account of a breach of its condition on either side? All these are political, and not judicial questions.<sup>66</sup>

As for the Supremacy Clause, when it states that the Constitution and the laws of the United States "made pursuance thereof, shall be the supreme law of the land," Hayne was equally confident that "no indication is given either as to the power of the Supreme Court,

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<sup>65</sup>" Speech of Mr. Hayne of South Carolina [January 27, 1830]."

<sup>66</sup>*Ibid.*

to bind the States by its decisions, nor as to the *course to be pursued in the event laws being passed not in pursuance of the Constitution.*"<sup>67</sup>

Hayne's most effective argument was his simplest: "[C]an it be supposed for a moment, that when the States proceeded to enter into the compact . . . , they could have designed, nay, that they could, under any circumstances, have consented to leave to a court to be created by the Federal Government the power to decide, finally, on the extent of the powers of the latter, and the limitations on the powers of the former." And what was the best evidence of that? Simply, that "in a great majority of cases, that court could manifestly not take jurisdiction of the matters in dispute." Hayne warned that Congress always could "commit a violation of the Constitution . . . in a manner as to deprive the court of all jurisdiction over the subject."<sup>68</sup>

Although Hayne may have exaggerated the extent to which the Supreme Court did not have jurisdiction, and Congress's willingness to engage in machinations to prevent it, recall that at the time of the Alien and Sedition Acts, the Judiciary Act of 1789 provided that the Supreme Court had no *appellate* jurisdiction to review a conviction of defendant under such acts, or any other federal criminal law. Since the Constitution did not grant the Supreme Court *original* jurisdiction for such criminal offenses, a defendant convicted for a violation of the Alien and Sedition Acts had no legal right to seek recourse with the Supreme Court. Moreover, the Constitution granted Congress the power to define the appellate jurisdiction of the Supreme Court under the "Exceptions Clause" of Article III,

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<sup>67</sup>Ibid.

<sup>68</sup>Ibid.

Section 2 of the Constitution.<sup>69</sup> Thus, Congress could enact legislation clearly in violation of the Constitution, and so long as the law did not touch on those areas of original or appellate jurisdiction authorized pursuant to the Constitution, the Supreme Court had no authority to ultimately decide the issue. If a legal case could be brought in a lower federal courts challenging the law, this would leave the determination of the extent of Congress' power under the Constitution subject to the decision of a lower federal court, a court created by, and regulated by, Congress.<sup>70</sup> Given the deliberate growth in the power of the federal courts, and the Supreme Court, during the early republic, and the *people's* gradual acceptance of such power, Webster's argument that the Founders consciously chose the Supreme Court as the ultimate umpire of disputes between federal government, the states and the *people* over the extent of the power and authority of the federal government is problematic at best. Webster was correct that there is nothing in the Constitution that grants the state legislatures power to be the ultimate judge of the constitutionality of acts of the federal government, but the role of the Supreme Court is equally unclear. Clearly, the Court had the constitutional responsibility to determine "what the law is" in cases that come before within its jurisdiction but its role as the "ultimate" and "sole" umpire of

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<sup>69</sup>Article III, Section 2 of the Constitution defines the original jurisdiction of the Supreme Court and also provides that "the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." Pursuant to such power, Congress passed the Judiciary Act of 1789 and provided, in chapter 13, that the Supreme Court did not have appellate jurisdiction in criminal cases.

<sup>70</sup>The most troubling recent example of this power was contained in the Detainee Treatment Act of 2005, which provided that "[n]o court, justice or judge shall have jurisdiction to hear or consider" habeas corpus petitions brought by aliens being held in Guantanamo Bay. There are limits to this power but legal scholars and various courts have disagreed as to what those limits are. *See, for example, Martin J. Katz, "Guantanamo, Boumediene, and Jurisdiction-Stripping: The Imperial President Meets the Imperial Court," Constitutional Commentary, Vol. 25, Issue 3 (Summer 2009): 377-424.*

disputes between the federal government, the States, and the *people* were not yet established during the early republic. As professors Gary Lawson and Christopher Moore concluded, “no one . . . has even attempted to put forth a plausible originalist case for a generalized judicial supremacy in constitutional interpretation. Instead, those who defend judicial supremacy . . . have done so on grounds unrelated to the Constitution’s original public meaning.”<sup>71</sup> Similarly, Gordon Wood concluded, from his study of the origins of judicial review and judicial supremacy, that:

for many Americans in the 1790s judicial review did exist, but it remained an extraordinary and solemn political action, akin to the interposition of the states suggested by Jefferson and Madison in the Kentucky and Virginia Resolutions of 1798-1799—something to be invoked only on the rare occasions of flagrant and unequivocal violations of the Constitution. It was not to be exercised in doubtful cases of unconstitutionality and was not yet accepted as an aspect of ordinary judicial activity.<sup>72</sup>

Hayne acknowledged the right and duty of the judiciary to decide, “in the last resort,” the legal questions submitted to it, but it was only the last resort “in relation to the authorities of the other Departments of the Government; not in relation *to the rights of the parties to the constitutional compact.*”<sup>73</sup> Hayne also rejected the notion of congressional supremacy and, echoing Calhoun’s *Exposition*, “that the majority must govern”:

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<sup>71</sup>Gary Lawson and Christopher D. Moore, “The Executive Power of Constitutional Interpretation,” 81 *Iowa Law Review*, No. 5 (1996): 1267-1330, 1267, 1292. See, however, David W. Tyler, “Clarifying Departmentalism: How the Framers’ Vision of Judicial and Presidential Review Makes the Case for Deductive Judicial Supremacy,” 50 *William and Mary Law Review*, No. 6 (2009): 2215-2264.

<sup>72</sup>Wood, *Empire of Liberty*, 447.

<sup>73</sup>“Speech of Mr. Hayne, of South Carolina [January 27, 1830].” Hayne was describing what is known as the “departmental theory” of American constitutional interpretation. See Robert Post and Reva Siegel, “Popular Constitutionalism, Departmentalism, and Judiciary Supremacy,” Yale Law School, *Faculty Scholarship Series*, Paper 178 (2004), [http://digitalcommons.law.yale.edu/fss\\_papers/178](http://digitalcommons.law.yale.edu/fss_papers/178). Both Madison and Jefferson ascribed to this theory, which claims that each department of the federal government is independent of each other and has the equal right and duty to interpret the Constitution when political

Now will any one contend that it is the true spirit of this Government, that the *will of a majority of Congress* should, in all cases, be *the supreme law*? If no security was intended to be provided for the rights of the States, and the liberty of the citizen, beyond the mere organization of the Federal Government, we should have had no written Constitution, but Congress would have been authorized to legislate for us, in all cases whatsoever. . . If the will of a majority of Congress is to be the supreme law of the land, it is clear the Constitution is a dead letter, and has utterly failed of the very object for which it was designed—the protection of the rights of the minority. But when, by the very terms of the compact, strict limitations are imposed on every branch of the Federal Government, and it is, moreover, expressly declared, that all powers, not granted to them, “are reserved to the States or the People,” with what show of reason can it be contended, that the Federal Government is to be the exclusive judge of the extent of its own powers?<sup>74</sup>

In his closing remarks, Hayne reiterated the history of the Virginia and Kentucky Resolutions and Madison’s admonition that the duty and right of interposition was a remedy rarely to be employed, and “called for by occasions only, deeply and essentially affecting the vital principles of their political system.” Hayne then invoked his own prayer to the Almighty and crafted his own motto: “*Liberty—the Constitution—Union.*”<sup>75</sup>

Like Hayne, Webster’s final remarks were briefer regurgitations of arguments presented at length in his previous two speeches. He never addressed the practical problem posed by the Supreme Court’s limited original and appellate jurisdiction. If the Constitution was a compact between the states, he presumed, where does the compact provide that the states can decide on the constitutionality of acts of the federal

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and legal matters come before it. For the executive, this constitutional determination is implicitly undertaken when deciding whether or not to veto legislation on *constitutional*, as opposed to *policy*, grounds. The principle advocate of the departmental theory of constitutional interpretation during the 1830s was Andrew Jackson, who did not hesitate to veto legislation he deemed unconstitutional, despite congressional and judicial determinations to the contrary: “The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both.” David J. Bodenhamer, *The Revolutionary Constitution*, (New York: Oxford University Press, 2012), 108.

<sup>74</sup>“Speech of Mr. Hayne, of South Carolina [January 27, 1830].”

<sup>75</sup>*Ibid.*

government? If the Constitution was a compact between the states, why did the *Preamble* provide that the Constitution was established “by the People of the United States”? Why did the *Preamble* at least provide that the Constitution was established “by the People of the several States”?<sup>76</sup> For Webster, when creating the Constitution and the federal government, the *people* acted collectively as one, and that was that.

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The first senator to rise in direct response to the multi-week debate between Hayne and Webster was John Rowan of Kentucky, and he clearly was not impressed with Webster’s analysis. He attacked Webster’s claim that the Constitution, and the federal government, were formed “by the people at large” as a doctrine that had never been “openly avowed . . . in either House of Congress,” and only implied by John Adams during his presidency. Rowan charged that such a formulation meant that with the ratification of the Constitution, the states effectively surrendered all of the sovereignty to the federal government, and queried how such a momentous event was “kept a secret from the people of the State.”<sup>77</sup> Rowan then outlined his understanding of the compact, in terms similar to those outlined by Madison in his *Report of 1800*:

Now, sir, I understand *State* to mean the people who compose it,—that it is but a name by which they, in their collective capacity, are designated. By the people of the United States, I understand, the distinct collective bodies of people, who compose the States that are united by the Federal Constitution. And by the United States, I understand, the distinct collective bodies of people of which the States are composed.<sup>78</sup>

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<sup>76</sup>“Speech of Mr. Webster, of Massachusetts [January 26 and 27, 1830].”

<sup>77</sup>“Speech of Mr. Rowan, of Kentucky [February 4, 1830],” in Belz, *Daniel Webster, The Webster-Hayne Debate on the Nature of the Constitution*, [http://oll.libertyfund.org/titles/1557#Webster\\_0099\\_592](http://oll.libertyfund.org/titles/1557#Webster_0099_592).

<sup>78</sup>“Speech of Mr. Rowan, of Kentucky [February 4, 1830].”

According to Rowan, just prior to the ratification of the Constitution by each state, the sovereignty of each was “separate and distinct, and consisted in the concentrated will of the people of each.” When, for example, Georgia ratified the Constitution, it was the *people* of Georgia effectively modifying the Georgia Constitution by ceding certain powers and authorities to the federal government. The *people* of Virginia did likewise with respect to the Virginia Constitution. If Webster was correct, that the federal Constitution was brought into existence by the *people en masse*, that would mean, for example, that the *people* of Georgia had the power and authority to modify the constitution of Virginia. According to Rowan, that obviously was not the case:

The people of no one State could interfere with the rights of another, nor with its own, in any other capacity, than as the collective body which composed the State. But, upon the supposition, that the People of all the States, not in their State capacities, but at large, and by their confluent voice or agency, formed the Constitution. The difficulty still presents itself. By what authority did all unite in modifying the Constitution of each. They had not entered all into one general compact, and thereby conferred power upon the majority, to form the Constitution, by the adoption of the State machinery, which they had thrown off. This Government is not formed by the people at large, out of the *exuviae* of the States. But will the gentleman have the goodness to tell us, what is the power, and where does it reside, which is employed in altering the Constitution of a State?

. . . Now, if none but the people of a State, in their distinct State capacity, could affect its Constitution, then their action in forming the Constitution of the United States, must have been exerted in their State capacity. The States, whereby I mean the people of each, as a distinct political body, then must have formed the Constitution, and not the People at large. If these views are correct, how can the gentleman reconcile his idea, that the Constitution was formed by the People, and not by the States, with his other idea, that it was formed by the *People* to impose certain *restraints* upon State sovereignty. If the People acted in their distinct State capacities, then they could consistently impose restraints upon the exercise by the States of their sovereign power—but then they acted as States—and imposed the restraints

by *compact*; and in no other capacity could they act, nor by any other mode than by compact, could they achieve that object.<sup>79</sup>

Rowan finished by defending the State *veto*, but in terms not in concert with Calhoun's description of such right. Calhoun's single state veto meant that an individual State could invalidate a federal statute for the entire nation, presumably without the requirement that any other state had agreed with such veto. That was the mode of governance under many of the enforcement provisions of the Articles of Confederation. Rowan's description of the single State *veto* was not that ambitious, and incorporated elements from Jefferson's *Draft*, combined with elements of Madison's *Virginia Resolutions*. Jefferson's *Draft* argued that state legislatures could declare an act of Congress as unconstitutional and could "nullify of their own authority all assumptions of power by others within their limits," as well as "take measures of it's own" to ensure that no actions of the federal government that are not authorized under the Constitution "shall be exercised within their respective territories."<sup>80</sup> Madison's *Virginia Resolutions of 1798* argued that "the states who are parties thereto have the right, and are in duty bound, to interpose for arresting the progress of the evil, and for maintaining within their respective limits, the authorities, rights, and liberties appertaining to them."<sup>81</sup> Rowan's formulation also seconded Madison's belief in the importance of public opinion. He began by asking whether a law in violation of the Constitution is supreme, and what if a state resists:

And what, you will ask me, will be the result of this resistance by a State of an unconstitutional law of Congress, or an unconstitutional decision of the Supreme Court? I answer that the first result will be the preservation of the sovereignty of the State, and of the liberty of its citizens, at least for a time. The next result will be, that the attention of the people of the other States will

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<sup>79</sup>Ibid.

