

A VIEW OF THE CONSTITUTION
OF THE
UNITED STATES OF AMERICA

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The Fetha Nagast

The Law of the Kings

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A View of the Constitution of the United States of America

William Rawle

Preface, Introduction, and Notes by H. Jefferson Powell

Commentaries on the Constitution of the United States

Joseph Story

Introduction by Ronald D. Rotunda and John E. Nowak

Our Chief Magistrate and His Powers

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OF THE
UNITED STATES OF AMERICA

SECOND EDITION

William Rawle

WITH A PREFACE, INTRODUCTION,
AND NOTES BY

H. Jefferson Powell
DUKE UNIVERSITY

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The text of *A View of the Constitution of the United States of America* has been photographically reproduced from the second edition, originally published by Philip H. Nicklin, Philadelphia, in 1829.

Editor's Preface, Editor's Introduction, and Endnotes
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For Zoe, with love

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Editor's Preface

I first met William Rawle and his *A View of the Constitution of the United States of America* many years ago, at a time in which I was studying intensely a much better-known antebellum book, Joseph Story's *Commentaries on the Constitution*. Justice Story clearly admired Rawle, and that evoked my own interest. In that long-off and naive era (no doubt rightly in the past given the rarity and fragility of such books), the Yale Law School library allowed anyone with borrowing privileges to take out volumes like Rawle's as if they were the latest paperback and as a consequence I was able to read *A View* at leisure. I have been fascinated ever since and the opportunity to make Rawle's great book more accessible to modern readers is a true pleasure. My hope is that doing so will enable contemporary readers to share, almost at first hand, the experience of thinking through the constitutional law of the United States with one of its early masters.

I am grateful to Jasper Liou of the Duke Law School class of 2009, who provided outstanding research assistance. In publishing this volume, Keith Sipe of the Carolina Academic Press once again shows his commitment to the defense of academic publishing against the ravages of cost/benefit analysis.

I am grateful as always to my wife Sarah and to my daughter Sara for their ideas and their enthusiasm. I know they share my pleasure in dedicating this book to my daughter Zoe. With her zest for life, Zoe helps me keep in focus what is truly important.

Editor's Introduction

On January 29, 1825, William Rawle copyrighted a book entitled *A View of the Constitution of the United States of America*. *A View*, as I shall refer to it, was one of the first free-standing treatises on the law of the United States Constitution,¹ and it was furthermore one of the earliest contributions to a genre of legal writing that has persisted unto this day, close to two centuries after Rawle published his book.² Rawle published a second edition of *A View* in 1829, and began work on a third edition at the request of Dartmouth College that his lingering final illness did not allow him to complete.³

Rawle's work quickly attracted favorable attention from other legal scholars. Justice Joseph Story, who in his capacity as a mem-

1. *A View* "seems to be the earliest work devoted entirely to the Constitution, in which the background, philosophy, and articles of that document are discussed systematically." Elizabeth K. Bauer, *Commentaries on the Constitution 1790–1860* 63 (1952) As a formal matter, Rawle's only significant competitor as an early constitutional-law treatise writer was a much younger colleague at the Philadelphia bar, Thomas Sergeant. See Sergeant, *Constitutional law: Being a View of the practice and jurisdiction of the courts of the United States, and of constitutional points decided* (Philadelphia: 1822). Sergeant apparently had little impact outside the radius of Philadelphia's influence, and even Rawle, who knew his book, cited him only rarely. On Sergeant, see Bauer, at 39 n. 1. I will discuss Rawle's real intellectual opponent, St. George Tucker, below.

2. The leading constitutional-law treatise at present would be the third edition of Professor Laurence H. Tribe's treatise on *American Constitutional Law* if he had not abandoned the enterprise. See Tribe, *The Treatise Power*, 8 *Green Bag* 2d 291 (2005).

3. See Bauer, at 63.

ber of the Harvard law faculty would publish a massive, three-volume treatise in 1833, repeatedly cited *A View* and praised Rawle as “a distinguished commentator” whose “valuable labors” were characterized by “their accuracy, philosophical spirit, and clearness of statement.”⁴ *A View* apparently enjoyed considerable popularity as well as a text book, and was used in that capacity at Harvard Law School even after Story published his *Commentaries on the Constitution*.⁵ It has sometimes been argued that Rawle was used at the United States Military Academy in the teaching of constitutional law and that West Point thus gave an official imprimatur to the legitimacy of secession (which Rawle thought lawful), with unfortunate consequences in 1861. In fact, however, there is no evidence that *A View* was used at West Point except for a single academic year, 1825–26.⁶

In line with its use as a text, Rawle described *A View* as “an elementary treatise to the *American student*,” with its chief value to the public consisting “in the exhibition of those judicial decisions, which have settled the construction of some points that have been the subjects of controversy.” This modest appraisal understated,

4. These quotations are to be found respectively in 2 Story, *Commentaries on the Constitution of the United States* (1833), §773, and 3 id. §§1452 n.1 & 1490 n.1. The following is a partial list of Story’s other references to Rawle in his *Commentaries*: 1 id. §§359, 413; 2 id. §§681, 703, 757, 763, 766, 775, 778, 783 790, 791, 794, 796, 797, 799, 836, 843, 853, 864, 869; 3 id. §§1099, 1145, 1161, 1457, 1462, 1497, 1502, 1526, 1527, 1555, 1560, 1583, 1614. 1666.

5. Bauer remarked generally that Rawle and Kent were the most “widely used” treatises on constitutional law in the antebellum period, although she only mentioned three specific schools (Harvard, Dartmouth and West Point) at which *A View* was a required text. Bauer, at 336–38. Wharton’s 1837 memoir of Rawle noted that the book had “been adopted as text book of instruction in several of our literary institutions.” Thomas I. Wharton, *A Memoir of William Rawle, LL.D.* (1837), 4 *Memoirs of the Historical Society of Pennsylvania* 63 (1840).

6. On this essentially legendary view of Rawle’s responsibility for the secessionist views of Southern graduates of West Point, see Bauer, at 338–39; Jacob Kobrick, *No Army Inspired: The Failure of Nationalism at Antebellum West Point*, at 3–4, www.publications.villanova.edu/Concept/2004/No%20Army%20Inspired.doc (visited October 10, 2007).

no doubt deliberately, Rawle's goals, which included the advocacy of a particular approach to the Constitution that was in itself highly controversial. From a twenty-first century perspective, Rawle's controversies are long forgotten but his book remains important. *A View* is an important witness to the constitutional views held by some among the generation that wrote, ratified and first interpreted the Constitution. It also attests, as we shall see, to the ineradicable conflicts that the Constitution embodies.⁷

The author of A View

William Rawle belonged to a family that had been prominent in Pennsylvania and Philadelphia affairs since the beginning of the Eighteenth Century. Rawle's great-grandfather, Francis Rawle, represented Philadelphia in the provincial assembly and wrote what was later described as "the first original treatise on any general subject that appeared in this province;" it was apparently the first book that Benjamin Franklin printed.⁸ Rawle's father, also named Francis, appeared set on a similar course of literary and political distinction when he died in 1761 at the age of thirty-two from a tetanus infection after a hunting accident. Our author, who was born in 1759, was therefore reared by his mother, Rebecca Warner Rawle and after she married again by her husband Samuel Shoemaker. Under their tutelage Rawle received a good education in schools administered by the Society of Friends, to

7. This edition of *A View* is photocopied from the 1829 second edition. Unless noted otherwise, all citations are to this edition. (The quotations earlier in this paragraph and in this footnote are from page v.) I have consulted the 1825 first edition as well; as Rawle noted in the preface to the second edition, there are few changes: "In this edition, the principles laid down in the first, remain unaltered. The author has seen no reason for any change of them. A small variation in the arrangement, and the correction of some typographical errors, will principally distinguish it from the first."

8. The book was entitled *Ways and Means for the Inhabitants of Delaware to become rich* and appeared in 1725. See Wharton at 33, 36, 73. I have relied on Wharton's memoir and on the biographical sketch of Rawle in Bauer, at 58–65.

which generations of the Rawle family belonged, and an early exposure to the culture and attitudes of Philadelphia's upper class. Like many members of the Quaker colonial aristocracy, Rawle's family were unsympathetic to armed resistance to the Crown, and his stepfather served as the mayor of Philadelphia during the British occupation of the city in 1777–78. When the royal army evacuated the city in the early summer of 1778, Shoemaker (who had been declared guilty of high treason by the revolutionary assembly) was forced to flee and Rawle accompanied him to New York City, which remained in British hands.