<sup>80</sup>Jefferson's *Draft*, eighth resolution.

<sup>81</sup>*Virginia Resolutions of 1798*, third resolution.

be awakened to the aggression, and the Congress or the Supreme Court, whichever shall have been the aggressor, will be driven back, into the sphere of its legitimacy, by the rebuking force of public opinion. Such was the result of the nullifying resolutions of the States of Virginia and Kentucky, in relation to the alien and sedition laws.<sup>82</sup>

Levi Woodbury of New Hampshire spoke on February 23<sup>rd</sup>, and began his speech by lamenting that a debate on public lands had “opened the door to a course of argument, and a latitude of discussion . . . not only into a Committee of the Whole on the State of the Union, but no the State of the Union in all time past, present and to come.” Woodbury also took umbrage at Hayne’s attack on New England and its manufacturers, who had been painted by Hayne as the principle villains on the subject of land sales and the tariff. Despite his expressed chagrin at the course of the debate, Woodbury gave his own brief history lesson on various attempts to specify the limitations on government power, including Magna Carta, the written federal Constitution, the latter “well known to have been created chiefly for limited objects connected with commerce and foreign intercourse.” A discussion followed of the controversies of the 1790s—the Jay Treaty and Alien and Sedition Acts—and the division in Congress, beginning in 1794 of “advocates of extended constructive powers in the General Government, and especially in its Executive department, and of restricted views on these constitutional powers.” As for the Alien and Sedition Acts, Woodbury noted the “strong reasoning of Mr. Madison in the Virginia Resolutions of 1798, and the acute mind of Mr. Jefferson in those of Kentucky,” and then quoted, verbatim, Madison’s third and fourth resolves, the former containing the remedy of interposition, and

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<sup>82</sup>“Speech of Mr. Rowan, of Kentucky [February 4, 1830].”

an excerpt from a letter late in Jefferson's life, advocating a strict construction of the *necessary and proper* clause of the federal Constitution.<sup>83</sup>

Woodbury then recounted the recent political history of New Hampshire, its flirtations with the Federalists before rejoining its Republican brethren, who recognized attempts by the federal government to expand its powers should be confronted by the "*the duty* of the Legislatures of the individual States, to adopt such constitutional measures, as may tend to correct the error, or avert the evil."<sup>84</sup>

But nothing seems plainer to me, than that one is the only true government to preserve and perpetuate a mere confederacy of independent and democratic sovereignties; and the other, by whatever name baptised, is a government tending to consolidation—to consolidation, not of the Union, but of all political powers in the Union. The difference does not consist so much in words as in things; not in professions, but in effects: the one tending to a republican confederation; the other, in the words of the Virginia Resolutions, to a practical "monarchy."<sup>85</sup>

Woodbury noted the imminent extinguishment of the federal debt and the significant surpluses generated by duties and sales of lands in the West, and feared the favoritism and corruption such pecuniary riches might generate among politicians in Washington. Without a meaningful check on the power of the general government by the states, Woodbury saw the "degeneracy, if not the ruin of our confederacy." Woodbury then rejected what he saw as the most troubling aspect of Webster's arguments: "Has it come to this, under such a government, that one of the parties cannot, in any way, interpose and correct its ruinous tendencies, and its insidious constructions, when the great exigencies of the country demand it?"<sup>86</sup> The senator noted that Webster's theory on the nature of the

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<sup>83</sup>"Speech of Mr. Woodbury, of New Hampshire [February 23, 1830],"

<sup>84</sup>*Ibid.*

<sup>85</sup>*Ibid.*

<sup>86</sup>*Ibid.*

Union was in the minority, and thus, the lion's share of the debate among all the senators reflected less disagreement than the fiery rhetoric suggested: "Most must admit that [the states] can interfere in some way: so said the fathers of democracy in '98, so said the Virginia and Kentucky Resolutions; and so do those say whom I represent." Woodbury then set forth his own unique understanding of the compact, which he interpreted as being a compact between the state governments and the federal government, each created by the "agents" of the people, i.e., the delegates that represented the *people* at the ratifying conventions. Citing Madison's explication in his *Report of 1800*, however, that the parties to the constitutional compact were the *people*, acting in their highest sovereign capacity, Woodbury agreed that ultimate power remained with the *people*:

My theory on this subject may vary more in form than substance from other gentlemen's, but as each speaks for himself on this floor, I may be permitted to say briefly it is this: that the parties to the Constitution are the agents of the people and the States, placed in the General Government on the one hand, and the agents of the people placed in their State Governments on the other hand; and that the people, separated from their agents, are only the great primary power and foundation of the whole, never acting as one whole upon or about the Constitution either legislatively, executively or judicially; but acting on it in those forms, or any others, only by their agents in the States and in the General Government. But the people themselves are still a power behind the throne greater than the throne itself; and entrench yourselves as you may, to the teeth, in parchments and constructions, they, by their agents, in Convention in the States, can abolish every institution, political or civil, of the Union or of their respective States.<sup>87</sup>

Woodbury resisted the familiar trope that constitutional conflicts were primarily due to faction or the petty difference between the political parties, first the Republicans and Federalists, and now the various strains within what was now called the Democratic Party. For Woodbury, the genesis of the conflict was the natural tendency of agents of the state and federal governments to desire an expansion of their own respective sphere of

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<sup>87</sup>Ibid.

power and authority. A good example of this was Woodbury's analysis of the Supreme Court and its supposed role at the ultimate arbiter of the meaning of the Constitution. For the senator, there was little merit in such a powerful role for the Court "because its members are all appointed by, and answerable to only one of the parties" to the compact, the federal government: "The amendments of the Constitution reserving the rights and powers to the States or people, would be nugatory—a mere mockery, if the suicidal grant was made to the Supreme Court, to the mere agents of one party, to decide finally and forever on the extent of their own powers." Such a role also made little practical sense as well given the limited jurisdiction granted under the Constitution. Woodbury's opinion regarding the Court was aligned with that of Thomas Jefferson, who described federal judges as the "subtle corps of sappers and miners constantly working underground to undermine the foundations of our confederated fabric." And the cause of such mischief, according to Jefferson, was the natural inclination of judges to expand their authority: "They are construing our constitution from a co-ordination of a general and special government to a general and supreme one alone. This *will lay all things* at their feet, and they are too well versed in English law to forget the maxim, "*boni judicis est ampliare jurisdictionem,*" i.e., "*It is the part of a good judge to enlarge his jurisdiction.*"<sup>88</sup>

But what of Calhoun's contention that a state could nullify a federal law or incorrect decision of the Supreme Court? If the Court, in the opinion of the *people*, made a wrong decision, "is there, first, no remedy for the people? Are not they supreme?" Woodbury answered his own question with the assurance that the *people*, "if the case excite them

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<sup>88</sup>Ibid. Jefferson view of the judiciary was contained in his letter to Thomas Ritchie. Thomas Jefferson to Thomas Ritchie, December 25, 1820, *Founders Online*, National Archives, <http://founders.archives.gov/documents/Jefferson/98-01-02-1702>.

enough,” would take action as the ultimate sovereign, either by “changing the agents who have misbehaved” or “by conventions, alter or abolish their whole system of Government.” “This is a doctrine,” Woodbury continued, “neither revolutionary nor leading to anarchy, but rational and democratic, and lies at the foundation of all popular governments.” But this doctrine, Woodbury finally made clear, did not include the right of a state legislature to nullify a federal law or decision of the Supreme Court:

When all these modes fail, another and decisive resort on the part of the States, is to amendments of the Constitution, by the safe and large majority of three-fourths. The acknowledged power of the States by their resolutions and concert in this way, to effect any changes, limitations or corrections, shows clearly that in them the real sovereignty between the two governments is placed by the Constitution, and in them the final, paramount, supremacy resides. They can alter this Constitution; but we here cannot alter their Constitutions. We then are the servants and they the master. On the contrary whatever others may hold, I do not hold that any certain redress beyond this, on the part of any State, can be interposed against such decisions of the Supreme Court as are followed by legal process, unless that State resorts, successfully, to force against force, in conflict with the federal agents. It is admitted by me, however, that, a State may resolve, may express her convictions on the nullity or unconstitutionality of a law or decision of the General Government. These doings may work a change through public opinion, or lead to a cooperation of three fourths of the sister States, to correct the errors by amendments of the Constitution. But whenever the enforcement of the law or decision comes within the scope of the acknowledged jurisdiction of the Supreme Court, and can be accomplished by legal process, I see no way in which that Court can be controled, except by moral and intellectual appeals to the hearts and heads of her Judges or by amendments to the Constitution; or by the deplorable and deprecated remedy of physical force. This latter resort I do not understand any gentleman here to approve, until all other resorts fail; and even then only in a case where the evil suffered is extreme and palpable, and indeed, more intolerable and dangerous than the dissolution of the Government itself.<sup>89</sup>

Woodbury admitted that his views on the nature of the Union could be wrong, but “whether right or wrong,” he believed they were consistent with “the views of the fathers of

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<sup>89</sup>“Speech of Mr. Woodbury, of New Hampshire [February 23, 1830].”

the democratic party,” Madison and Jefferson, “and if I err, I err with the Platos and Socrates’ of my political faith.”<sup>90</sup>

The third senator to meaningfully respond to the constitutional issues raised by Hayne and Webster was William Smith, Hayne’s senatorial colleague from South Carolina. A lawyer by training, Smith had a long record and state and federal politics, with a reputation as a defender of states’ rights while being an early opponent of fellow South Carolinian John C. Calhoun and his early nationalist views. Elected to the Senate in 1816, ironically, Smith lost his Senate seat to Hayne in 1823. The South Carolina legislature elected Smith back to the Senate in 1826 to fill a vacancy after the death of Senator John Gaillard earlier that year. While he vehemently opposed the protective tariff, he opposed state nullification and the plan to call a state convention but did recognize the power of the *people* as the ultimate sovereign.<sup>91</sup>

After a series of pointed remarks on federal land policy, Smith, with an “invincible reluctance” to venture into a discussion not before the Senate, addressed the “two great political questions” raised by Webster and Hayne, namely:

whether, if a State be borne down by the oppressive operation of a law of the United States, the proper appeal from that oppression, is not to the Judiciary:

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<sup>90</sup>Ibid.

<sup>91</sup>“William Smith,” in Belz, *Daniel Webster, The Webster-Hayne Debate on the Nature of the Constitution*, [http://oll.libertyfund.org/titles/1557#Webster\\_0099\\_675](http://oll.libertyfund.org/titles/1557#Webster_0099_675). In the fall elections of 1830, South Carolina legislators that were staunch supporters of John C. Calhoun’s relatively recent conversion to a vigorous states’ rights doctrine now considered Smith as too moderate. Smith was defeated by Stephen Miller, an unabashed supporter of abolishing tariffs and nullification, whose campaign rhetoric included the phrase, “There are three and only three ways to reform our Congressional legislation, familiarly called, the ballot box, the jury box and the cartridge box.” Smith would later be nominated by President Jackson to the U.S. Supreme Court and was confirmed by the Senate, but he chose to decline the nomination. Mary Chesnut, the famous Civil War diarist, was Stephen Miller’s daughter from a second marriage. Elisabeth Muhlenfeld, *Mary Boykin Chesnut: A Biography* (Baton Rouge: Louisiana State University Press, 1992), 18.

or whether, in such a case, the State aggrieved, has not a right to withdraw, and say to the rest of the Union, we no longer belong to you, because you have violated the compact with us; we have decided for ourselves that you have oppressed us; your laws are unconstitutional, and we will no longer continue a member of the Union.<sup>92</sup>

As to the first inquiry, Smith accepted the general principle that judges were fit to decide ordinary cases between litigants, but he expressed dismay that a single judge (on the Supreme Court, for example) could cast the deciding vote on the fate of the Union in a case where the “law is notoriously unconstitutional, and oppressive upon the whole community of a State; where the ground of complaint would be, that Congress had enacted a law, not only against the letter, but likewise the spirit and meaning of the Constitution.” In such event, Smith concluded, would not the opinion of a single judge effectively be considered the equivalent of the Constitution itself? Smith queried, “is it not time to enquire, whether it be not fit to place it in some more responsible repository?”<sup>93</sup>

As for the remaining “great question,” Smith offered no opinion on nullification or the proper modes of interposition. On the right of secession, he refrained from offering his personal views—“This is not the time, and place, and circumstances”—but instead referred the Senate to the people of South Carolina:

If South Carolina is aggrieved by the Tariff, and she most assuredly is, to an extent of great oppression, and the remedy is only to be found in a separation from the Union, it belongs exclusively to the people of that State to meet in convention, examine the subject, weigh the consequences, and settle the mode of operation.<sup>94</sup>

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<sup>92</sup>“Speech of Mr. Smith, of South Carolina [February 25, 1830],” in Belz, *Daniel Webster, The Webster-Hayne Debate on the Nature of the Constitution*, [http://oll.libertyfund.org/titles/1557# Webster\\_0099\\_725](http://oll.libertyfund.org/titles/1557# Webster_0099_725).

<sup>93</sup>“Speech of Mr. Smith, a South Carolina [February 25, 1830].”