While in New York, Rawle began studying law under the guidance of the Loyalist attorney general John T. Kempe but despite his admiration for Kempe, Rawle found his studies and his life less than satisfactory in a city under military government. "There is something," he wrote in a letter during this period, "in the air of a military government extremely disagreeable [and in] the profession which I have chosen, it is impossible to obtain even a slender knowledge of essentials [because of] the military government which prevails; in consequence of which the still small voice of the law is seldom heard and never attended to."⁹ In the summer of 1781, therefore, Rawle sailed to Britain, where he entered the Middle Temple and studied law for several months. After Yorktown, he decided to return to Philadelphia. Rawle found no difficulty in swearing allegiance to the now-triumphant revolutionary government since, as he wrote, he had "in no one instance taken a decisive part on either side; unless the voyage to New York, which was the effect of filial duty should be urged as a crime."¹⁰ By January 1783 Rawle was once again in his native city and after some additional legal study he was admitted to the bar in September of that year, and married a couple of months afterward.

9. Quoted in Wharton, at 43–44.

10. Letter to Rebecca Shoemaker (Jan. 1, 1782), quoted in Wharton, at 51. Rawle declined to apply to the British government for a pension despite the fact that his father's property had been confiscated by the revolutionary authorities because, he explained, he done nothing himself to merit consideration as a Loyalist. See the letter quoted in Wharton, at 52.

Rawle's early years in practice were difficult financially and professionally—in later years he reminisced about deciding at one point to abandon the law and take up farming¹¹—but his Loyalist connections seem to have presented no obstacle to his reincorporation into the upper-class circles in which his family had moved for several generations. He soon was playing a visible role in the cultural life of Philadelphia and served both as secretary of the Library Company of the city, in which capacity he invited the members of the Philadelphia framing convention to use the Company's collection, and for a single term as a representative in the state legislature. Perhaps most importantly, he was invited to join a Society for Political Inquiries that Franklin organized in the late 1780s to meet regularly and discuss political questions of a general and theoretical sort. There Rawle came into intimate contact with leading figures such as Robert and Gouverneur Morris, Benjamin Rush, and the premier revolutionary of them all, George Washington, most of whom were proponents of the Constitution during the ratification struggle in 1787–88. Rawle in turn shared, or came to share, the Federalist politics of Washington and the Morrises, not only during ratification but as the label "Federalist" came to denote one of the two warring political alliances that developed in the early 1790s.

Washington was sufficiently impressed that in 1791 he appointed Rawle to the position of United States attorney for the district of Pennsylvania, an office Rawle filled until his resignation in May of 1800.¹² Rawle's tenure as a federal prosecutor marked his emergence as one of the leading figures of the Philadelphia and indeed the national bar. Rawle's name is to be found all over the reports of cases decided by the federal circuit court, the Pennsylvania state courts, and the Supreme Court of the United States.¹³ Among the high-pro-

11. *Id.* at 53–54 (recounting Rawle's own statements to Wharton).

12. There was a story circulating in the Philadelphia bar that Washington actually offered Rawle the position of first attorney general of the United States, but I have not seen any confirmation that it is correct. See Bauer, at 81 & n. 81.

13. Before 1896, the federal government compensated United States attorneys through a fee system based on the cases they undertook and they

file cases Rawle handled in this period were the Washington administration's chosen test case for the lawfulness of its enforcement of American neutrality,¹⁴ the prosecutions of the leaders of the Whiskey Rebellion,¹⁵ a famous treason case arising out of 1798 disturbances over another federal tax,¹⁶ a major prosecution under the Sedition Act,¹⁷ an important state decision on the nature of American federalism,¹⁸ and Supreme Court decisions addressing the constitutional amendment process and Congress's powers over war.¹⁹

were expected to supplement this as each thought necessary through private practice. On the fee system and its problems, see Homer Cummings & Carl McFarland, *Federal Justice: Chapters in the History of Justice and the Federal Executive* 493–94 (1937).

14. *Hensfield's Case*, 11 F.Cas. 1099 (C.C.D.Pa. 1793). After President Washington issued his politically controversial Neutrality Proclamation upon the outbreak of war between Great Britain and revolutionary France, the executive branch attempted vigorously to enforce its understanding of the limitations the law of nations placed on the involvement of neutral states and their citizens in a war. Hensfield, an American citizen, allegedly had served on a French privateer preying on British shipping. The characterization of his prosecution as a test case is Stewart Jay's. See Jay, *Origins of Federal Common Law: Part One*, 133 U. Pa. L.Rev. 1003, 1048–49 (1985). From the administration's perspective Rawle achieved a strategic victory, even though the jury acquitted Henfield: the circuit court, which included Justices James Wilson and James Iredell, strongly endorsed Rawle's argument that the federal courts could entertain prosecutions under the executive's enforcement policy despite the absence of any specific federal criminal statute.

The prize cases, as they are known, raised not only the lawfulness of federal prosecutions without statutory authorization but also the substantive content of the law of nations. Ironically, Rawle himself seems to have doubted the executive-branch interpretation of the international law of neutrality although he faithfully enforced the view taken by President Washington and his cabinet. See Thomas Jefferson, Letter to James Monroe (July 14, 1793), in 9 *The Writings of Thomas Jefferson* 163 (Andrew A. Lipscomb et al.ed. 1903) ("Mr. Rawle ... supposed the law more doubtful").

15. See, e.g., *United States v. Mitchell*, 26 F.Cas. 1277 (C.C.D.Pa. 1795).

16. *United States v. Fries*, 9 F.Cas. 924 (C.C.D.Pa. 1800).

17. *United States v. Cooper*, 25 F.Cas. 631 (C.C.D.Pa. 1800).

18. *Respublica v. Cobbett*, 3 Dall. 467 (Pa. 1798).

19. Respectively, *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378 (1798) (holding, over Rawle's argument to the contrary, that the eleventh amendment was validly adopted despite the lack of a presidential signature and

The case perhaps of the most interest in relationship to *A View* is *United States v. Worrall*, a 1798 prosecution for attempted bribery of a federal official that Rawle brought as a common-law prosecution without statutory authority.²⁰ The jury convicted the defendant who then moved to have the conviction set aside on the ground that there is no federal common law of crimes and Justice Samuel Chase interrupted Rawle's rebuttal with an emphatic statement of his agreement with this view. Chase subsequently (and inexplicably) joined District Judge Richard Peters in nonetheless sentencing Worrall, but the general issue remained hotly debated for many years, with Federalists generally supporting Rawle's perspective and Republicans mostly taking the Federalist (but eccentric) Chase's position that federal criminal prosecutions must have a statutory basis. Rawle's extensive vindication in *A View* of the position he took in *Worrall* a quarter-century earlier is one of the few examples in the book of a controversial viewpoint that seems directly reflective of Rawle's time in public service.

By the time Rawle resigned the position of United States attorney, his reputation as an outstanding lawyer was secure, and he remained a highly admired member of the legal profession until his death in 1836.²¹ Late in his life, Rawle served as one of

that it stripped the federal courts of jurisdiction over cases already before them as well as of future cases), and *Bas v. Tingy*, 4 U.S. (4 Dall.) 37 (1800) (accepting Rawle's argument that Congress had lawfully placed the United States in a limited maritime war with France).

20. 2 Dall. 384 (C.C.D.Pa. 1798).

21. With the predictable classicism of the day, his fellow-lawyers came to refer to the aging Rawle as "the Nestor of the Philadelphia bar." See Bauer, at 65. Rawle's success reflected not only his professional skill and amiable temperament, but also his comfortable location in the upper echelon of both society and profession. Rawle's longtime friend and courtroom adversary, Peter S. Du Ponceau, reminisced after Rawle's death that "[it] was really a proud thing at that time, to be a *Philadelphia lawyer*," and that Justice Bushrod Washington proudly described Rawle and his associates as "*my bar*" when they attended sessions of the federal Supreme Court. Letter to Thomas I. Wharton (June 3, 1837), reprinted in Wharton, at 86 (emphases in original). Du Ponceau himself published a short book on the Constitution, *A Brief View of the Constitution of the United States*, in

three members of a commission appointed to propose a general collation and revision of Pennsylvania statutory law, on which he served for four years, but with that exception after 1800 he declined further participation in political life and devoted his efforts to his private practice and to a remarkable range of civic activities, including the presidency from 1818 until his death of the Maryland Society for Promoting the Abolition of Slavery.²² While Rawle himself did not engage in teaching, he showed a particular interest in education generally and in legal education in particular,²³ and was a prolific (if largely unpublished) writer. The College of New Jersey (now Princeton) recognized Rawle's literary and educational interests in 1827 by awarding him an honorary doctorate of letters.

The relevance of William Rawle's biography to an understanding of *A View* lies, I think, more in what it says about the disposition with which he approached the Constitution than in its illumination of his specific constitutional views—although as I noted above with respect to the *Worrall* case the reader of *A View* catches on occasion a glimpse of Rawle's professional ex-

1834. As its title indicated, it was “intended to be introductory to the more formidable tomes on constitutional law” such as Rawle's and Story's. See Bauer, at 76, and on Du Ponceau more generally, at 65–79.

The Philadelphia firm of Rawle & Henderson LLP is the direct institutional descendant of Rawle's private practice, which his son William, Jr., joined in 1813. After that, Rawle seems gradually to relinquished the lead in actual practice to his namesake. See Wharton, at 69. For a history of the firm, see http://www.rawle.com/About_History.asp (visited October 5, 2007).

22. See Wharton, at 58–59; Bauer, at 63–64.

23. Rawle was, for example, a trustee of the University of Pennsylvania for many years, and his friend Du Ponceau described him as playing a significant role in encouraging the establishment and maintenance of a Law Academy to foster legal education. See *id.* at 89–90. Rawle was also one of the major organizers and the first president of the Historical Society of Pennsylvania (see Wharton, at 63–65) and continued more generally his patronage of public library facilities and literary events. The law library at Temple University has a Rawle Reading Room that houses a Rawle Collection of some four thousand volumes assembled by our author and his descendants. See http://www.law.temple.edu/servlet/RetrievePage?site=TempleLaw&page=Library_Collections (visited October 5, 2007).

perience at work. Rawle was a great admirer of George Washington and (unsurprisingly) as a result a supporter of ratification and a loyal Federalist during the tumultuous Nineties, when he served as the one of key executive-branch officers in a restless and politically crucial state.²⁴ After 1800, however, Rawle refrained scrupulously from further involvement in political partisanship, and the voice he adopted in *A View* was that of a cultured lawyer of moderate views, deeply concerned with public affairs but displaying little political affiliation. As we shall see, Rawle was by no means automatically middle-of-the-road in his views, and at the heart of his constitutional perspective he was quietly commending a vigorous commitment to a certain kind of politics quite opposed to the political passions of many of his contemporaries. But it was intrinsic to Rawle's perspective that it, and he, avoid the socially disruptive attitudes prevalent in the Nineties.²⁵ Rawle, to be sure, made no effort to conceal his admiration for Washington, "whose character stamps inestimable value on all that he has uttered, and whose [political and constitutional opinions], springing from the purest patriotism and the soundest wisdom, ought never to be forgotten or neglected" (308).²⁶ By the 1820s, however, earlier Republican criticisms of Washington as a tool of Federalist politicians had long receded, and Rawle's invocation of "this great man" (308 n.*) suggested an approach to constitutional issues that was irenic and non-partisan. For Rawle, I suggest, the right approach to interpreting the Constitution of the United States depends on cultivating the right temperament for the task, and *A View* was as much an education in that temperament as it was a handbook on the details of the law.

24. See his encomium of Washington and "the principles of [his] administration" at 198.

25. It seems entirely likely that Rawle's dislike of political bitterness went even further back to the personal hardships he experienced during the American Revolution.

26. I shall cite page numbers in the second edition of *A View* in this fashion.

A View as a book

As the great student of antebellum constitutional scholarship, Elizabeth K. Bauer, correctly noted, *A View* was in a sense unprecedented: earlier publications with extensive discussions of the United States Constitution dealt with constitutional law in some other, broader context.²⁷ The famous judge James Kent, whose extensive treatment of federal constitutional law appeared almost two years after *A View*,²⁸ adhered to this tradition of treating constitutional law as a subset of a more extensive category of law, and it was only with Justice Joseph Story's *Commentaries on the Constitution*, published in 1833, that another jurist clearly picked up on Rawle's implicit claim that the Constitution ought to be dealt with as an autonomous subject.²⁹ In a sense, Rawle created the genre of constitutional-law treatise, free (for better and worse) of the suggestion stemming from Sir William Blackstone's *Commentaries on the Laws of England* that the public law of government is ancillary to the private law of *meum et tuum*, property and tort.³⁰ Rawle's decision to treat the law of the federal Constitution as a topic that stands on its own marks an important stage in the development of the American consciousness of law's role

27. See footnote one above. Bauer's *Commentaries on the Constitution 1790–1860* is over half a century old, and her approach as well as many of her specific judgments would need revision in the light of subsequent scholarship, but her book remains an elegant and essential guide to the study of pre-Civil War constitutional thought.

28. See 1 Kent, *Commentaries on American Law* Part II (1826). This first volume of Kent's exhaustive survey of American public and private law appeared in November 1826, close to two years after Rawle's January 1825 book. See Bauer, at 93–94.

29. Even Story formally placed his three-volume treatise within the context of an overall survey of American law, as his title indicates. See generally H. Jefferson Powell, Joseph Story's *Commentaries on the Constitution*: A Belated Review, 94 *Yale L.J.* 1285 (1985).

30. This is not the place to discuss the profound intellectual impact that Blackstone had on American law. Compare Duncan Kennedy, The Structure of Blackstone's *Commentaries*, 28 *Buff. L. Rev.* 205 (1979), with William S. Brewbaker, III, Found Law, Made Law and Creation: Reconsidering Blackstone's Declaratory Theory, 22 *J. Rel. & Law* 255 (2006–07).

in the activities of government: after *A View* and Story's *Commentaries* it was possible to see constitutional law as a subject for formal study in colleges and law schools and as a discrete area of intellectual enquiry. If Rawle's book had no other contemporaneous significance, this alone would make it historically important.

In fact, however, *A View* had a rather different and crucially important context in its day. Rawle's book was a direct and (I believe) deliberate attempt to undercut the authority of an earlier and highly influential discussion of constitutional law, St. George Tucker's *View of the Constitution of the United States*, which Tucker published as appendix D to his 1803 edition of Blackstone's *Commentaries*.³¹ Tucker was a leading figure in founding-era jurisprudence: while Rawle was building a reputation as a litigator, his contemporary Tucker was establishing himself as a judge and legal scholar.³² Tucker's edition of Blackstone was the first that attempted to adapt the latter's Tory English views to American Whig sensibilities, and its appearance in the wake of the Republican electoral triumph in 1800 gave it the aura of an official restatement of American law in the age of Jeffersonian democracy.³³ The prominence of "the American Blackstone"³⁴ ensured that Tucker's constitutional ideas were widely disseminated.

Rawle did not choose to discuss Tucker directly,³⁵ but *A View* is unmistakably an answer to the Virginian's Jeffersonian constitutionalism. Rawle's choice of a title directly referenced Tucker's

31. See 1 St. George Tucker, *Blackstone's Commentaries* (1803).

32. Tucker was a judge on the Virginia General Court from 1788 to 1803, and then served on the state's highest court until his appointment as United States District Judge in 1811, serving in that office until his death in 1827. He taught law at William & Mary from 1803. On Tucker, see Bauer, at 170–82.

33. See H. Jefferson Powell, *A Community Built on Words* 139–40, 144–45 (2002) (discussing Tucker's status as a constitutional authority).

34. Bauer, at 181.

35. In this respect, Rawle took a different approach from Story, who was equally concerned to refute Jeffersonian ideas but made frequent and respectful reference to Tucker's *View*. One reason, perhaps, for their differing strategies was that Story, unlike Rawle, had been a well-known mem-

work,³⁶ and Rawle's substantive arguments again and again responded directly to Tucker's, if (to be sure) without acknowledgment. Tucker's *View* was the intellectual context of Rawle's *A View*, and it is impossible to understand Rawle without some sense of what he was arguing against.

The guiding principle of Tucker's understanding of the Constitution of the United States was his thorough-going application of the concept of compact: the Constitution is a compact—Tucker preferred this term but his use of it makes it clear that compact is a synonym for contract—between the states as sovereign bodies. This idea was a commonplace among Jeffersonian Republicans in the early decades of the nineteenth century, but Tucker employed it with a logical and lawyerly rigor not always found in other Republican arguments. The Constitution is, therefore, nothing more than a solemn treaty or agreement between independent nations, and the United States the label for that alliance rather than the name of a unified people: it is a “federal” constitution as Tucker used that term rather than a “national” one. “[E]very feature of the constitution appears to be strictly federal.”³⁷ The proper interpretation of the Constitution, Tucker reasoned, has to proceed from this premise. “As federal, [the Constitution] is to be construed strictly, in all cases where the antecedent rights of a *state* may be drawn in question.” “[T]he powers delegated to the federal government, are, in all cases, to receive the most strict construction that the instrument will bear, where the rights of a

ber of Jefferson's Republican party. Rawle, a Federalist if not a violently partisan one, had no personal need to distance himself from Jefferson.

36. It is possible that Rawle also intended a side reference to John Taylor, *New Views of the Constitution of the United States* (1823). Rather than being a treatise on constitutional law generally, *New Views* was a lengthy dissertation on the nature of the federal Union, which Taylor treated as exclusively “[a] federal compact, and not an American nation.” *Id.* at 276. (Taylor differed with Tucker in that the latter's approach was more nuanced.) On Taylor, see Bauer, at 182–97.