<sup>94</sup>*Ibid.*

Smith bemoaned the tendency of the federal Congress to “bend” the Constitution “to suit the interests of the majorities,” but there was a silver lining to this unfortunate phenomenon: “Investigations of its true and plain common-sense construction is going on in more hands than one.” Comparing South Carolina’s present burdens to the burdens that precipitated the American Revolution (“What was the exciting cause of that revolution? A three penny tax on tea”), Smith warned the Senate that separation from the Union would occur if “the cupidity or the madness of the majority in Congress” pushed further oppressive measures on the people of South Carolina, until “no other alternative remains.” Smith dramatically painted a dire future ahead for the nation, if the power of public opinion did not avert the coming crisis. Addressing the president of the Senate, John C. Calhoun, Smith asked:

if there be even one man, who can for a moment suppose, that twelve million of the free People of the United States will calmly submit to have the direction of the whole of their labor taken out of their own hands, and placed under the management of the General Government; not to secure a revenue for governmental purposes, but that the Government may, at its discretion, parcel out the profits of the labor of one portion of the Union, to bestow on those of another portion of the Union? Sir, it is morally certain that they will submit to no such tyranny. Nor will it be necessary for the People to rise in their might to put it down, either by one portion seceding from the rest, or by the more direful alternative, a civil war, that must drench the States with the blood of their own citizens. Public opinion must, and will correct this mighty evil, and in its own way, and leave the States still further to cultivate their Union, upon those pure principles that first brought them together. If I am mistaken, however, and these hopes should prove illusive, it will then be time for the States to determine what are their rights, and whether they have constitutional powers to secede from the Union.<sup>95</sup>

Senator Edward Livingston of Louisiana, who would be appointed Jackson’s Secretary of State in 1831, and later draft the president’s “Proclamation on Nullification” in 1832, accepted many of the elements of Virginia and Kentucky Resolutions. In his speech

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<sup>95</sup>Ibid.

on March 9, 1830, the senator agreed that the Constitution was “the result of a compact entered into by the several States,” and supported many of the modes of interposition that had become common in the early republic. The senator, however, rejected the notion that a state, however defined, could constitutionally resist the enforcement of a federal statute, even if unconstitutional. According to Livingston, with the creation of the federal Constitution, the states had “unequivocally surrendered every constitutional right of impeding or resisting the execution of any decree or judgment of the Supreme Court . . . even if such decree or judgment should, in the opinion of the States, be unconstitutional.” A state’s, and presumably the *people’s*, recourse was limited to: (1) remonstrating against it to Congress; (2) encouraging the *people* in their elective functions to charge or instruct their representatives; (3) soliciting the cooperation of the states, which have a right to declare that they consider the act as unconstitutional and therefore void; (4) by proposing amendments to the Constitution as set forth in Article V; and (5) “if the act be intolerably oppressive,” it could resort to the right of revolution, “the extreme right which every people have to resist oppression.”<sup>96</sup>

Moreover, if a law of the United States violated the “constitutional right of a State” but could not be “brought before the Supreme Court” for adjudication, and such violation not only justified the accepted methods of interposition but also “a withdrawal from the Union,” the state could proceed. That right of withdrawal, however, would not be a right “derived from the Constitution” but “justified only on the supposition that the Constitution”

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<sup>96</sup>“Speech of Mr. Livingston, of Louisiana [March 4, 1830],” in Belz, *Daniel Webster, The Webster-Hayne Debate on the Nature of the Constitution*, [http://oll.libertyfund.org/titles/1557#Webster\\_0099\\_984](http://oll.libertyfund.org/titles/1557#Webster_0099_984).

had been broken, “and the State absolved from its obligation.” Calhoun’s formulation of a state veto, however, would:

introduce a feature in our Government, not expressed in the Constitution, not implied from any right of sovereignty reserved to the States, not suspected to exist by the friends or enemies of the Constitution when it was framed or adopted, not warranted by practice or cotemporaneous exposition, nor implied by the true construction of the Virginia resolutions in ‘98.<sup>97</sup>

Interestingly, Livingston also rejected the claim of Webster that the Constitution was the result of the “general will of the People of the United States in their aggregate capacity, and founded, in no degree, on compact between the States.” Such a theory, would have “disastrous” practical results because, given the current population of the States, it would place “three-fourths of the States at the mercy of one-fourth, and lead inevitably to a consolidated Government.”<sup>98</sup>

Richard Ellis judged Livingston’s formulation as rejecting “nullification and state sovereignty,” and as an excellent representation of what he termed the “traditional states’ rights” theory of the Old Republicans.<sup>99</sup> Livingston, while accepting Madison’s contention that the federal Constitution was a compact between the people of each state, failed to directly address Madison’s theory that the *people* of a state, acting in their highest sovereign capacity, could join forces with the *people* of other states and legally amend the Constitution outside of the dictates of Article V, or nullify an unconstitutional action of the federal government.<sup>100</sup>

Senator John M. Clayton of Delaware, the last senator to speak substantively on the nature of the Union, rose in the Senate chamber on March 4. Over two months had passed

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<sup>97</sup>“Speech of Mr. Livingston, of Louisiana [March 4, 1830].”

<sup>98</sup>*Ibid.*

<sup>99</sup>Ellis, *The Union at Risk*, 11.

<sup>100</sup>“Speech of Mr. Livingston, of Louisiana [March 4, 1830].”

since Senator Foot proposed his resolution. Clayton, who later supported Jackson’s stand against state nullification and later assisted in the passage of a compromise tariff in 1833, did not directly reject a compact theory of the Constitution—the word “compact” never appeared in his speech—but he did address “the right of a State to regulate her conduct by the judgment of her own self-constituted tribunals, upon the validity of an act of Congress in opposition to the solemn decisions of the Supreme Court of the United States.” In answer, he flatly rejected the right of a State to nullify an act of Congress “without the aid of the Federal Judiciary.”<sup>101</sup>

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Unlike the slavery debate that was precipitated by the largely forgotten Congressman from New York, James Tallmadge, the weeks of debate in the Senate produced nothing of consequence to those states that felt the sting of tariff duties as high as 45%. A compromise on the tariff would come three years later, and like the Missouri Compromise, the short-term and long-term winners and losers, and the likelihood that the Union would remain intact, often were difficult to identify. In the fall of 1831, tariff opponents organized a national convention in Philadelphia in September and October of 1831, which produced memorials seeking a reduction in the tariff.<sup>102</sup> By late 1831, it was clear that no relief would come from Congress. South Carolina, and other southern states, had “petitioned, remonstrated and resolved” for years against the increasingly injurious

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<sup>101</sup>“Speech of Mr. Clayton, of Delaware [March 4, 1830],” in Belz, *Daniel Webster, The Webster-Hayne Debate on the Nature of the Constitution*, [http://oll.libertyfund.org/titles/1557#Webster\\_0099\\_791](http://oll.libertyfund.org/titles/1557#Webster_0099_791).

<sup>102</sup>Fritz, *American Sovereigns*, 219.

tariff to no avail, and political leaders in the Palmetto State felt compelled to invoke more drastic measures, and turned back to Calhoun's state veto.<sup>103</sup>

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On October 26, 1832, a special session of the South Carolina legislature passed a bill calling for the creation of a convention to be held on November 19. William Freehling described the convention delegates as a combination of "unionists," who rejected nullification as a legitimate remedy and appeared willing to support Andrew Jackson in any military move against South Carolina, "conservative nullifiers," who favored nullification but sought to avoid disunion, and "radical nullifiers," who interpreted nullification simply as a step toward a more desired secession from the United States. A subcommittee of the House prepared an "Ordinance of Nullification," along with an accompanying report written by Senator Robert Hayne and two essays, one drafted by John C. Calhoun (revised by George McDuffie) and another by Robert Turnbull, which described the terms on which South Carolina would settle the tariff fight. On November 22, the documents were presented to the convention for its consideration. Two days later, the convention formally adopted each of the documents as its own.<sup>104</sup>

South Carolina's "Ordinance of Nullification" declared the tariffs of 1828 and 1832 as "unauthorized by the constitution of the United States" and violative of the "true meaning and intent thereof" and, thus, were "null, void, and no law, nor binding upon this State, its officers or citizens." Rather than formally adopting the "state veto" from Calhoun's

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<sup>103</sup>Ibid, 220.

<sup>104</sup>Freehling, *Prelude to War*, 260-63. See also Ellis, *The Union at Risk*, 74-76.

*Exposition*, the *Ordinance of Nullification* purported to be effective only with the borders of South Carolina:

And it is further ordained, that it shall not be lawful for any of the constituted authorities, whether of this State or of the United States, to enforce the payment of duties imposed by the said acts within the limits of this State; but it shall be the duty of the legislature to adopt such measures and pass such acts as may be necessary to give full effect to this ordinance, and to prevent the enforcement and arrest the operation of the said acts and parts of acts of the Congress of the United States within the limits of this State, from and after the first day of February next, and the duties of all other constituted authorities, and of all persons residing or being within the limits of this State, and they are hereby required and enjoined to obey and give effect to this ordinance, and such acts and measures of the legislature as may be passed or adopted in obedience thereto.<sup>105</sup>

The *Ordinance* also directed that “no case of law or equity, decided in the courts of this State” that considered the legitimacy of the *Ordinance* or the constitutionality of the tariffs could be appealed to the Supreme Court, and any person attempting to so would be held in contempt of court. The *Ordinance* required all civil or military office holders (other than members of the legislature) to take an oath “to obey, execute, and enforce” the *Ordinance*, including all subsequent measures adopted by the legislature to put the *Ordinance* into effect. Officers failing to take the oath would be stripped of their offices “as if such person or persons were dead or had resigned.” More disturbing, prospective jurors would be required to take the same oath in any case that may call into question the legitimacy of the *Ordinance* “or any act of legislature passed in pursuance thereof.”<sup>106</sup>

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<sup>105</sup>“South Carolina Ordinance of Nullification, November 24, 1832,” Yale Law School, *The Avalon Project: Documents in Law, History and Diplomacy*, [http://avalon.law.yale.edu/19th\\_century/ordnull.asp](http://avalon.law.yale.edu/19th_century/ordnull.asp) (hereinafter, the “*Ordinance of Nullification*” or the “*Ordinance*”).

<sup>106</sup>*Ordinance of Nullification*.

After South Carolina figuratively drew a legal line in the sand around its borders, it closed the *Ordinance* with a clear threat to Jackson and anyone else who might attempt to enforce the tariff:

And we, the people of South Carolina, to the end that it may be fully understood by the government of the United States, and the people of the co-States, that we are determined to maintain this our ordinance and declaration, at every hazard, do further declare that we will not submit to the application of force on the part of the federal government, to reduce this State to obedience, but that we will consider the passage, by Congress, of any act authorizing the employment of a military or naval force against the State of South Carolina, her constitutional authorities or citizens; or any act abolishing or closing the ports of this State, or any of them, or otherwise obstructing the free ingress and egress of vessels to and from the said ports, or any other act on the part of the federal government, to coerce the State, shut up her ports, destroy or harass her commerce or to enforce the acts hereby declared to be null and void, otherwise than through the civil tribunals of the country, as inconsistent with the longer continuance of South Carolina in the Union; and that the people of this State will henceforth hold themselves absolved from all further obligation to maintain or preserve their political connection with the people of the other States; and will forthwith proceed to organize a separate government, and do all other acts and things which sovereign and independent States may of right do.<sup>107</sup>

What “civil tribunals” South Carolina had in mind was unclear. Given that any officers of any such tribunal would have taken an oath to uphold the *Ordinance*, that every juror impanelled to hear the case would have taken that same oath, and that no appeal of the decision of such tribunal could make its way to the Supreme Court, South Carolina had effectively challenged President Jackson to stand down and capitulate to its demands.

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On December 4, 1832, President Andrew Jackson submitted his annual message to Congress, the main thrust of which reiterated his philosophy to maintain a proper balance

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<sup>107</sup>Ibid.

between the federal government and the states, including his dissatisfaction with the Second National Bank and the federal government's ambitious program of internal improvements. In a wide-ranging address, he touched on trade with Mexico and Central America, the retirement of the national debt, the direct election of the president and Vice President, the status of the Army and the Navy, Indian removal in Georgia and Indian wars in Illinois, the lack of federal circuit courts in the West, the sale of public lands and even a "band of lawless pirates" off the coast of Sumatra.<sup>108</sup>

As for South Carolina and its nullifiers, the events in South Carolina only merited one brief paragraph in the middle of the message. "It is my painful duty to state," Jackson intoned, "that in one quarter of the United States opposition to the revenue laws has arisen to a height which threatens to thwart their execution, if not to endanger the integrity of the Union." The President expressed his hope that "the moderation and good sense" of the people of South Carolina might overcome any "obstructions" that might be "thrown in the way of the judicial authorities of the general government" charged with enforcing it. If not, the president believed "the laws themselves are fully adequate to the suppression of such attempts as may be immediately made." "Should the exigency arise rendering the execution of the existing laws impracticable from any cause what ever," he would promptly notify the Congress with his proposal for the "measures as may be deemed necessary to meet it."<sup>109</sup>

Jackson coupled his comments on South Carolina with a proposal to reduce the tariff and his recommendation that future tariff measures should be "limited to those articles of domestic manufacture which are indispensable to our safety in time of war." As might be

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<sup>108</sup>"Andrew Jackson's Fourth Annual Message to Congress, December 4, 1832," Miller Center, University of Virginia, <http://millercenter.org/president/speeches/speech-3637>.