37. *View of the Constitution of the United States with Selected Writings* 95 (1999). I shall cite to this edition of Tucker's appendix D rather than to the 1803 original since the 1999 Liberty Press edition is more easily available.

state or of the people, either collectively, or individually, may be drawn in question.”³⁸ The “nature of that instrument” determines the proper approach to construing its meaning: “it is ... a maxim of political law, that sovereign states cannot be deprived of any of their rights by implication,” and therefore the federal government “can possess no legitimate power, but such as is absolutely necessary for the performance of a duty, prescribed and enjoined by the constitution” in its text.³⁹

Tucker saw his state-sovereignty understanding of the Constitution not just as a general perspective but also as a guide to the correct interpretation of specific constitutional issues. Since the Constitution is a federal compact among sovereign states that have chosen to act together in the international arena,

the connections, intercourse and commerce of the confederate republic, with foreign states and nations; and with each other, as sovereign and independent states, naturally fall under the jurisdiction of the federal government, whilst the administration of all their other concerns, whatsoever, as naturally, remains with the states forming the confederacy.

Where the Constitution undeniably extends federal power beyond this “grand boundary between the limits of federal and state jurisdiction,” as in empowering Congress to create a federal law of bankruptcy, such grants of authority, “being in derogation of the municipal jurisdiction of the several states, ought for reasons already given to be strictly construed.”⁴⁰

Given Tucker’s premise that the Constitution, and the federal government it organizes, are the creatures of the individual states’ sovereign will, he thought it followed that there are no implicit

38. Tucker, at 101, 105. Tucker thought that the states became entirely and separately sovereign upon the Declaration of Independence, see *id.* at 100–01, and linked this principle to his insistence that federal powers be strictly construed. See, e.g., *id.* at 103, 121, 136, 227–28.

39. *Id.* at 91, 94, 120.

40. *Id.* at 127.

limitations on state authority. “[E]ach state *retain[s] an entire liberty* of exercising, as it thinks proper, all those parts of its sovereignty, which are not mentioned in the constitution, or act of union, as parts that ought to be exercised in common.”⁴¹ Indeed, the Constitution’s authority as the supreme law of the land, which Tucker readily acknowledged, is in his view conditional, resting on the continued willingness of the states to respect it.⁴²

The federal government, then, appears to be the organ through which the united republics communicate with foreign nations, and with each other. Their submission to its operation is voluntary: its councils, its sovereignty is an emanation from theirs, not a flame by which they have been consumed, nor a vortex in which they are swallowed up. Each is still a perfect state, still sovereign, still independent, and still capable, should the occasion require, to resume the exercise of its functions, as such, in the most unlimited extent.⁴³

While Tucker expressed a strong hope that no difficulty requiring a dissolution of the constitutional union would arise—it would be “[a] crisis to be deprecated by every friend to his country”—he had no doubt that the states retain the legal power to bring the Constitution and the federal government to an end.⁴⁴ As we shall

41. *Id.* at 121.

42. It followed therefore that the states were entitled to terminate their participation in the constitutional compact, or the existence of the confederacy itself, by any means they chose. See, e.g., *id.* at 257 (arguing that because the state legislatures can decline to appoint presidential electors, the Constitution “furnishes the means of a peaceable dissolution of the government, if ever the crisis should arrive that may render such a measure eligible, or necessary”).

43. *Id.* at 136. Indeed, at one point Tucker argued that the Constitution’s authority rests on the continued “acquiescence” of the people of the several states rather than on the past actions of the states. See *id.* at 123.

44. Tucker’s clearest statement of his views on secession is found not in his *View* (appendix D to the first volume of his edition of Blackstone) but in an earlier appendix B to the same volume. He pointed out that the Articles of Confederation forbade any alteration in the political system

see below, Rawle agreed with Tucker on this issue as a narrow legal matter, although in terms very different than those Tucker assumed.

The vision of A View

Throughout his book, Rawle consistently understood the Constitution as something more than a narrowly legal instrument and quite different from a contract between parties dealing at arms-length: it is, most fundamentally, the set of “the principles on which [American] government is formed and conducted” (9). To be sure, Rawle admitted, the Constitution was the product of political compromise.

Different local positions and different interests were ... the sources of many impediments to the completion of this great work, which at last resulted in the combination of mutual and manly concessions.... The constitution thus became the result of a liberal and noble sacrifice of partial and inferior interests to the general good (18–19).

they established without the unanimous consent of every state legislature. The eleven states that ratified the Constitution and instituted a new government under it despite the initial refusal of North Carolina and Rhode Island to agree had thereby seceded from the existing United States.

This was an evident breach of that article of the confederation, which stipulated [unanimity].... Yet the seceding states, as they may not be improperly termed, did not hesitate, as soon as nine states had ratified the new constitution, to supersede the former federal government and establish a new form [and] by this act the seceding states subverted the former federal government. [S]ince the seceding states ... have shown that they consider the right to do so whenever the occasion may, in their opinion require it, as unquestionable, we may infer that that right has not been diminished by any new compact [i.e., the Constitution] which they may since have entered into.

Tucker, *Of the Several Forms of Government*. This passage is found on pages 84–86 of the Liberty Fund edition of Tucker’s *View* that I using. Citations to Tucker subsequent to this footnote are all from his *View*.

It is an error, nevertheless, to conclude that the Constitution lacks an overall animating purpose, which Rawle identified as the “distinct exposition of principles” set forth in the Preamble (29). In contrast to Tucker, whose emphasis lay on the Constitution’s constraints on (federal) governmental power, Rawle saw it as primarily concerned with vesting in the general government the powers necessary to achieve the Preamble’s high goals: “from the nature of our Constitution, no new rights can be considered as created by it, but its operation more properly is the organization and distribution of a conceded power in relation to rights already existing” (106).

While Rawle was perfectly willing to use the language of sovereignty in describing the states’ powers, he consistently rejected the substance of Tucker’s state-compact view of the Constitution. Because a state, he explained early in the book,

is neither a stranger, nor properly speaking a confederate, it seems to follow that it must be considered as part of the greater nation, a term, which in the course of this work we shall chiefly use in reference to the United States [since] the states ... cannot with full propriety be so designated (30–31).

“[T]he Constitution of the United States was the work of the people” (261) and the government it creates is not, in Rawle’s view, properly understood in federal terms. The “only material remnant of the federative character” of the United States under the Articles of Confederation is the power of the state legislatures to appoint senators (36) but even that power is tightly circumscribed and implies no authority on a legislature’s part to control the actions of the senators it appoints nor any obligation on the latter’s part to act in accordance with the legislature’s wishes (38–39): “the members of the senate ... do not in any sense sit and act as states in a federative quality, and are not bound by instructions” from the legislatures that appointed them (286). The very term “federal” was a misnomer when applied to national authority under the Constitution: at one point, Rawle gently chastised Chief Justice John Marshall himself merely for using the ex-

pression “federal courts” in an opinion Rawle quoted.⁴⁵ “[T]he United States for ... most important purposes form a single nation” (242), not the confederacy of nation-states that Tucker envisioned.⁴⁶

A *View's* rejection of Tucker's state-compact theory eliminated the justification for his strict-construction approach to the interpretation of the Constitution, and Rawle expressly rejected strict construction as well. Once one understands that the government of the United States is a genuinely national government under which the states exercise autonomous governmental authority over matters not requiring national decision, it is possible “to decide on the true mode of giving a construction to the constitution.”

Some have contended that it should be construed strictly; others have asserted, that the most liberal construction should be allowed. By construction we can only mean the ascertaining the true meaning of an instrument, or other form of words, and by this rule alone ought we to be governed in respect to this constitution.... The true rule therefore seems to be no other than that which is applied in all cases of impartial and correct exposition; which is deduce the meaning from its known intention and its entire text, and to give ef-

45. “In these quotations the author has retained, without approving of, the expression *federal*, frequently applied to the courts of the United States. The government not being strictly a federal government, its tribunals are not properly federal tribunals” (252 n.*). The offending passages are from Marshall's opinion for the Court in *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 819–23 (1824).

46. Cf. Tucker, at 95: “every feature of the constitution appears to be strictly federal.” Rawle's use of a plural verb in reference to “the United States” captures the difficulty nationalists sometimes had in finding language to express with clarity their position. State-compact theorists had their own terminological problems. See generally H. Jefferson Powell, *The Principles of '98: An Essay in Historical Retrieval*, 80 Va. L.Rev. 689 (1994), for a discussion of the varying and inconsistent uses to which Jeffersonian constitutionalists put the language of “compact” in this period.

fect, if possible, to every part of it, consistently with the unity, and the harmony of the whole (31–32).

Rawle's language here was deliberately bland and unprovocative, but no serious advocate of state-sovereignty constitutionalism is likely to have missed the underlying, thoroughly nationalist point. The Constitution's "known intention," in Rawle's view, was to vest "all the powers necessary for the attainment of the great objects" outlined in the Preamble, reserving "to the state governments, or to [the people] themselves, only what is not necessary for the attainment of those objects" (29–30).⁴⁷ Rawle thought that the Preamble states "the general principle on which [the Constitution was] constructed [is] declared and manifest throughout" (115) and controls the interpretation of its specific provisions. Attempts to limit Congress's rightful authority to the bare words of the text—such as Tucker's—spring out of "a morbid jealousy" (114). If the Constitution's specific provisions are interpreted properly, as Rawle understood its general principle, the result is to justify a much broader understanding of national power than Jeffersonian orthodoxy admitted, even if Rawle denied (rather halfheartedly) that he was arguing for a full-fledged Hamiltonian approach to interpretation.⁴⁸

On one issue only, the lawfulness of secession, does the argument of *A View* seem to contradict Rawle's nationalism, and more attention has been given to Rawle's views on secession than

47. Even the Constitution's restrictions on Congress were, for Rawle, an indication that "a due construction of the Constitution" requires a broad reading of Congress's powers. "When a general power over certain objects is granted, accompanied with certain exceptions, it may be considered as leaving that general power undiminished in all those respects which are not thus excepted" (34).

48. Rawle harshly characterized Tucker-style strict construction as "proceed[ing] from a needless jealousy, or rancorous enmity." In contrast, the strongest criticism he could make of "liberal construction" is that it "may be carried to an injurious extreme; concessions of power may be conceived, or assumed, which never were intended, and which therefore are not necessary for [the Constitution's] legitimate effect" (31).

on any other issue.⁴⁹ Justice Story set the tone of later discussion in his *Commentaries*:

It is a matter of surprise ... that a learned commentator should have admitted the right of any state, or of the people of any state, without the consent of the rest, to secede from the Union at its own pleasure. The people of the United States have a right to abolish, or alter the constitution of the United States; but that the people of a single state have such a right, is a proposition requiring some reasoning beyond the suggestion, that it is implied in the principles on which our political systems are founded.⁵⁰

In this instance, however, Story's haste to repudiate any suggestion that the Jeffersonian compact theory of the Constitution is correct led him to oversimplify Rawle's views on secession.⁵¹

As we have seen, Rawle rejected Tucker's understanding of the Constitution as a state compact as thoroughly as Story, and his discussion of secession ought to be read with that in mind. *A View's* discussion of the question of state secession is embedded in a chapter, the last in the main text, entitled *Of the Permanence of the Union*, and Rawle's thrust throughout the chapter was to insist on the importance of sustaining the supremacy and the con-

49. The apparent anomaly of a Northern, anti-slavery constitutionalist approving secession, and the erroneous idea that *A View* was a standard text at West Point for many years, have spurred interest in Rawle's opinions although without always encouraging a close examination of what he actually wrote.

50. 1 Story § 359, citing Rawle, *A View* chapter 32 and various specific pages.

51. Story immediately attributed what he saw as Rawle's constitutional heresy to "the notion that all governments [are] founded in *compact* ... a notion, which it has been our purpose to question." 1 Story § 359. For the nationalist Story, the state-compact theory espoused by Tucker among others was anathema. See, e.g. id. § 352 ("There is nowhere found upon the face of the constitution any clause, intimating it to be a compact, or in anywise providing for its interpretation, as such."). As we have seen, Rawle too rejected the state-compact theory, which in itself suggests that Story's reading of Rawle was inaccurate.

tinuance of the national government: he concluded the chapter, and thus his discussion of constitutional law as a whole, with a lengthy excerpt from Washington's famous Farewell Address in which Washington fervently commended "the continuance of the Union" to his fellow Americans, "a name which belongs to you in your national capacity [and] must always exalt the just pride of patriotism, more than any appellation derived from local discriminations."⁵² He reiterated his earlier argument that no state can absolve a citizen from his duty of allegiance to the United States (296–97, referring to the discussion at 96); approved the legitimacy and indeed the duty of the national government to use force if necessary to prevent a political faction within a state from seeking to give it a non-republican form of government (296, 298–99); and flatly denied that any state legislature possessed the power to secede at the time of his writing (302).⁵³ Rawle labored, in fact, to make the conditions for lawful secession as stringent as possible: "nothing is more clear than that the act should be deliberate, clear and unequivocal", (302) "manifested in a direct and unequivocal manner" (305) as "the will of the people of such state" (302),⁵⁴ and accompanied by withdrawal from its represen-

52. The quotations from Washington are found at 310 and 308. Rawle's friend DuPonceau, who shared Rawle's nationalism, commented in the introduction to his 1834 *Brief View of the Constitution* that he had avoided any discussion of the lawfulness of secession: "I feared lest the shade of Washington should frown upon me." See Bauer, 299–300 (quoting DuPonceau).

53. At this point Rawle appears to assert that a state could amend its constitution to give the legislature the power to decide on secession, although he immediately added that "it would perhaps be impolitic to confide it to them." This is in considerable tension with his recognition that the legislators might be acting "against the interests and the wishes of a majority of their constituents" (302) and his insistence that to be legitimate secession would have to come from "the people [as] the only moving power" (303). See also 299: "If a faction, an inferior number [to "the majority of the people of a state"], make such an effort ... the Union is bound to employ its power to prevent it."

54. There is, again, an apparent ambiguity in Rawle's reasoning. Immediately following his statement on 305 that the people's decision to secede must be "direct," Rawle continued that "[i]f it is ever done indirectly,

tation in Congress (305) and on demand by payment of its proportionate share of the national debt (306).

[W]ithout plain, decisive measures of this nature, proceeding from the only legitimate source, the people, the United States cannot consider their legislative powers over such states suspended, nor their executive or judicial powers any way impaired, and they would not be obliged to desist from the collection of revenues within such state (305).

Rawle lamented the prospect of secession as a path to “jealousies and discord ... internal war [and invasion by] foreign enemies” (306); Americans owed it themselves but also “to the world in general, anxiously and faithfully to preserve ... [t]he first example which has been exhibited of a perfect self-government” (307). Nevertheless, if the people of a state clearly undertook the “solemn, serious act” of secession (305), he admitted its political and constitutional legitimacy. “To deny this right would be inconsistent with the principle on which all our political systems are founded, which is, that the people have in all cases, a right to determine how they will be governed” (296). Without conceding that Rawle’s Loyalist relatives had been right, and that the Revolution itself was an illegal and unconstitutional act of rebellion—concessions Rawle was unwilling to make⁵⁵—he evidently be-

the people must refuse to elect representatives, as well as to suffer their legislature to re-appoint senators.” It is possible that here, as Rawle did on occasion elsewhere, he was mooting different perspectives on a matter he thought debatable even though he had a clear opinion himself on the proper answer. Alternatively, Rawle’s real point was that in addition to announcing their intention to secede the people of the state would have to act to terminate their participation in the national legislature. He rejected the argument that a sufficient number of state legislatures could prevent Congress from legislating simply by failing to appoint senators, see 303–05, which seems to imply that the mere absence of a state’s (or even many states’) senators could not serve to terminate Congress’s authority over unrepresented states.

55. See Rawle’s description at 23–26 of the American colonists’ gradual and reluctant transformation of their position from complaints about

lieved that the lawfulness of secession had to be conceded, but he set that right within a context making a conscientious exercise of the right almost unthinkable. For Rawle, American constitutionalism involves a moral commitment to the high and national principles outlined in the Preamble, and a genuine adherence to those “principles of its cohesion” (294) rendered the possibility of legal secession very nearly an abstraction. “A moral power equal to and of the same nature with that which made, alone can destroy” (16).

Next to his nationalism, the constitutional principle that Rawle invokes most prominently in *A View* is that of representation, which he saw as uniquely characteristic of the American constitutional system. “It has been reserved for modern times and for this side of the Atlantic, fully to appreciate and soundly to apply the principle of representation in government” (12).⁵⁶ In theory, Rawle understood genuine representation to rest on universal participation in the choice of legislative and executive officers and “the just relation of representation to numbers” by which he meant what we now think of as the rule of one person, one vote (15, 42).⁵⁷ The Constitution’s mandate of “decennial enumeration and apportionment” was, in his opinion, its most effectual safeguard against a loss of liberty (187). At the same time, he conceded that the Constitution adhered to the principle “not purely and abstractedly, but with as much conformity to it

the violation of “their chartered rights” to the Declaration of Independence.