<sup>109</sup>"Andrew Jackson's Fourth Annual Message to Congress, December 4, 1832."

predicted, nationalists and advocates of a high tariff reacted negatively. John Quincy Adams complained, “[I]t goes to dissolve the Union into its original elements, and is in substance a complete surrender to the nullifiers of South Carolina.”<sup>110</sup>

Given the content and tone of his annual message to Congress, close observers on either side of the issue must have been shocked when, just six days later, the president issued a special Proclamation on issues of nullification and secession.<sup>111</sup> Largely drafted by Secretary of State Edward Livingston, the same Edward Livingston, who as Senator from the Louisiana, presented a detailed interpretation of the nature of the Union in the midst of the Webster-Hayne debate in 1830 and who as a congressman from New York railed against the Sedition Act as unconstitutional, the Proclamation began in an officious and legalistic manner with a series of “Whereas” clauses reciting, in accurate detail, the principle components of South Carolina’s *Ordinance of Nullification*. “The ordinance is founded,” the *Proclamation* explained, “not on the indefeasible right of resisting acts which are plainly unconstitutional, and too oppressive to be endured, but on the strange position that any one State may not only declare an act of Congress void, but prohibit its execution,” consistent with the Constitution, and remain within the Union. To buttress his characterization of the *Ordinance*, and the theory a single state could nullify an act of Congress, as “strange,” the Proclamation attacked certain practical aspects of the theory. First, unlike federal laws, which could be appealed not only to the judiciary but also to the “people and the States,” there was no mechanism to appeal the decision of the state of South Carolina. Second, the effect of granting South Carolina the *constitutional* right to

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<sup>110</sup>Ibid; Ellis, *The Union at Risk*, 83.

<sup>111</sup>“President Jackson’s Proclamation Regarding Nullification, December 10, 1832,” Yale Law School, *The Avalon Project*, [http://avalon.law.yale.edu/19th\\_century/jack01.asp](http://avalon.law.yale.edu/19th_century/jack01.asp). (hereinafter referred to as “Jackson’s *Proclamation*” or the “*Proclamation*.”)

prevent the collection of tariff duties would mean that no duties could be legally collected anywhere: citizens obligated to pay duties would simply object based on the Constitutional requirement in Article I, Section 8, Clause 1 that all impost must be uniform or “equal” throughout the United States. By this argument, Livingston had cleverly converted South Carolina’s theory of state nullification, which enjoyed greater support among certain states’ rights theorists, into Calhoun’s more radical state veto, which did not.<sup>112</sup>

The *Proclamation* then recounted those instances during the early history of the nation when certain laws of Congress—“the excise law in Pennsylvania, the embargo and non-intercourse law in the Eastern States, the carriage tax in Virginia”—were deemed unconstitutional by certain states of the Union, but pointed out that, thankfully, no state attempted to nullify such laws. “If this doctrine had been established at an earlier day, the Union would have been dissolved in its infancy.” “To the statesman of South Carolina,” the *Proclamation*, somewhat mockingly and somewhat solemnly, intoned, “belongs the invention, and upon the citizens of that State will, unfortunately, fall the evils of reducing it to practice.”<sup>113</sup> Not satisfied, the *Proclamation’s* next paragraph was even more vitriolic, characterizing the Ordinance as “the doctrine of a State veto,” and claiming the doctrine carried with it, the “internal evidence of its impracticable absurdity.”<sup>114</sup>

The *Proclamation* retreated in its rhetoric with a brief history of the nation under the Articles of Confederation. While the life of the nation under the Articles was sometimes characterized by the states ignoring the dictates of Congress, no state claimed a legal right under the Articles to annul an act of Congress. It was due to these defects, the *Proclamation*

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<sup>112</sup>Jackson’s *Proclamation*.

<sup>113</sup>*Ibid.*

<sup>114</sup>*Ibid.*

continued, that the Constitution was ratified, in order “*to form a more perfect Union.*” Just then, the president figuratively slammed his hand on the table and exclaimed:

I consider, then, the power to annul a law of the United States, assumed by one State, *incompatible with the existence of the Union, contradicted by the letter of the Constitution, unauthorized by its spirit, inconsistent with every principle on which it was founded, and destructive of the great object for which it was formed.*<sup>115</sup>

The *Proclamation* then turned back to a discussion of South Carolina’s justification for nullification, which Jackson and Livingston counted as having four. First, although the tariff was purportedly passed for constitutional reasons, i.e., to raise revenues, its real purpose was to protect certain manufacturing, which was not constitutional. The question of Congress’ motive, the *Proclamation* warned, was fraught with danger and mischief: “[H]ow is that purpose to be ascertained? Who is to make the scrutiny? How often may bad purposes be falsely imputed?” Introducing speculation as to “motive” into constitutional inquiry was, therefore, an “absurd and dangerous doctrine.”<sup>116</sup>

South Carolina’s second justification—the tariff laws operated unequally—was similarly dismissed. Every law could be objected to on such basis. The third and fourth justifications—the revenue raised by the tariff was greater than were required and the revenue raised would be spent in an unconstitutional manner—were no more convincing to the president. Congress was given the express power to raise revenue and had within its discretion the right and authority to decide how much revenue was needed and for what purposes. The states and the *people* have recourse in the next election if they disagree with this exercise of discretion, but it must reside somewhere: “The Constitution has given it to the representatives of all the people, checked by the representatives of the States, and by

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<sup>115</sup>Ibid.

<sup>116</sup>Ibid.

the executive power.” As for spending the revenues in an unconstitutional manner, South Carolina could await the unconstitutional manner and complain then.

Mixed in amidst the specific rebuttals to South Carolina’s justification for the *Ordinance of Nullification* were additional insults aimed at the *Ordinance* and pious language with respect to the sanctity of the Union. On the one hand, South Carolina’s theory of state nullification was “destructive,” “impractical” and “absurd,” and when certain aspects were especially annoying, they were an “impractical absurdity.” But the Constitution, on the other hand, was deserving of reverence, “as the work of the assembled wisdom of the nation,” “the street-anchor of our safety, in the stormy times of conflict with a foreign or domestic foe,” as well as “the object of our reverence, the bond of our Union, our defense in danger, the source of prosperity in peace.”<sup>117</sup>

The *Proclamation* then moved onto South Carolina’s threat of secession, which was “deduced from the nature of the Constitution, which they say is a compact between sovereign States who have preserved their whole sovereignty, and therefore are subject to no superior.” South Carolina’s rationale for a right to secede, the Proclamation countered, was “fallacious” but because “it enlists State pride” and because it “finds advocates in the honest prejudices of those who have not studied the nature of our government sufficiently to see the radical error on which it rests.” Livingston initially followed the formula he laid out during the Webster-Hayne debate more than two years before. The Constitution was a compact, he admitted, but not a compact between the sovereign states. Rather it was the people of the United States, “acting through the State legislatures, . . . to meet and discuss its provisions, and acting in separate conventions.” But rather than acknowledge that the

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<sup>117</sup>Ibid.

parties were the *people* of each state, as Madison attempted to make clear in his *Report of 1800*, and as Livingston himself had seconded in his speech before the Senate in March of 1830, he side-stepped the issue by focusing on the fact that the federal government represented all of the people: “We are ONE PEOPLE in the choice of the President and Vice President. . . . The people, then, and not the States, are represented in the executive branch.” Livingston strained to make the same point with respect to the legislative branch. Livingston wisely made no mention of the Senate, which was commonly accepted to be, in fact, representatives of the states and chosen by the state legislatures. With respect to the House, while the members of the House were not elected by all of the *people*, “they are all representatives of the United States, not representatives of the particular State from which they come,” they are paid by the United States and their “first and highest duty, as representatives of the United States” is promote the “general good.”<sup>118</sup>

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<sup>118</sup>Ibid. In his speech before the Senate on March 7, 1830, Livingston was clear that the Constitution was a compact between the States and painted a very different picture with respect to the nature of the House of Representatives:

[The Federal Constitution] was framed by delegates appointed by the States; it was ratified by conventions of the people of each State, convened according to the laws of the respective States. It guaranties the existence of the States, which are necessary to its own; the States are represented in one branch by Senators, chosen by the Legislatures; and in the other, by Representatives taken from the people, but chosen by a rule which may be made and varied by the States, not by Congress—the qualification of electors being different in different States. They may make amendments to the Constitution. In short, the Government had its inception with them; it depends on their political existence for its operation; and its duration cannot go beyond theirs. The States existed before the Constitution; they parted only with such powers as are specified in that instrument; they continue still to exist, with all the powers they have not ceded, and the present Government would never, itself, have gone into operation, had not the States, in their political capacity, have consented. “Speech of Mr. Livingston, of Louisiana [March 9, 1830].”

Regardless of the parties to the compact, Livingston argued secession could only be a “revolutionary act . . . morally justified by the extremity of oppression.” It could never be a *constitutional* act. In fact, Livingston now argued that *because* the Constitution was a compact, a state could not secede from the Union:

A compact is an agreement or binding obligation. It may by its terms have a sanction or penalty for its breach, or it may not. If it contains no sanction, it may be broken with no other consequence than moral guilt; if it have a sanction, then the breach incurs the designated or implied penalty. A league between independent nations, generally, has no sanction other than a moral one; or if it should contain a penalty, as there is no common superior, it cannot be enforced. A government, on the contrary, always has a sanction, express or implied; and, in our case, it is both necessarily implied and expressly given. An attempt by force of arms to destroy a government is an offense, by whatever means the constitutional compact may have been formed; and such government has the right, by the law of self-defense, to pass acts for punishing the offender, unless that right is modified, restrained, or resumed by the constitutional act.<sup>119</sup>

This is where Livingston clearly departed from the formulation set forth in his 1830 Senate speech and Madison’s formulation. Rather than establish the right of the national government to “sanction” South Carolina and threaten violence in the name of self-defense, Livingston could have set forth the same arguments that he did in response to Webster and Hayne. While the *people* of South Carolina were a party to the Constitutional compact, he might have argued, they did not have the unilateral right to nullify an act of the federal government. Relying on Madison, the *Proclamation* could have made clear to South Carolina that while it respected the *opinion* of the *people* as well as the views of the state legislature, legitimate constitutional action against the tariff could only take place by invoking the two types of interposition set forth by the last remaining Founder.

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<sup>119</sup>Ibid.

Rather than acknowledge South Carolina had acted in the name of its *people*, the *Proclamation* regressed into the remedies available to *governments* for breach of a compact. Thus, Livingston proceeded as if South Carolina put forth Jefferson's compact theory of the Constitution and argued that if a compact had no "sanction" in the event of breach, it "could be broken with no other consequence than moral guilt. For Livingston, in a compact that creates a *government*, as opposed to a compact that creates a "league," only the government had an implied right or sanction in the face of secession, namely, the "right, by the law of self-defense, to pass acts for punishing the offender, unless the right is modified, restrained, or resumed by the constitutional act." Under the Constitution, he continued, the federal government had the express authority to "pass all law necessary to carry its powers into effect, and under this grant provision has been made for punishing acts which obstruct the due administration of the laws."<sup>120</sup>

Livingston premised much of criticism of the *Carolina doctrine* on South Carolina's notion that the States retained "their entire sovereignty." When the States became part of one nation, "they surrendered many of their essential parts of sovereignty" such as the right to declare war, enter into treaties and the right to punish treason. "The allegiance of their citizens was transferred in the first instance to the government of the United States; they became American citizens, and owed obedience to the Constitution." So how can the states be said to be sovereign and independent, he reasoned, when its citizens owe an allegiance to laws not made by the state.<sup>121</sup>

Livingston challenged South Carolina to submit its grievances to a convention of all of the states. "Yet this obvious and constitutional mode of obtaining the sense of the other

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<sup>120</sup>Ibid.

<sup>121</sup>Ibid.

States on the construction of the federal compact, and amending it, if necessary, has never been attempted by those who have urged the State on to this destructive measure.” If South Carolina is serious about a convention, “why have they not made application for it in the way the Constitution points out?” The *Proclamation* then warned the citizens of South Carolina that the president would enforce the laws of the United States and of the “danger they will incur by obedience to the illegal and disorganizing ordinance of the convention,” and that “the course they are urged to pursue is one of ruin and disgrace to the very State whose rights they affect to support.”<sup>122</sup>

The closing paragraphs were addressed to the American people, assuring them that the president would faithfully “execute the laws to preserve the Union by all constitutional means.” But make no mistake, if recourse to force—“the recurrence of its primeval curse on man for the shedding of a brother’s blood”—was necessary, while the United States would not fire the first shot, he would use it. The *Proclamation* concluded with a call for the people of the United States to support and preserve the Union and a prayer to the “Great Ruler of nations”:

grant that the signal blessings with which he has favored ours may not, by the madness of party or personal ambition, be disregarded and lost, and may His wise providence bring those who have produced this crisis to see the folly, before they feel the misery, of civil strife, and inspire a returning veneration for that Union which, if we may dare to penetrate his designs, he has chosen, as the only means of attaining the high destinies to which we may reasonably aspire.<sup>123</sup>

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<sup>122</sup>Ibid.

<sup>123</sup>Ibid.

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The most significant contribution historian Richard Ellis made to a fuller understanding the Nullification Crisis was his research and scholarly interpretation of the various state responses to the Calhoun's *Exposition*, the *Carolina doctrine* and Jackson's *Proclamation*. As was the case with the Sedition Act crisis, the responses of the various events to the latest constitutional crisis was heavily influenced by unique local factors independent of events occurring in Columbia and Washington, D.C.