56. Rawle believed that the representative nature of the House of Commons had been perhaps fatally undermined by malapportionment and ministerial dominance. See 185–87.

57. Rawle did not expressly state his understanding of the relationship between the principle of representation and the federal judiciary. He did observe that in making appointments the president is intended to “carefully ascertain[] and strictly pursu[e] the true interests of the people” (164), and that Congress’s power to “new model all the inferior tribunals” and the two houses’ powers with respect to impeachment, affords “a sufficient [popular] control ... over the judiciary power for every useful purpose” (281).

as was practicable" (40).⁵⁸ He nevertheless noted deviations from the principle with evident disapproval. The states' equal representation in the Senate, he observed, "is not perhaps defensible on the principle of representing the people, which ought always to be according to numbers, but it was the result of mutual concession and compromise" (38). Similarly, Rawle described the three-fifths clause of Article I section 2 as an "anomaly in our system" but one that it "would now be unseasonable and useless to consider or to answer the arguments on either side. It has been agreed to, and the question is for ever at rest" (46). While conceding that Article II permits a state legislature to choose the state's presidential electors itself, Rawle also observed that selecting the electors by popular election "seems most congenial with the nature of our government" (55) and expressed skepticism about worries that direct popular election of the president would lead to "ferments and commotions" (57).⁵⁹ In the United States, "representation in its nature universal," and exceptions to it "are few, and do not impair the principle" (15).

For Rawle, representation and citizenship were correlative terms, and the universality of the principle of representation was matched by a very broad understanding of American citizenship.

In a republic the sovereignty resides essentially, and entirely in the people. Those only who compose the people, and partake of this sovereignty, they alone can elect, and are capable of being elected to public offices, and of course they alone can exercise authority within the community.... Therefore every person born within the United States, its territories or districts, is a natural born

58. In this passage Rawle had the House of Representatives primarily in view, but he thought more generally that the Constitution's representative quality is imperfect from a theoretical perspective.

59. Rawle also noted that the transformation of the electoral college from a supposedly deliberative mechanism to a means for registering the preferences of "the predominant political party which has chosen those electors" completely undermines "the whole foundation of this elaborate system" (57–58).

citizen in the sense of the Constitution, and entitled to all the rights and privileges appertaining to the capacity (85–86).

The Constitution makes no distinction among citizens other than the prohibition on naturalized citizens becoming president, and Rawle referred in a number of passages to his claim that the Constitution “strongly enforce[s] the equality of all our citizens” (121).⁶⁰ To a modern reader, this aspect of Rawle’s discussion may be puzzling. His language is quite sweeping—“the principle that the place of birth creates the relative quality” of citizenship “is established as to us” (86) and all citizens “partake of the same rights, enjoy the same liberty, and [are] protected by the same government” (92)—but at no point does Rawle explain how these principles relate to slaves (or indeed free African Americans).⁶¹ “Principles without practice are like the intentions of an individual without acts,” he thought, for “they confer no benefit, and avert no evil” (148). Perhaps Rawle, himself an opponent of slavery, simply had no answer to the question of how

60. See, e.g., 181, where Rawle criticized the British custom of not paying salaries to the members of Parliament. “The consequence is, that only men of fortune can take seats in the house of commons. This is inconsistent with the equality that ought to be found in a republic.” Cf. 192 (the Constitution provides a “perfect equality in matters of religion”). Rawle thought the constitutional status of the residents of the District of Columbia troubling, since “they are unquestionably, to a certain extent, citizens of the United States” and yet have no representation in Congress. He concluded, a bit lamely, that the presence of the national government “has greatly contributed to [the District’s] prosperity, and its political anomaly has produced no general inconvenience” (113–14).

61. Rawle’s only discussions of slavery were a very brief reference to the fugitive slave clause, under which, he wrote, “no asylum can by the Constitution of the United States, be afforded” to “fugitives from service or labour in any of the states” (99), and an equally brief discussion of the clause in Article I section 9 prohibiting Congress from banning the slave trade (“a traffic now justly reprobated by most Christian nations”) before 1808. Rawle happily noted that “Congress did not fail to avail itself of the power [to ban the trade], as soon as it became lawful to execute it” (117).

to reconcile his principles of representation and equality with the existence of human chattel slavery.⁶²

Rawle thought the principle of representation essential to the Constitution's protection of liberty (it provides "the ultimate remedy" for unconstitutional action, 131), but he was equally emphatic about the crucial role of the judiciary. The central advantage of a written constitution, he explained, was that it makes judicial review of legislation possible. "A written constitution which may be enforced by the judges and appealed to by the people, is therefore most conducive to their happiness and safety... Where there is not a fixed and settled constitution ... the judiciary has no power to declare a law unconstitutional" (16, 274). Because the Constitution, like the parallel state constitutions, is written and definite, the power of judicial review is "the bulwark of [the people's] safety" and "constitutes the public security" (276). Its legitimacy is "in the nature of a principle incorporated for [these] useful purposes into the Constitution" by the people "on full deliberation" (274). Although Rawle conceded that some provisions in the Constitution are not fully justiciable,⁶³ his basic assumption was that the task of interpreting the Constitution authoritatively is exclusively judicial. "Legislative expositions of the Constitution ... are entitled to the greatest respect" (256), but "it does not rest with congress to give a binding construction to the Constitution" (227; accord, 98). "A high function also appertains to the judiciary in the exclusive right to expound the Constitution, and thereby to test the validity of all the acts of the legislature" (199).

62. Rawle was predictably silent as well on the exclusion of women from political life, although there is no reason to doubt that he understood native-born or naturalized women to be citizens.

63. In discussing the eighth amendment's prohibition on the imposition of "excessive fines," Rawle opined that "[t]he judicial authority would not undertake to pronounce a law void, because the fine it imposed appeared to them excessive." With respect to legislation, then, the excessive fines clause "is rather to be considered in the light of a recommendation than as a condition on which the constitutionality of the law depends" (131).

While the power to interpret and enforce the Constitution is shared by all American courts, state and federal, Rawle acknowledged the “irrefragable authority” of the Supreme Court “whenever [it] has pronounced its solemn decision upon constitutional points” (32). Rawle rested the Court’s final authority not on an assumption that it cannot make a constitutional error but on the practical ground that “there must be some point at which to stop” the process of constitutional disputation and “human infallibility can no where be found” (277–78).⁶⁴ On this issue as on others, Rawle insisted that the Constitution must be construed as a realistic instrument of governance.

*Constitutional interpretation in A View:
The presidency as an example*

Despite its comparative brevity, Rawle’s *A View* is an encyclopedic survey of what he saw as the significant issues in the interpretation of the Constitution. In this introduction, I shall address one of the larger and more complex questions he discussed, the place of the president within the constitutional system, both because of its intrinsic interest and as an illustration of his overall approach to the interpretive task.

As a formal matter, Rawle understood the three branches of the national government as coordinate entities, each with a distinct constitutional mandate. “It is as inconsistent with sound principles for the executive to suspend, at its pleasure, the action of the legislature, as for the latter to undertake to deprive the executive of its constitutional functions” (34).⁶⁵ At the same time,

64. In the light of his constitutional nationalism, it is hardly surprising that Rawle held a high view of the Court’s generally nationalist decisions, see 280–81, but he was also willing to criticize the reasoning and language of the Court. See, e.g., 252 n.*, 303 n.*.

65. Rawle’s immediate point was to praise the Constitution for denying to the president the power to adjourn or dissolve Congress at his discretion, but the whole tenor of *A View* supports the conclusion that he understood each of the branches to enjoy a core of constitutional authority that is beyond the power of the others to infringe. See especially 113

Rawle's unwavering insistence on construing the Constitution in practical terms could lead him to describe Congress as "the superior body" of the two political branches (177) because of the practical relationship between the legislature and the executive. The executive branch is entirely dependent on Congress for its "modes of action ... in relation to [functions] or a nature merely civil" (151); executive offices and departments are the creation of Congress which has the power in doing so to define their functions (152, 165–66). In contrast, Rawle thought the president's role in the legislative process was carefully circumscribed by "wise and cautious qualifications:"

He does not originate laws or resolutions; he takes no part in the deliberations on them during their progress; he does not act in relation to them indirectly by advice or interference of any sort, until they have passed both houses: it is only when *their* operations are concluded that his power begins (50).⁶⁶

While it is the president's duty "to recommend subjects for consideration when the public good requires it," his only formal involvement in the actual crafting of the laws lies in his exercise of the veto power, which Rawle envisioned more as creating an opportunity for congressional, and ultimately public, "reconsideration of their measures" than as a substantive contribution to legislation (62).⁶⁷

(Congress cannot vary the constitutional powers of the executive), 277–81 (Congress cannot correct decisions of the Supreme Court).