The Commonwealth of Kentucky flatly rejected Calhoun's interpretation of the Virginia and Kentucky Resolutions on terms that would have resonated with John Breckinridge, who added the requirement in 1798 and 1799 that any nullification must be the action of a *majority* of states, and not the action of a single state. Kentucky had been a consistent critic of the federal government's nationalist policies leading to the Second Bank of the United States and a series of internal improvement projects, but in 1830, the General Assembly of Kentucky rejected South Carolina's contention that "a minority, either of the States or of the people," could overrule the majority:

The consequences of such a principle, if practically enforced, would be alarming in the extreme. Scarcely any important measure of the general government is ever adopted, to which one or more of the States are not opposed. If one State have a right to obstruct and defeat the execution of a law of Congress because it deems it unconstitutional, then every State has a similar right. When the dissatisfied State opposes to the Act of Congress its measures of obstruction, the alternative is presented, shall the act be enforced within the particular State, or be abandoned by Congress? If enforced, there is a civil war; if abandoned, without being repealed, a virtual dissolution of the Union. . . .

Nor can the State of South Carolina derive the smallest aid in sustaining its doctrine of resistance to the federal authority, from the manner in which the constitution was formed; whether it was the work of the people of the United States collectively, or is to be considered as a compact between sovereign States, or between the people of the several States with each other, there is,

there can be, there ought to be, but one rule, which is, that the majority must govern.<sup>124</sup>

Kentucky recognized that a single state had the right, of course, to resist “extreme oppression” and to make “an appeal to arms” but not even South Carolina claimed that the tariff justified civil war. Unless the *majority* spoke, “neither the State of South Carolina nor any other State in the Union, is at liberty to pass any act to defeat the system. That State and all other States, are bound by the terms of our constitutional union, to yield obedience to the system.”<sup>125</sup>

Kentucky was very cognizant of its recent past, and its response to the Alien and Sedition Acts:

At a former epoch, when certain acts passed by Congress, called the alien and sedition laws, which were believed to be unconstitutional by the General Assembly, it neither interposed nor threatened the adoption of any measures to defeat or obstruct their operation within the jurisdiction of Kentucky. It expressed, and expressed in very strong language, its disapprobation of them and its firm conviction that they were unconstitutional, and therefore void. There it stopped, and that is the limit which no state should pass, until it has formed the deliberate resolution of lighting up the torch of civil war. Every state, as well as every individual, has the incontestable right freely to form and to publish to the world, its opinion of any and of every act of the federal government. It may appeal to the reason of the people, enlighten their judgments, alarm their fears, and conciliate their support, to change federal rulers, or federal measures. But neither a state nor an individual can rightfully resist, by force, the execution of a law passed by Congress.<sup>126</sup>

Georgia, with its consistent opposition to federal program of internal improvements, and its on-going legal battles with the judiciary over the fate of Cherokee Indians, made it a natural ally with Calhoun and the nullifiers. But as events unfolded, it became clear that scars from former political rivalries and genuine disagreement on the principle tenets of

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<sup>124</sup>“Extract from Report of Kentucky in reply to South Carolina, January 27, 1830,” in Ames, *State Documents on Federal Relations*, 158-59.

<sup>125</sup>Ibid.

<sup>126</sup>Ibid.

the *Carolina doctrine*, especially the right of a state to unilaterally nullify an act of Congress and secede from the Union, would dictate whether Georgia joined its southern brethren across its northeastern border and take on the national government.

Ellis described Georgia politics during this era as divided between those loyal to George M. Troup, elected governor of the state in 1823 and 1825, and those loyal to General Elijah Clark and then his son, General John Clark. As is common in political rivalries, the political differences between the competing groups arose from a combination of personal animosity and loyalty to vastly different constituencies. Troup's strength was in the eastern and central portions of the state where slave plantations were a critical part of the local economy and culture. Troupites supported William H. Crawford in the 1824 presidential election and, not surprisingly, had issues with Andrew Jackson. Clark followers more likely were found in the less populous and economically depressed western and northern parts of the state, where slavery was largely absent. Clarkites generally supported Jackson in the 1824 election. To make things even more complicated and unpredictable, Crawford, obviously no friend of Andrew Jackson, disliked Calhoun even more and made it known that he supported Martin Van Buren of New York, and not Calhoun, as Jackson's natural successor. Calhoun, in an attempt to negate Crawford's hostility toward him, cultivated an alliance with the Clarkites.<sup>127</sup>

As the events of the Nullification Crisis proceeded in South Carolina, and Calhoun's association with the movement became publically known, the Clarkites abandoned any notion of supporting Calhoun's effort and started to refer to themselves as the "Union" party in Georgia. Troup, retaining his disdain for Calhoun, and while never publically

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<sup>127</sup>Ellis, *The Union at Risk*, 102-04.

endorsing nullification, did express support for South Carolina's right to secede from the Union:

Whatever the people in South Carolina, in convention shall resolve for their safety, interest and happiness, will be right, and none will have the right to question it. You can change your government at pleasure; and, therefore, you can throw off the government of the Union, whenever the same safety, interest and happiness require it.<sup>128</sup>

During the spring and summer of 1832, South Carolina nullifiers made a conscious effort to solicit the support of sister-states to the west. These efforts bore fruit in August during a commencement ceremony at the University of Georgia in Athens, which were often used by the state's leading politicians as an opportunity to assemble and discuss the events of the day. Crawford and a group supportive of Jackson and hostile towards the nullifiers held a meeting at the campus chapel only to find that a larger group of Georgians supportive of the nullifiers had the same idea. The meeting in Athens ended with the nullifiers in control of the agenda, which included calling for an anti-tariff convention to be held in Milledgeville in November. Union party members considered boycotting the convention in the hopes that such action would generate popular support against convening such a convention. Despite Unionist efforts, Troupites sustained the momentum for the anti-tariff convention, which convened on November 12, 1832.<sup>129</sup>

Early procedural battles over the legitimacy of the convention and the "credentials" of its delegates ended in defeat for the Unionists, and delegates who opposed nullification walked out of the convention. Now unopposed, Troupites had free reign to adopt whatever measures they deemed prudent and necessary. But instead of an open endorsement of

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<sup>128</sup>*Niles Weekly Register*, Vol. 39, October 16, 1830, 129, <https://play.google.com/books/reader?id=P1E8AAAAIAAJ&printsec=frontcover&output=reader&hl=en>; Ellis, *The Union at Risk*, 104-5.

<sup>129</sup>Ellis, *The Union at Risk*, 106-7.

Calhoun's state veto, the convention instead adopted a series of resolutions expressing sympathy with traditional states' rights principle, including the compact theory of the Constitution, the limited and express powers of the federal government, and the right of the parties to the compact to judge the constitutionality of the actions of the federal government. Exercising such right, the convention declared the Tariff of 1832 unconstitutional, called on Congress to reduce the duties under the tariff, and proposed that representatives from all of the southern states convene at a convention in March. In order to maintain the momentum for the aims of the convention, twenty thousand copies of the proceedings were published and distributed throughout the state.<sup>130</sup>

Undeterred, the Unionists used sympathetic newspapers to challenge the legitimacy of the convention, pointing out that by the end of the convention, a majority of the counties in Georgia had no representation. The most prominent support for the Unionists came from Governor Lumpkin, whose annual address to the legislature condemned "[t]he mystical doctrine of nullification, which he labeled as "unsound, dangerous and delusive in practice as well as theory." Fueled by Lumpkin's support, and the Unionist majority in the Georgia General Assembly adopted a series of resolutions condemning the convention as the work of a minority of the state and condemning South Carolina for its doctrine of nullification, which was a "mischievous policy" that was "neither peaceful, nor a constitutional remedy," but a doctrine "tending to civil commotion and disunion."<sup>131</sup> At this point, the Unionists appeared to be ascendant and in control of the debate.

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<sup>130</sup>Ibid, 107-8.

<sup>131</sup>Wilson Lumpkin, *The Removal of the Cherokee Indians from Georgia: 1827-1841*, Vol. 1 (privately printed, repr., Savannah, GA: Wymberley Jones DeRenne, 1907), 124-25, <https://play.google.com/books/reader?id=yp2CAAAAIAAJ&printsec=frontcover&output=reader&hl=en&pg=GBS.PA124>; Ellis, *The Union at Risk*, 110.

After President Jackson's provocative *Proclamation*, the mood measurably shifted, reigniting the passions of previously muted Troupites, who now openly railed against Jackson for asserting "the power of enforcing, at the point of bayonet, an *unconstitutional* law upon a sovereign state." The president's threatening tone was especially disconcerting in light of Georgia's own dispute with the federal government over the rights of Cherokee Indians living within Georgia's borders. Samuel Worcester, a Christian missionary to the Cherokees, had been convicted in Gwinnet County of violating a state law prohibiting non-Indians from being on Indian land without a license. The case ultimately made its way to the Supreme Court. In the case of *Worcester v. Georgia*, Chief Justice John Marshall's majority opinion ordered Worcester freed after concluding that individual states had no authority in Indian lands.<sup>132</sup> At the time of the *Proclamation*, Georgia was defying Marshall's order and had not yet released Worcester. Now, in light of the Jackson's belligerent attitude in his Proclamation, Georgians feared that if Jackson used force against South Carolina, he would have to do the same to enforce the Supreme Court's order in Georgia. In Washington, D.C., allies of the president harbored the same fears, concluding the president had "placed himself in a position, where it will become his duty to sustain the Supreme Court in their position against Georgia nullification, and some go as far as to express an opinion that he will do it."<sup>133</sup>

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<sup>132</sup>*Worcester v. Georgia*, 31 U.S. 515 (1832).

<sup>133</sup>Ellis, *The Union at Risk*, 111-13. Interestingly, in *Worcester*, when discussing whether the relative power of parties to a treaty was relevant in determining the rights retained by the weaker party, Marshall concluded that such difference in power was irrelevant, and concluded that the Cherokee Nation had retained its sovereignty. Relying on Vattel, Marshall opined "the settled doctrine of the law of nations is, that a weaker power does not surrender its independence—its right to self government, by associating with a stronger, and taking its protection. A weak State in order to provide for its safety, may place

Georgians had good reason to be concerned. Northern congressman sympathetic to the plight of Indians in the South made it known that no support would be forthcoming on South Carolina unless the president was willing to use force to protect the sovereignty of the Cherokee Nation. South Carolina nullifiers welcomed the linkage, believing Jackson was less likely to use force against them if that meant he would have to move militarily against Georgia as well. “[N]o person but a Jackson or a Van Buren man,” editorialized the *United States’ Telegraph*, a paper sympathetic to Jackson, “can see any essential difference between the cases of Georgia and South Carolina. Georgia refuses to obey the decisions of the Federal Judiciary. Not a word is said by the Executive or his minions, except that she is right in doing so. South Carolina says that she will do so at a future period. And the Palace is in arms.”<sup>134</sup> Georgia leaders campaigned to preempt Jackson’s use of military force against the state by distinguishing their defiance of the Supreme Court from the *Carolina doctrine*. Georgia leaders, such as Governor Lumpkin, attempted to de-link the issues, writing to Secretary of War Lewis Cass, in a less than delicate manner:

I am . . . fully aware and alive to the unhallowed and unprincipled course now in operation, by the nullifiers, and old friends of the Hartford Convention, and the great efforts now making by their hireling presses, to identify Georgia with South Carolina, both in principle and action. They are now making a great and united effort to throw Georgia into the nullifying wake of South Carolina, and . . . they endeavor to make it appear that the conduct of Georgia in the missionary case and that of South Carolina in her scheme of nullification . . . are identical—are parallel cases. It cannot be believed that any honest man of common sense will be at a loss to draw the proper distinction between the destructive heresies and acts of South Carolina, obviously tending to the destruction of the Federal Union, and those acts of

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itself under the protection of one or more powerful without stripping itself of the right of government, and ceasing to be a State.” *Worcester v. Georgia*, 31 U.S. 515, 560-61.

<sup>134</sup>*United States’ Telegraph*, December 19, 1832.

Georgia which have been resorted to in defence of her local jurisdictional rights over her own citizens and territory. . .”<sup>135</sup>

Similar arguments appeared in various newspapers throughout the state but none were particularly illuminating or persuasive. Ellis concluded that states’ rights advocates who rejected nullification but defied the wishes of the Court simply had not accepted the notion that the federal judiciary, who “were not accountable to the will of the majority,” should be the ultimate arbiter of federal-state disputes.<sup>136</sup>

Ultimately, the federal government and the state of Georgia resolved the issue peacefully by January of 1833. For reasons unknown, many supporters of Indians rights and Worcester did an about-face and worked to quietly and quickly end the stalemate. Ellis concluded northern supporters were worried a showdown with Georgia ultimately would bolster South Carolina’s position and possibly push Georgia into the nullifier’s camp, and at the same time, damage the credibility of the Court if Georgia could not be made to heel. Even the Court aided in reducing tensions between the parties by not asking federal marshals to enforce the decision, which had become standard. Lumpkin agreed to release Worcester in exchange for his agreement to remain off Indian lands and reaffirmed his state’s commitment to the Union in his 1833 annual address. In November of that year, at his second inaugural address, he declared, “he who would destroy the sovereignty of the states by *consolidation*, or the Federal Union by nullification is a traitor to liberty, and deserves the universal execration of mankind.”<sup>137</sup>

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<sup>135</sup>Wilson Lumpkin to Lewis Cass, January 2, 1833, in Lumpkin, *The Removal of the Cherokee Indians from Georgia*, 196-97; Ellis, 113-14.