66. It seems unlikely that Rawle, with his numerous contacts in the nation's capital, was unaware of the extent to which this understates the extensive behind-the-scenes role that Jefferson had played in the crafting of legislation during his presidency, but his successors in that office returned to the less interventionist stance of the first two presidents.

67. On the president's duty to "give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient," Article II section 3, see also 171–73. Rawle did not see this duty as involving the formulation or proposal of legislation: once the president has conveyed "his own impressions of what it would be useful to do, with his information of what had been

Rawle's understanding of the practical operation of the national government also influenced his description of the relationship between the executive and the judiciary. In line with his ascription to the courts of "the exclusive right to expound the Constitution" authoritatively, Rawle insisted that in such situations the courts must "control the executive, and what it decides to be unlawful, the executive cannot perform." Similarly, the executive is obligated to obey the judiciary's interpretation of legislation. "Its construction of the acts of the legislature is received as binding and conclusive" (199). The judicial branch's role in constraining presidential overreaching, furthermore, lies not only in its general authority to determine what the law is, but in its power directly to address illegal executive actions: Rawle completely rejected any doctrine of executive immunity from liability "to the person injured in the same manner that a private individual would be" (168). Even if one were to doubt the fortitude of the courts in resisting congressional violations of the Constitution (a doubt Rawle piously dismissed as "altogether an illegitimate view of the character of the judicial power and mode of action"), judicial review of "the legality of [the president's] conduct ... would therefore be the more complete by being unbiassed and certain" since "it would be exercised with more alacrity against a single officer, already become the subject of general suspicion or disapprobation, than against those acts which must be considered as the measures of the entire government" (292).

In the light of the effective powers both Congress and the courts possess to check unlawful executive actions, Rawle saw little merit

done," he "will then have discharged his duty, and it will rest with the legislature to act according to their wisdom and discretion" (172). It is striking that Rawle noted Jefferson's abandonment of the precedent his hero Washington set of addressing Congress in person without apparent disapproval (indeed, he described the coeval practice of Congress returning answers to the president, also abandoned under Jefferson, "as a mere matter of ceremony"), but that is consistent with Rawle's quite narrow view of the part the president should play in the legislative process (172–73).

in the “fears of those theoretical writers, who have gratified themselves by lamenting the internal dangers of our republic [posed by] the tendency of the executive authority to overpower the freedom of the people” (286). Having created adequate safeguards against any such danger,⁶⁸ the Constitution in Rawle’s view rightly avoided trammeling the president with legalistic definitions of his substantive powers.

An energy of action, duly proportioned to the exigencies that arise, must be seated in the executive power. . . . It is difficult to adopt general expressions exactly descriptive of the proper extent and limitation of this power. . . . [A]n exact specification of the manner in which the executive power shall be exercised, is not, and could not be introduced into the Constitution [and] it would be at once unnecessary and impossible to define all the modes in which it may be executed (148–49).

The “simplicity of the language” of Article II section 3—the president “shall take Care that the Laws be faithfully executed”—was the Constitution’s appropriate resolution of the issue of enumerating the executive’s powers: “It declares what is his duty, and it gives him no power beyond it” (149).⁶⁹ Rawle rejected as entirely

68. See the exhaustive summary of the “proper regulations” under which the executive power is exercised at 150.

69. In addition to the implications of the take care clause, Rawle thought the Constitution denotes only two important “auxiliary means” of carrying out the executive office (149): the president’s “power over the army, navy, and militia” and his “qualified power of appointing the executive and judicial officers” (162). Rawle disapproved of the advice and consent power of the Senate with respect to executive officers on two grounds. By requiring the president to take into account the views of senators who could reject a nomination “either actuated by party motives, or for want of proper information of the fitness of the individual,” the involvement of the Senate “affect[s] in some degree the responsibility to public opinion which would accompany an unlimited power of appointments.” As a practical matter, furthermore, Rawle thought the advice and consent power an ineffective check on improper appointments because of the president’s unilateral power to dismiss any executive officer at will and replace him

the claim regularly made by modern executive branch lawyers that the president need not enforce laws he thinks unconstitutional as he did the idea occasionally mooted that there are circumstances in which the executive need not enforce a judicial judgment.

The acts of either [Congress or the judiciary], when constitutionally consummate, are obligatory on those whose duty it is to enforce them. The office of executing a law, excludes the right to judge of it, and of course does not require that the executive power should concur in opinion on its utility (147).

From a twenty-first century perspective, Rawle's description of the executive office might seem internally contradictory. On the one hand, his rejection of any attempt to find in Article II an exhaustive list of presidential powers and his emphasis on the executive's "qualities of promptness, vigour, and responsibility" (147) seem to presage modern arguments on behalf of an executive acting in large measure on his or her own independent judgment of what the Republic needs and on the basis of the president's own independent constitutional powers. "No occasional act of the legislature of the United States seems to be necessary, where the duty of the president is pointed out by the Constitution" (300). These echoes before the fact of Teddy Roosevelt's stewardship theory of the presidency are, however, balanced by Rawle's emphatic insistence that the president's duties are, for the most part, defined not by the Constitution but by Congress in enacting the laws, and that in any event he is bound to carry out the laws Congress enacts as interpreted by the courts. The logic of Rawle's understanding of the presidency in fact reverses that of Roosevelt's. The two men shared a robust confidence in the ability of the president to carry out his duty

during a recess of the Senate under the recess appointments clause of Article II section 2. See 162–63.

in good faith, but they had different concepts of what his fundamental duty is. For Roosevelt, the president's independent duty to decide for himself "what [is] imperatively necessary for the Nation" creates the power to act "for the public welfare, whenever and in whatever manner [is] necessary, unless prevented by direct constitutional or legislative prohibition."⁷⁰ For Rawle, in contrast, the president's constitutional duty to carry out Congress's decisions about what is in the public interest—to obey the laws it enacts—justifies the power to act energetically and without unnecessary scruples over the modes of executive action.

Rawle devoted considerable attention to the president's role in the conduct of foreign affairs, which for him as well as for many more recent constitutionalists raises some unique issues. The Constitution's distribution of national authority in that regard is quite different than in the domestic sphere.

The Constitution has vested exclusively in the president and senate the duty of foreign intercourse. The interference of congress in any shape is not warranted further than to afford the means of carrying on that intercourse to the extent that the president and senate hold to be requisite for the national interest, and of furnishing the means of effectuating treaties constitutionally made, when, as has been seen, their intervention is absolutely necessary (73–74).

Rawle took the principle that the conduct of foreign affairs is not a matter for Congress as a whole so seriously that despite the imperative language of Article I,⁷¹ he thought it a difficult question

70. See Theodore Roosevelt, *An Autobiography* 357 (1913).

71. Article I section 7 provides that "All Bills for raising Revenue shall originate in the House of Representatives;" section 8 grants to Congress the power to raise money; and, section 9 prohibits the expenditure of funds "from the Treasury, but in Consequence of Appropriations made by Law."

whether the House of Representatives has any role in executing a treaty requiring the expenditure of money; his conclusion was that “in this single instance, the payment of money, the concurrence of the house of representatives is necessary to give effect to the treaty” but that the House “must be considered bound to perform the duty” of carrying out the treaty (68–74).⁷²

Rawle derived this view of the location of “the duty of foreign intercourse” primarily from Article II section 2, which gives the president the power, “by and with the Advice and Consent of the Senate to make Treaties,” but as always his discussion of how constitutional arrangements should be interpreted was informed by his understanding of how they work, and must work, in practice. He accepted the position, held by the executive branch since Washington’s administration, that all official communication with other governments must take place through the executive. “Under the expression, *he is to receive ambassadors*, the president is charged with all transactions between the United States and foreign nations” (171), but Rawle did not think the president’s role limited to the transmission of messages. United States diplomacy, he noted, is conducted “under instructions from the president,” as to which the “senate is not consulted in the first process” (63).⁷³ The president’s duty to inform Congress or the Senate about the state of American foreign affairs is limited by his power “not ... to communicate more than, in his apprehension, may be consistent with the public interests” (171), and he is under no duty to submit the results of the diplomacy conducted under his supervision to the Senate if in his unilateral view it is inconsistent with “the national interests” (194). National security issues, as well, are necessarily a matter for special presidential concern because of his superior access to information. “Of the danger of an invasion before it happens, no one can be a better judge than

72. Tucker thought it an error that the Constitution excludes the House from the treaty-making process. See Tucker, at 275–76.