<sup>136</sup>Ellis, *The Union at Risk*, 115.

<sup>137</sup>Wilson Lumpkin, *The Removal of the Cherokee Indians from Georgia*, 1827-1841, Vol. II, (privately published, repr., New York: Dodd, Mead & Company, 1907), 297-98, <https://archive.org/stream/removalofcheroke021907lump#page/n9/mode/2up>; Ellis,

Like Georgia, South Carolina's *Ordinance* and Jackson's *Proclamation* caused a political division within the Old Dominion based on economic and geographic factors that had defined state politics in Virginia beginning in the 1820s. Those most sympathetic to South Carolina's plight came from the eastern and slaveholding tidewater and piedmont areas. Jackson supporters and unionists were found in the north and western Shenandoah Valley and trans-Allegheny areas consisting of small farms with few slaves. Thomas Ritchie, the highly influential editor of the *Richmond Enquirer* was an ardent supporter of states' rights and of William Crawford in the 1824 presidential election. He supported Jackson in 1828, and like most former Crawford supporters, he generally opposed nullification and Calhoun's presidential aspirations in favor of Martin Van Buren's. Prominent Democrats in the state, such as U.S. Senator John Tyler, tended to be hostile to Jackson and Van Buren and generally supportive of Calhoun. As 1832 was coming to an end, the prevailing attitude across the state was that, although opposed to the protective tariff, South Carolina had acted precipitously by endorsing nullification without exhausting other potential remedies. The consensus rejected individual state nullification as a *constitutional* remedy.<sup>138</sup>

As in Georgia, Jackson's belligerent *Proclamation* transformed the political landscape. A new majority rejected the president's nationalist interpretation of the origins of the Constitution and was appalled by his threat to use force to crush the nullifiers, as if South Carolina was deserving of no more respect than that of a local mob committing

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*The Union at Risk*, 116-21; see also Ronald A. Berutti, "The Cherokee Cases: The Fight to Save the Supreme Court and the Cherokee Indians," 17 *American Indian Law Review*, No. 1 (1992): 291-308, 304-06.

<sup>138</sup>Ellis, *The Union at Risk*, 124-27.

treason against the United States. The states, Jackson's reconstituted critics charged, were sovereign entities and, therefore the right of secession was:

a natural, inherent and inalienable right, and is the primary principle asserted in the Declaration of Independence. . . . No government or power has a right to enquire the reasons for her conduct when a state secedes, much less whip her back. It is different with counties, individuals and a number of individuals, because they have tribunals to go to for redress; because they are but component parts of the whole, because, in short, they are not *sovereigns*. . . . A state may *secede* as well for oppressive as unconstitutional legislation.<sup>139</sup>

Virginia's governor John Floyd, who despised Jackson as "the worst man in the Union," seized on the dramatic shift in public opinion and quickly submitted South Carolina's *Ordinance of Nullification* to the Virginia legislature for its endorsement. Privately, Floyd noted in his diary that he was prepared to use "military force" in response to Jackson's use of "the sword to enforce doctrine of treason." Support for Floyd's efforts came from his allies in the eastern, slaveholding parts of the state. While anti-Jackson forces rallied in the state legislature, others continued the attack in the state's newspapers. Abel P. Upshur, a General Court judge in Virginia, writing under the name "Locke," published a series of six essays under the title, "An Exposition of the Virginia Resolutions of 1798," arguing that state nullification was a logical extension of the Virginia and Kentucky Resolutions. Grass-roots meetings were held in eleven counties, many of which passed resolutions critical of the president's handling of the issue. The resolutions passed at a meeting in Amelia County, for example, expressed sympathy with South Carolina's battle with the federal government, condemned the protective tariff, and ominously urged the state to use force if the federal government attempted a military solution in South Carolina. While the Amelia County resolutions did not endorse a *constitutional* right of secession,

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<sup>139</sup>Ellis, *The Union at Risk*, 129.

resolutions from a number of the other counties affirmed it as a legitimate and *constitutional* remedy.<sup>140</sup>

Supporters of the president scrambled to rally a defense and to ward off any regrettable action in the state legislature. Ritchie pleaded with Jackson to recognize the right of a state to secede in extreme cases, to judge the actions of the federal government, and interpose as Virginia had done in 1798 and 1799. When Jackson balked at placating Ritchie, Ritchie attacked the principles of the *Proclamation* in his *Enquirer*. In the western part of the state, support for Jackson remained strong and residents held their own meetings and passed their own resolutions, one of which characterized the *Carolina doctrine* as akin to “Disunion, Anarchy and Despotism.”<sup>141</sup>

On December 13, Governor Floyd transmitted South Carolina’s *Ordinance* to the legislature and urged immediate action. After the legislative committee responsible for initially reviewing the *Ordinance* refused to support it, membership on the committee was reformed with a greater percentage of representatives known to be sympathetic to state nullification. Proponents of nullification approved a motion to print copies of the *Virginia Resolutions of 1798* and the *Report of 1800* while rejecting a motion to reprint James Madison’s October August 28, 1830 letter to Edward Everett, in which Madison denied that the Virginia and Kentucky Resolutions supported the right of a single state to nullify federal law. Observing the proceedings of the Virginia legislature, Chief Justice John Marshall

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<sup>140</sup>Charels H. Ambler, *The Life and Diary of John Floyd: Governor of Virginia, An Apostle of Secession, and the Father of the Oregon Country* (Richmond, VA: Richmond Press, Inc., 1918), 204-5; The Library of Congress, <https://archive.org/details/lifediaryofjohnf00ambl>. Floyd’s low regard for Jackson was based on his conclusion that Jackson was “a scoundrel in private life, devoid of patriotism and a tyrant withal, and is only capable of using power that he may have the gratification of seeing himself obeyed by every human.” Ambler, *The Life and Diary of John Floyd*, 205; Ellis, *The Union at Risk*, 130-33.

<sup>141</sup>Ellis, *The Union at Risk*, 133.

wrote: “I look with anxious solicitude to the proceedings of our legislature, and with much more of fear than of hope.”<sup>142</sup>

Although now stacked with members sympathetic to South Carolina, when the committee issued its report on December 29, 1832, it did not contain a clear endorsement of the South Carolina’s *Ordinance*. It did reaffirm Madison’s compact theory of the Constitution as set forth in the *Report of 1800*, as well as condemn protective tariffs. The crux of the report was an indictment of the nationalist constitutional principles espoused by the president in his Proclamation. Jackson supporters in the Virginia House attempted to modify the report to include a denunciation of state nullification as well as secession, claiming that each had no basis in the Constitution of the United States, in the Resolutions of ‘98 or in the *Report of 1800*.<sup>143</sup>

A compromise set of resolutions, containing a hodge-podge of positions taken from each of the opposing sides, surprisingly mustered a one-vote majority, and critics of Jackson quickly scrambled to pass an alternative set of resolutions closer in tone and temperament to the committee report. The final resolution contained a strong condemnation of the *Proclamation* but omitted any suggesting that secession was a legitimate remedy in response to actions of the federal government and implored both the

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<sup>142</sup>James Madison to Edward Everett, October 28, 1932, [http://www.constitution.org/jm/18300828\\_everett.htm](http://www.constitution.org/jm/18300828_everett.htm); Ellis, *The Union at Risk*, 133. Ellis incorrectly dated Madison’s letter to Everett as October 10. As for Marshall’s quote, curiously, a little over 30 years earlier, Marshall used almost identical language when he foresaw Napoleon’s defeat at the Battle of Leipzig: “I look with anxious solicitude—with mingled hope & fear, to the great events which are taking place in the north of Germany.” John Marshall to Timothy Pickering, December 11, 1813, in Henry Cabot Lodge and George Cabot, *Life and Letters of George Cabot*, (Boston: Little, Brown, and Company, 1878), 530, <https://play.google.com/books/reader?id=qYETAQAAMAAJ&printsec=frontcover&output=reader&hl=en&pg=GBS.PR1>.

<sup>143</sup>Ellis, *The Union at Risk*, 134-35.

federal government and South Carolina to stand down and resist taking any action further action that put the future of the Union in peril.<sup>144</sup>

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James Madison was well aware of Calhoun's theory of the single state veto and dissatisfaction with the tariff was widespread throughout the South. He was also familiar with the debates that had raged in the Senate during the winter and early spring of 1830, and aware of the ongoing debate raging across the nation regarding the proper interpretation of the Constitution. He also was very much aware South Carolina nullifiers were using his and Jefferson's legacy as support for their arguments in support of the right of a single state to nullify and act of Congress and to secede from the Union. No longer able to sit idly by, despite failing health, Madison felt compelled to enter the political fray one more time. Biographer Drew McCoy painted a sharp and sobering picture of the aging founder:

During the final six years of his life, amid a sea of personal troubles that threatened to engulf him, Madison could not get the nullifiers out of his mind. At times mental agitation issued in physical collapse. For the better part of a year in 1831 and 1832 he was bedridden, if not silenced, by a joint attack of severe rheumatism and chronic bilious fevers. Literally sick with anxiety, he began to despair of his ability to make himself understood by his fellow citizens.<sup>145</sup>

Exactly what finally propelled James Madison to enter the nullification debate is unclear. McCoy concluded that the trigger was a communication from Senator Hayne, who assumed Madison would approve of the senator's reliance on the Virginia and Kentucky Resolutions during his verbal sparring with Webster. Hayne proudly provided Madison

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<sup>144</sup>Ibid, 135.

<sup>145</sup>McCoy, *The Last of the Fathers*, 151.

with a copy of his speeches from the debate, and flattered the elder statesman by expressing the “conviction that nothing can save us from consolidation and its inevitable consequence, the separation of the States, but the restoration of the principles of ‘98.”<sup>146</sup>

Madison responded to Hayne’s gracious letter, but the senator must have been shocked and disappointed at the reply, in which Madison immediately made clear his disagreement with the theory “that the States (perhaps their Government) have, singly, a constitutional right to resist, and by force annul within itself, acts of the Government of the United States” that did not constitute “extreme cases of oppression, which justly absolve the State from the constitutional compact to which it is a party.” Madison repeated his now oft misunderstood opinion that the constitutional compact was created by the *people* of the several states, not “the Governments of the component States, . . . ; nor was it formed by a majority of the people of the United States, as a single community, in the manner of a consolidated Government.” Of course, in the event of an accumulation of “usurpations and abuses of power,” a single state could resort to its “original rights and the law of self-preservation,” but secession was a *natural* right, not a *constitutional* right.<sup>147</sup>

Madison noted that “distinguished names” had misunderstood his *Virginia Resolutions*, which he attributed to the “oblivion of cotemporary indications and impressions” that had obscured its correct meaning. As evidence, Madison cited the various states that responded in writing in 1799 to the resolutions adopted by Virginia and Kentucky in 1798, none of which approved of the *Resolves* but none of which interpreted

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<sup>146</sup>McCoy, *The Last of the Fathers*, 140; Robert Y. Hayne to James Madison, March 5, 1830, *The James Madison Papers at the Library of Congress*, Library of Congress, Manuscript Division, [http://www.loc.gov/resource/mjm.23\\_0049\\_0050/](http://www.loc.gov/resource/mjm.23_0049_0050/).

<sup>147</sup>“[Copy of] James Madison to Robert Y. Hayne [as enclosed in James Madison to Edward Everett, April 17, 1830], April 3, 1830,” *Founders Online*, National Archives, <http://founders.archives.gov/documents/Madison/99-02-02-2017>.

the *Resolves* as advocating the *constitutional* right of a single state to nullify an act of Congress.<sup>148</sup>

Madison pinpointed one of the key assumptions that he believed has led interpreters of Virginia and Kentucky Resolutions astray. Although Madison did not mention Jefferson by name, Madison alluded to the tendency to treat the federal government and the state governments as if “they belong to different nations alien to each other.” This led to the false impression that “disputes between the Government of the United States and those of the Individual States may and must be, adjusted by negotiation, as between independent powers.” Madison lamented that such analysis “too often tainted the reasoning applied to constitutional questions.”<sup>149</sup>

Madison then took aim at Calhoun’s veto, which Madison interpreted as meaning not only that the “the offensive law of the United States is to be suspended within the State” but also “arrest its operation every where.” Whether intended or not, Madison largely dismissed the significance that some had placed on supposed nationwide impact of the veto. For Madison, if Calhoun’s use of the phrase “veto” did not mean that the act of nullification was to apply nationwide, but only meant that the state could *constitutionally* prevent the enforcement of the unconstitutional law within its own borders, both the legal as well as practical effect of such a single state nullification necessarily meant that the offending law could not be enforced throughout the rest of the country. As Edward Livingston had argued during the Webster-Hayne debate, the “uniformity in the operation

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<sup>148</sup> “[Copy of] James Madison to Robert Y. Hayne [as enclosed in James Madison to Edward Everett, April 17, 1830], April 3, 1830.”

<sup>149</sup> *Ibid.*

of the laws of the United States” was “indispensible.”<sup>150</sup> Madison expounded on the critical importance of such principle in his letter to Edward Everett in August of that year:

That to have left a final decision, in such cases, to each of the States, then thirteen, and already twenty four, could not fail to make the Constitution and laws of the United States different in different States, was obvious; and not less obvious, that this diversity of independent decisions, must altogether distract the Government of the Union, and speedily put an end to the Union itself. A uniform authority of the laws, is in itself a vital principle. Some of the most important laws could not be partially executed. They must be executed in all the States or they could be duly executed in none. An impost or an excise, for example, if not in force in some States, would be defeated in others. It is well known that this was among the lessons of experience, which had a primary influence in bringing about the existing Constitution.<sup>151</sup>

Related to his rejection of the single state right of nullification, Madison also rejected Calhoun and Hayne’s disdain for majority rule and Calhoun’s proposed check on the right of a single state to nullify a federal law: the right of three-fourths of the states to override such nullification. Such a formulation, Madison argued, necessarily would grant “the smallest fraction over” one-fourth of the states the power to reverse the decisions of the federal government at the time of its choosing. Even if in a particular instance the minority of states were correct, “to establish a positive and permanent rule, giving such power, to such a minority, over such a majority, would overturn the first principle of a free Government, and in practice could not fail to overturn the Government itself.”<sup>152</sup>

Madison attempted to explain to Hayne what he meant by “interposition.” For Madison, there were two distinguishable types of interposition that were *constitutional* in

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<sup>150</sup>Ibid.

<sup>151</sup>“James Madison to Edward Everett, August 28, 1830,” [second of two letters to Everett on that date], *Founders Early Access*, The University of Virginia, 2009-2015, <http://rotunda.upress.virginia.edu/founders/default.xqy?keys=FOEA-chron-1830-1830-08-28-2>.

<sup>152</sup>Ibid.

nature, the first being “the several modes and objects of interposition against abuses of power; and more especially between interpositions within the purview of the Constitution.” This type of interposition involved the type of actions Senator Livingston described so well in his speech during the Webster-Hayne debate: protests, remonstrances and petitions sent to Congress, encouraging the *people* in their elective functions to charge or instruct their representatives, soliciting the cooperation of the states to send in their own protests, or proposing amendments to the Constitution. Madison’s second type of interposition involved “appealing from the Constitution to the rights of nature, paramount to all Constitutions.” Was the “rights of nature” referred to by Madison just another name for the *people’s* natural “right of revolution” that Madison referred to earlier? Despite the reference to a “natural” right in his letter Senator Hayne, in this context, Madison was not referring to the “natural” (or what he later refers to as the “original,” in his letter to Charles Haynes and his letter to William Rives) right of revolution, which justifies “a single State or any part of a State” casting off the “yoke” of “extreme cases of oppression.” That Madison failed to persuade Hayne, or that Hayne misunderstood Madison’s point, was made clear in subsequent months and years as Hayne never abandoned his position on the *constitutional* right of a single state to veto or nullify a federal law.<sup>153</sup>

Although Madison’s penchant for inexactitude was frustrating, this second type of interposition was what Christian Fritz refers to as the constitutional “middle ground” between the *people’s* right to exercise “ordinary” modes of politics—debating, protesting, campaigning, voting—and the *people’s* right of revolution in response to an oppressive government. This form of interposition involved the people of a state forming a majority

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<sup>153</sup>Ibid.

with the people of other states and collectively taking action as the ultimate sovereigns of the nation and the creators of the Constitution. This collective action as the ultimate sovereign was the same type of action that the people of Virginia, for example, employed when they created the Virginia constitution. Madison's middle ground was made clearer in subsequent letters Madison wrote during the Nullification Crisis.<sup>154</sup>

Madison's first type of interposition was the stuff of ordinary politics. The best example would be the events that ultimately led to the adoption of the Virginia and Kentucky Resolutions, and the resolutions themselves, targeting "unjustifiable acts of the Federal Government" consistent with "the provisions and forms of the Constitution." Grass roots protests and petitions were followed by pleas to their respective state representatives, which were followed by resolutions of state legislatures of protest seeking the repeal of the offending legislation. When the federal government failed to respond, the *people* spoke with greater clarity during the 1800 presidential and congressional elections.

The second type of interposition, this constitutional "middle ground," was later described by Madison in a letter to Charles Haynes as "not within the purview of the Constitution," in other words, not found within the four corners of the document. Unlike interpositions involving the *people* engaging in the stuff of "ordinary" politics, this type of interposition involved the *people* of the several states acting "in the sovereign capacity in which they were parties to the constitutional compact." The *people* of a particular state can decide whether the constitutional compact "has or has not been violated and made void. If one contends that it has, the others have an equal right to insist on the validity and execution of it." A true nullification of the offending legislation would only take place when

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<sup>154</sup>Fritz, *American Sovereigns*, 226-27. See also Fritz, "A Constitutional Middle-Ground between Revision and Revolution."

a sufficient number of states agree and are able to engage in “co-operating interpositions.”<sup>155</sup>

In his October 31, 1833, letter to William C. Rives, Madison defended himself from critics who had charged him with abandoning the Principles of '98. Drafted in the third person so that Rives could present the arguments as his own, Madison characterized the differences between the two types of interposition as the “distinction between a *last resort* in behalf of constitutional rights, within the forms of the Constitution, and the ulterior resorts to the authority paramount to the Constitution:

These different resorts, instead of being incompatible, necessarily result from the principles of all free Governments, whether a Federal or other character. Is not the expounding authority, wherever lodged by the constitution of Virginia, the last resort within the purview of the Constitution against violations of it? and are not the people who made the Constitution a last resort within the constitutional provisions? The people as composing a State, and the States as composing the Union, may, in fact, interpose either as constituents of their respective governments, according to the forms of their respective constitutions, or as the creators of their constitutions, and as paramount to them as well as to the governments.

It cannot, as is believed, be shown that J. M. ever admitted that a *single* State had a constitutional right to annul, resist, or control a law of the United States, or that he ever denied either the right of the *States* as *parties* to the Constitution [not a single State or party] to interpose against usurped power; or right of a single State, as a natural right, to shake off a yoke too oppressive to be borne. These distinctions are clear, and, if kept in view, would dispel the verbal and sophistical confusion so apt to bewilder the weak and to disgust the wise.<sup>156</sup>

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<sup>155</sup>James Madison to Charles Eaton Haynes, August 27, 1832, Library of Congress, [http://lcweb2.loc.gov/mss/mjm/23/23\\_1103\\_1104.pdf](http://lcweb2.loc.gov/mss/mjm/23/23_1103_1104.pdf). Unfortunately the site misspells Haynes's last name as “Hayne,” an easy mistake likely due to the association of nullification with Senator Robert Hayne of South Carolina.

<sup>156</sup>James Madison to W. C. Rives, October 21, 1833, James Madison, *Letters and other Writings of James Madison* Vol. IV, 1829-1836 (Philadelphia: J.B Lippincott & Co., 1865), 309-323, 319, [http://books.google.com/books?id=EU10AQAAMAAJ&printsec=frontcover&source=gbs\\_ge\\_summary\\_r&cad=0#v=onepage&q&f=false](http://books.google.com/books?id=EU10AQAAMAAJ&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false).

Thus, Madison's Virginia Resolutions described the second type of interposition, but did not purport to exercise it. Only the *people* of the state of Virginia could begin to engage in that activity. While South Carolina's use of a convention recognized that the right of nullification must be an act of the *people*, acting in their highest sovereign capacity, it could not engage in an act of sovereignty without the "co-operating interpositions" of the other states. Similarly, Breckinridge and the Kentucky legislature in 1799 recognized that a *constitutional* nullification of an act of Congress had to be the action by the majority of the sovereigns. Where Breckinridge and the Kentucky legislature differed with Madison was in identifying the ultimate sovereign of the United States.<sup>157</sup>

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<sup>157</sup>One could make the logical argument that because any nullification of a federal statute likely would involve the cooperation of state officials, especially in the executive and judicial branches of the state government, if the representatives of the *people* in the state legislature joined with forces with the majority of the legislatures of the other states, respectively representing the *people* of such states, the proper conditions for nullification of the offending legislation would be met. The belief in the right of the *people* to create and amend constitutions outside the four corners of the existing constitution was prevalent during the ante-bellum period. See Akhil Reed Amar, "Philadelphia Revisited: Amending the Constitution Outside Article V," 55 *University of Chicago Law Review*, No. 4 (1988): 1043-1104; Fritz, *American Sovereigns*, esp. 237-45. Law professor Bruce Ackerman identified this aspect of the early republic as "higher lawmaking" in *We the People: Foundations* (Cambridge: The Belknap Press of Harvard University Press, 1991). Ackerman's believed this "higher lawmaking" occurred "rarely, and under special conditions":

Before gaining the authority to make supreme law in the name of the People, a movement's political partisans must, first, convince an extraordinary number of their fellow citizens to take their proposed initiative with a seriousness that they do not normally accord to politics; second, they must allow their opponents a fair opportunity to organize their own forces; third, they must convince a majority of their fellow Americans to support their initiative as its merits are discussed, time and time again, in the deliberative fora provided for "higher lawmaking." Ackerman, *We the People*, 6.

Former law professor Larry Kramer argued in *The People Themselves* that such "higher lawmaking" was not limited to rare occasions during the ante-bellum era of the nineteenth century but was typical of the era. Kramer believed that the *people* consistently

As for the right of secession, Madison did not make clear in any of his correspondence—maybe because he was never asked—why his theory of the constitutional compact only referred to the “natural” or “original” right of a single state to exercise the right of revolution and secede from the Union in order to throw off the yoke of oppression. Could not, for example, the *people* of a state act collectively with the *people* of the other states and reform the nation under a new constitution? Absolutely, as this is what the *people* did, beginning with the constitutional convention in Philadelphia and ending with the *people’s* ratification of the Constitution. The *people* of the individual states combined with the *people* of the co-states and scrapped the Articles of Confederation, substituting in its stead, the Constitution of the United States, in defiance of the express provisions of the Articles of Confederation regarding the amending of that bona fide agreement between the states. But it would be odd to characterize this reforming or creation of a constitution as an act of secession, which denotes a withdrawal or separation from a nation, as opposed to a reconstitution or reforming of such nation. This reconstituting or reforming of a nation and its constitution simply would be the most dramatic example of this second type of interposition.<sup>158</sup>

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expressed their interpretation of the Constitution through the mechanism of ordinary politics such as elections, and expected elected officials and unelected judges to heed their judgment. Kramer, *The People Themselves*, 197. Madison likely would have agreed with Kramer’s interpretation. The presidential election of 1800 not only involved making manifest the *people’s* preference for the policies of the Republicans but also their interpretation of the Constitution. Hence, the “revolution of 1800.” For an opposing point of view, see Henry Paul Monaghan, “We the Peoples, Original Understanding, and Constitutional Amendment,” 96 *Columbia Law Review*, No. 1 (1996): 121-177.

<sup>158</sup>In fairness to Madison, none of the advocates of states’ rights theory nonetheless rejected the right of a single state to nullify an act of Congress or *constitutionally* secede from the Union, ever explained the logic of their conclusions; they simply argued that Calhoun, Hayne or other advocates of such rights were illogical or impractical. The “Old Republican” states’ rights theory rested on the premise that the constitutional compact as a

Proponents of the *Carolina doctrine* and a nationalist theory of the Constitution believed that America either had “a consolidated Government” or “a confederated Government.” Madison disagreed. According to Madison, the Constitution was not formed “by the government of the component States” like the Articles of Confederation, “nor was it formed by a majority of the people of the United States, as a single community, in the manner of a consolidated Government.” Rather, “the undisputed fact is, that the Constitution was made by the people . . . as imbodyed into the several States . . . and, therefore, made by the States in their highest authoritative capacity.”<sup>159</sup>

As for the role of the Supreme Court and the lower federal courts, Madison rejected Calhoun’s contention that the single state veto was the proper *constitutional* check on the Congress and the president when the federal courts lacked jurisdiction to consider the constitutional challenges to legislation, as was the case with the tariff. For Madison, he believed that his *Report of 1800* made it “sufficiently clear that the ultimate decision” of the U.S. Supreme Court is “confined to cases within the Judicial scope of the Govt” with respect to “interfering decisions of a local or State authority” Judicial review, as Madison recognized in *Federalist No. 39*, and now affirmed was “clearly essential to prevent an appeal to the sword, and a dissolution of the compact.” But Madison also made clear in his

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compact between the *people* of the respective states, or between the governments of the respective states, or, in the case of Woodbury, between the state governments and the federal government as agents for the people of each state and the people of the nation, but such premise did not lead to any additional *constitutional* remedies for the *people* in the face of unconstitutional action of the federal government. Like Wilson, Story and Webster, and other advocates of the nationalist interpretation of the Constitution, the *people* were left with the right to exercise the stuff off ordinary politics, Madison’s first type of interposition, but not his second type of interposition, which recognized the sovereign power the *people* of the several states had to nullify or void an act of Congress, and the right to create, reform and reconstitute the governing document for the nation.

<sup>159</sup>James Madison to Edward Everett, August 28, 1830.

October 31 letter to Rives that the authority of the judiciary to decide such cases under such circumstances “neither denies nor excludes a resort to the authority of the parties to the Constitution, an authority above that of the Constitution itself.” The authority of the ultimate sovereign to interpose regardless of the decisions of the judicial as well as other branches of the government simply reflected the unlimited power of the sovereign.<sup>160</sup>

He repeated this same point N. P. Trist in December of 1831:

Other, and some not very candid attempts, are made to stamp my political career with discrediting inconsistencies. One of these is a charge that I have on some occasions, represented the supreme Court of the U. S. as the judge in the last Resort, on the boundary of jurisdiction between the several States & the U. S. and on other occasions have assigned this last resort to the parties to the Constitution. It is the more extraordinary that such a charge should have been hazarded; since besides the obvious explanation, that the last resort means in one case, the last within the purview & forms of the Constitution; and in the other, the last resort of all, from the Constitution itself, to the parties who made it, the distinction is presented & dwelt on both in the report on the Virga Resolutions and in the letter to Mr. Everett, the very documents appealed to in proof of the inconsistency. The distinction between these ultimate resorts is in fact the same, within the several States. The *Judiciary* there may in the course of its functions be the last resort within the provisions & forms of the Constitution; and the people, the parties to the Constitution, the last in cases ultra-constitutional, and therefore requiring their interposition.<sup>161</sup>

Meaningful concern with Madison’s specific compact theory, and its reliance on the *people*, acting in their highest sovereign capacity, was not evident until the 1820s and

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<sup>160</sup>James Madison to William C. Rives, October 31, 1831, *Founders Early Access*, The University of Virginia, <https://rotunda.upress.virginia.edu/founders/default.xqy?keys=FOEA-print-02-02-02-2852>; *Federalist No. 38*; James Madison to N. P. Trist, December 1831, James Madison, *The Writings of James Madison, comprising his Public Papers and his Private Correspondence, including his numerous letters and documents now for the first time printed*, ed. Gaillard Hunt, Vol. 9 (New York: G.P. Putnam’s Sons, 1900), [http://oll.libertyfund.org/titles/1940#Madison\\_1356-09\\_1329](http://oll.libertyfund.org/titles/1940#Madison_1356-09_1329); James Madison to Edward Everett, August 28, 1830.

<sup>161</sup>James Madison to William C. Rives, October 31, 1831, *Founders Early Access*, The University of Virginia, <https://rotunda.upress.virginia.edu/founders/default.xqy?keys=FOEA-print-02-02-02-2852>; *Federalist No. 38*; James Madison to Edward Everett, August 28, 1830.

1830s, likely in response to the flirtations with secession and nullification by the Hartford Convention and in connection with the Nullification Crisis, each of which utilized a convention of the *people* as the protagonist rather than the State legislature. And even here, nationalist critics rarely directly engaged Madison's distinct reliance on the *people* and the remedy of interposition, but simply described the Constitution as being formed by the *people*, acting *en masse*. Rather than seeking to understand the apparently subtle differences between the two theories, these nationalists typically conjoined Madison's reliance on the sovereign *people* with Jefferson's reliance on the State legislatures under the banner of individual "state sovereignty."

## 9 CONCLUSION

The Virginia and Kentucky Resolutions set forth James Madison and Thomas Jefferson's respective compact theories of the Constitution in response to the federal government's enactment of the Alien and Sedition Acts in 1798, a law each deemed violative of the Constitution. Each defined the Constitution as a "compact between the states," and each believed that state legislatures had a meaningful role to play in constitutional interpretation, including the duty to "sound the alarm" in response to unconstitutional actions of the federal government. Their compact theories diverged dramatically, however, when defining the nature of the constitutional compact, the parties thereto, and the remedies available to the states and the *people* in response to unconstitutional actions of the federal government.

Jefferson interpreted the Constitution as an agreement or contract between the sovereign state governments, akin to a treaty between independent nations. Thus, the federal government's exercise of power and authority not specifically granted under the Constitution was a breach of the constitutional compact, in response to which the state governments had the right and duty to nullify the offending action of the federal government within their respective state boundaries. Madison disagreed with Jefferson on many of these principles. For Madison, the parties to the constitutional compact were the thirteen distinct *peoples* of the several states, acting in their highest sovereign capacity, who collectively came together to create the Constitution and to form a more perfect Union, because "in that sense the Constitution was submitted to the 'states;'" in that sense the 'states' ratified it; and in that sense of the term 'states,' they are consequently parties to the

compact from which the powers of the federal government result.”<sup>1</sup> Madison, like Jefferson, believed that the powers granted to the federal government were limited to those specifically set forth in the Constitution, and like Jefferson, believed that all other power was retained by the states and by the *people*. Madison, however, did not interpret the remedies available to the states and the *people* in response to unconstitutional actions of the federal government by application of strict rules applicable to contracts or treaties. He recognized that the United States was not a league of separate and distinct nations, but “an intimate and constitutional union.” Thus, Madison did not deem every breach of the compact by the federal government as justifying a constitutional confrontation or countenancing nullification by the *people*. He rejected the notion that a single state government, or even the sovereign *people* of one state, could nullify an unconstitutional action of the federal government. Only a majority of the *people* of the several states, as the ultimate sovereigns of the nation, could nullify an unconstitutional act of the federal government, and such right of nullification should only be exercised when the unconstitutional action of the federal government “deeply and essentially” affected the “vital principles of their political system.”<sup>2</sup> Madison believed that the Sedition Act might be such an occasion because criminalizing speech or the publication of editorials critical of the government was a direct assault on the fundamental right of the *people*, as ultimate sovereigns of the nation, to freely examine the actions of the government and to hold it accountable.

Ultimately, neither Madison’s nor Jefferson’s theory of nullification was put to the test during the Sedition Act crisis. Jefferson’s election as president in 1800 averted a

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<sup>1</sup>*Report of 1800.*

<sup>2</sup>*Ibid.*

potential constitutional crisis that might have threatened the Union. As a result, the true meaning and understanding of the Virginia and Kentucky Resolutions, like the meaning and understanding of the Constitution itself, would be the subject of periodic debate and negotiation by the America people during the early republic. During the three ensuing decades, the *people* and state governments invoked the Principles of '98 in response to actions of the federal government they deemed violative of the constitutional compact. For Madison and Jefferson, the best evidence in support of their conclusion that the Alien and Sedition Acts had been unconstitutional was the Constitution itself. In the case of the Sedition Act, for example, they believed Congress lacked any express authority to regulate freedom of expression under the original Constitution, and the ratification of the First Amendment was intended to make such lack of authority absolutely clear.

Subsequent reliance on the Principles of '98, however, by New England Federalists from 1807-1815 and South Carolina nullifiers from 1828-1834, undermined the legitimacy of the Principles of '98 because the actions of the federal government, although objectionable to many as a matter of policy, appeared to be specifically authorized under the Constitution. New England's constitutional objection to the Embargo of 1807, and related legislation, and the federal government's conduct of the War of 1812, were undermined by the Constitution's explicit grant to the federal government of authority to regulate commerce, conduct the nation's foreign policy and declare war. Likewise, South Carolina's constitutional objection to the Tariff of 1828 appeared unfounded given the Constitution explicit grant to Congress of authority to enact tariffs. After all, the national government's legal and practical inability to collect sufficient taxes and duties under the Articles of Confederation had been one of the major imputes for the ratification of the

Constitution. Thus, New England and South Carolina's invocation of the constitutional principles of the Virginia and Kentucky Resolutions seemed misplaced; an ill-advised attempt to transform policy differences into a constitutional crisis that threatened nullification and disunion.

In between the efforts of New England and South Carolina nullification, Chief Justice John Marshall embraced elements of Madison's theory of the founding while clearly rejecting Madison's more restrictive interpretation of the powers delegated to the federal government. Marshall biographer Albert Beveridge later characterized Marshall's theory of the founding expressed in *McCulloch v. Maryland* as containing a "clearness and brevity" which "never has been surpassed."<sup>3</sup> Despite Beveridge's praise, Marshall's theory of the founding, the nature of the Union, and the remedies available to the states and to the *people* in response to unconstitutional actions of the federal government, was no less ambiguous than Madison's or Jefferson's. In his analysis of Marshall's decisions during this era, G. Edward White judged Marshall's jurisprudence as "a critique of reserved state sovereignty," or as having the "overriding purpose" of replacing "the idea that the Constitution was created by a compact among the states with the idea that the Constitution created a Union out of the states."<sup>4</sup>

If Madison's compact theory of the Constitution had been better understood, or more fairly, better expressed, or if Marshall had not only accepted the centrality of the *people* of the several states but also Madison's majoritarian remedy in response to unconstitutional actions of the federal government, would it have mattered? Would

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<sup>3</sup>Albert J. Beveridge, *The Life of John Marshall*, 4 vols. Vol. 4, "The Building of a Nation, 1815-1835" (Boston and New York: Houghton Mifflin Company, 1919), 292; <https://archive.org/stream/lifeofjohnmarsha04beveuoft#page/292/mode/2up>.

<sup>4</sup>White, *The Marshall Court and Cultural Change*, 486-87.

Marshall's full acceptance of Madison's compact theory of the Constitution have prevented him from constructing a broad interpretation of the powers of the federal government? Could not have Marshall's compact theory simply reflected a different conclusion than Madison as to the *people's* allocation of governmental power between the federal and state governments. Regardless, Marshall's rejection of compact theory left the states and the *people* with almost all of the same remedies that Madison foresaw for his *people* of the several states: protest, remonstrances, petitions, elections, resorts to the courts and Constitutional amendments. Marshall never defined what additional remedy, if any, the *people* of the several states had to combat unconstitutional actions of the federal government; Madison called it interposition.

Madison believed the *people* of the several states could collectively nullify an action of the federal government under very special circumstances, but like Marshall, Madison did not see the states governments as being present at creation. Madison, therefore, interpreted the alleged right of a state to secede as akin to the *people's* ancient right of revolution, not the act of a sovereign. Because Madison reserved a special remedy for the *people* of the sovereign states to act in their highest sovereign capacity, there would be no need for the *people* to call for secession. The *people*, acting in their highest sovereign capacity, would simply reconstitute their government and make the necessary correctives to the Constitution to ameliorate those aspects they believed had led to the crisis. After all, this is what the *people* had done when ratifying the Constitution. Unfortunately, Marshall had no occasion to adopt those aspects of Madison's compact theory of the Constitution.

On the floor of the Senate, in January through March of 1830, the three competing visions of the nation's creation were still up for negotiation. The nationalist views of Daniel

Webster and the states' rights views of Robert Hayne were at the ideological extremes, and each was in the minority. No less than five senators explicitly accepted a compact theory of the Constitution that placed the *people* of the several states at the center of creation.

Interestingly, as Madison subsequently argued throughout the Nullification Crisis, only one of those senators supported the right of a single state to nullify federal law.<sup>5</sup> Most

interesting were the remarks of Edward Livingston, who expressed a clearer grasp of Madison's compact theory of the Constitution than the other speakers, including Webster.

Livingston identified the *people* of the several states as the parties to the constitutional compact and championed the right of the *people* and the states to exercise Madison's first type of interposition: the right to protest, petition for a repeal of the offending law, amend the Constitution or seek redress in the federal courts. Would he have championed

Madison's second type as well to avoid a sectional crisis?

When Livingston subsequently drafted Jackson's *Proclamation*, he largely abandoned the more reasonable language from his 1830 Senate speech in attacking South Carolina's claim that a single state could nullify an act of the federal government. Rather than providing South Carolina with a constitutional path forward that would have required acquiring the support of the *people* in its sister states, the *Proclamation* adopted a national and confrontational tone South Carolina nullifiers interpreted as reflecting a desire to permanently relegate the state to a regional minority in national politics. As a result, South Carolina and other southern states most adversely affected by the protective tariff became committed to the most combative creation myth that a single "state," whether defined as

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<sup>5</sup>John Clayton of Delaware passed no judgment on the compact theory of the Union but did reject the right of a single state to nullify federal law "without the aid of the Federal judiciary."

the government of that state or the *people* of that state, could nullify an act of Congress. If Jackson's *Proclamation* had been more consistent with Livingston's Senate speech, and had Jackson's *Proclamation* embraced Madison's theory of popular interposition, would South Carolina have sought greater support from their southern neighbors such as Georgia and Virginia, who were largely sympathetic to their plight? Rather than declare the right of a single state to nullify an act of Congress and to secede from the Union, thereby forcing potential allies to adopt the most confrontational approach vis-à-vis the federal government, opponents of the protective tariff in South Carolina might have recommitted to obtaining the cooperation of other states. Would not such efforts have borne fruit in the way nullification and threats of secession did not? We will never know. What we do know is that the Nullification Crisis came to a peaceful resolution because Congress reduced the tariffs. Thus, South Carolina's ultimate political victory over the forces in favor of a protective tariff was the result of a battle between Jefferson's creation myth and the nationalist creation myth presented by Webster. Once the lines were drawn between these two binary theories of creation, the constitutional "middle ground" set forth in Madison's Virginia Resolutions, which was largely acceptable to John Marshall, the nation's first powerful chief justice, and to a number of Southern senators during the 1830 Senate debates, was lost and gone forever. In the years ahead, with the constitutional middle ground no longer a viable alternative, the forces who believed in Jefferson's creation myth would do battle time and again with the advocates of the nationalist creation myth, who eventually would be led by Abraham Lincoln.

A better understanding and acceptance of Madison's Principles of '98 may have benefited the nation during the nineteenth century. Today, given the threats of state

nullification and interposition that contribute to a souring of political discourse on issues of national concern, and the recent actions of the federal government, under both political parties, to monitor all communications among the *people* and to intimidate whistle-blowers who threaten to expose unconstitutional actions of the federal government, the nation could benefit from a better understanding and acceptance of Madison's Principles of '98, and the right, duties and remedies available to the *people* as the ultimate sovereigns of the United States.

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