73. Cf. Tucker, at 272 (“it may be assumed his instructions have been submitted to and approved by [the Senate], although a different practice is said to have been established”).

he, who being charged with all our foreign relations, must be the best informed of the proceedings of foreign powers" (157).⁷⁴

The picture that emerges from Rawle's account of the president's role in international affairs is that of an executive constitutionally empowered to adopt and pursue foreign policy without being dependent on the Senate (or, of course, Congress as a whole) for authorization. "[I]t is in respect to external relations; to transactions with foreign nations, and the events arising from them, that the president has an arduous task. Here he must chiefly act on his own independent judgment" (194). Rawle recognized, to be sure, the risk involved in creating an executive with substantial autonomy in the conduct of foreign affairs and command over the military. While the declaration of war clause of Article I "exclusively confide[s] to congress" the formal power to decide on war, "with all its train of consequences, direct and indirect," Rawle cautioned that "it must be remembered that, we may be involved in a war without a formal declaration of it."

In such a war we may ... be involved by the conduct of the executive, without the participation of the legislature. The intercourse with foreign nations, the direction of the military and naval power, being confided to the president, his errors or misconduct may draw hostilities upon us (109).

Even here, where the president's authority comes close to escaping the careful legal boundaries that circumscribe it domestically, Rawle thought that the constitutional system includes adequate safeguards against the misuse of power.⁷⁵

The first safeguard is the power of Congress to limit the president's discretion by law. The constitutional exclusivity of the

74. In a situation where the country faces "immediate invasion ... or strong defensive measures become necessary, it is still the president who is to act on his own judgment, till congress can be convened" (198).

75. Cf. Tucker, at 285: "The limitations which the constitution has provided to the powers of the president, seem not to be sufficient to restrain this department within its proper bounds, or to preserve it from acquiring and exerting more than a due share of influence."

president and Senate's participation in making treaties is limited by Congress's exclusive power to declare war, "and the right to qualify, alter, or annul a treaty being of a tendency to produce war, is an incident to the right of declaring war" (68). While the president's power to receive ambassadors provides the authority to decide whether to recognize a foreign government, Congress "indeed possesses a superior power, and may declare its dissent from the executive recognition or refusal;" "[t]he power of congress on this subject cannot be controlled" (195–96). The president's authority to direct the movements of the national military "at his discretion" can be "prevented by some special legislative act" (160). Military operations cannot be undertaken if Congress declines to fund them (109–10). Rawle does not discuss the constitutional limitations on Congress's power thus to restrain the president (other than with respect to treaty-making and funding), but from a contemporary standpoint his understanding of Congress's legal authority to curtail executive action is strikingly broad.⁷⁶

The second, and I think for Rawle probably the more important safeguard against presidential misadventures abroad lay in his understanding of the respective duties of the two political branches. While as a practical matter the president can and must give attention to issues of national security, the primary responsibility in that area lies not with him but with Congress, "[c]harged as they are with the preservation of the United States" (118). The Constitution deals with war-making asymmetrically: "It is the office of the legislature to declare war; the duty of the executive, so long as it is practicable to preserve peace" (197).⁷⁷ The president's military authority as commander in chief, in

76. No recent administration would concede, for example, that Congress can override a presidential decision about recognition, and one or more would have denied the existence of legislative power to limit where the president may order military deployments except perhaps through a blanket denial of funding.

77. Rawle strongly commended Washington's 1793 neutrality declaration, criticized by some as a usurpation of congressional authority, as "a legitimate execution of the duties of his high office" (75; accord, 197).

other words, is a means to ends set not by executive but by legislative will.⁷⁸ In the event that the maintenance of peace becomes impossible, the president can and must act, but for the purpose of giving Congress an opportunity to act (198: "till congress can be convened"). The president's power to use the United States military to protect American interests, the legal existence of which Rawle admitted, does not entitle him to substitute his own judgments about armed conflict for those of Congress. He is, in fact, under a constitutional obligation to avoid placing the legislature in a situation where a war is on its hands regardless of its views: "the president ... not having the constitutional power to declare war, ought ever to abstain from a measure likely to produce it" (196).⁷⁹ Here, as in other difficult questions of constitutional interpretation, Rawle thought that the right answer can be

78. "[T]he command of the military force" is "[a]mong the means provided to enable the president to perform his public duties ... the mode[] of action expressly provided for the magistrate, whenever his functions assume a military cast" (151). See also 149 (anticipating his discussion of the commander in chief power as one of "the auxiliary means" by which "the executive power shall be exercised"). By themselves these expressions are ambiguous; in the context of Rawle's overall discussion they confirm the impression that he did not see the commander in chief power as a grant of free-standing or exclusive authority to make national security policy against congressional preferences.

79. Rawle gave, as a "striking feature of difficulty in regard to executive duty," the problem of piracy which sometimes cannot be suppressed by the simple expedient of providing naval protection for American commerce because of the pirates' use of safe harbors in countries "in which the local government is either too feeble or too corrupt to punish them." (Rawle evidently had in mind piracy based in Spanish colonial possessions or Latin American countries newly independent of Spain.) While what a later era would call "police actions" involving the temporary occupation of pirates' bases might well be, in Rawle's judgment, "energetic but justifiable measures, it would involve [the president] in great responsibility to do so." The danger that such actions, "however justly intended and carefully regulated," would involve the United States in war were grounds for serious hesitation despite the motivations for unilateral executive action based in "the voice of humanity and the interests of the country." For Rawle, the solution for this difficulty lay in Congress's provision of "sufficient authority" to take appropriate action. See 197–98.

found when we remember that the Constitution is not merely a collection of legal rules, but that it consists even more fundamentally of the principles by which the American political community is constituted.

*A View and contemporary
constitutional interpretation*

The last few years have seen a remarkable resurgence in Rawle's long-dormant status as a constitutional interpreter. A *View* has been cited in law review articles about one hundred fifty times in the past decade, for issues ranging from impeachment and the scope of Congress's power over federal-court jurisdiction to the proper interpretation of the intellectual property clause and the second amendment; Rawle's discussion of the treaty power, in particular, has been discussed by leading scholars in the field. Furthermore, in its landmark decision on the second amendment, *District of Columbia v. Heller*, the Supreme Court cited or discussed Rawle's views at several points.⁸⁰ This attention is no small tribute to the work of someone who wrote close to two centuries ago, but it raises a broader question: why do these modern lawyers care what Rawle thought? (Very few of these citations are to be found in strictly historical articles with no in-

80. See *Heller*, 128 S.Ct. 2783, 2798, 2800, 2805–06, 2816 (2008). For scholars' references to Rawle, see, e.g., Brian C. Kalt, The Constitutional Case for the Impeachability of Former Federal Officials: An Analysis of the Law, History, and Practice of Late Impeachment, 6 *Tex. Rev. L. & Pol.* 13, 122 (2001); John Eidsmore, The Article III Exceptions Clause: Any Exceptions to the Power of Congress to Make Exceptions?, 19 *Regent U. L. Rev.* 95, 117–18 (2006/07); Edward C. Walterscheid, Understanding the Copyright Act of 1790: The Issue of Common Law Copyright in America and the Modern Interpretation of the Copyright Power, 53 *J. Copyright Soc'y* 313, 330–31 (2005/06); Saul Cornell & Nathan DeDino, A Well Regulated Right: The Early American Origins of Gun Control, 73 *Fordham L. Rev.* 487, 503–04 (2004). For the use of Rawle in interpreting the treaty power, see especially David M. Golove, Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power, 98 *Mich. L. Rev.* 1075, 1207–08 (2000), and Curtis A. Bradley, The Treaty Power and American Federalism, 97 *Mich. L. Rev.* 390, 416 (1998).

terest in affecting contemporary legal thought; Rawle's importance to an historical understanding of early American law is, I take it, obvious.) Rawle was a substantial figure in the legal profession of the founding era, and *A View* confirms the impression left by his admiring memoirists that he was a cultured, intelligent and amiable human being, but neither of those facts makes it self-evidently clear why his opinions on constitutional law should be thought important or even particularly relevant in the debates of our day.

The simple answer is that Rawle is an early source of commentary on constitutional issues that we care about today. He was in some very broad sense a founder, and he is certainly a witness to the sorts of arguments that founding-era constitutionalists took seriously. To the extent that arguments based on original understanding are relevant—and few constitutional lawyers view them as entirely irrelevant—Rawle counts. There is nothing wrong in principle with this sort of interest in Rawle, and it is no different than the use modern constitutionalists regularly make of other, often better-known figures. There is, nonetheless, a problem with doing so. Rawle's views on issues of constitutional interpretation were not isolated bullet points, unconnected to his overall understanding of the Constitution or to the context in which he wrote. When we attempt to pull out of its original setting his opinion on a particular matter, the power of a house of Congress to expel a member (for example),⁸¹ we are in danger of distorting what he actually meant. This does not mean that it is somehow illegitimate to use Rawle in addressing specific issues, but it does counsel caution, and an awareness that he wrote *A View* as a connected whole and with purposes of his own.

There is a second argument for reading Rawle with an eye toward addressing our own questions, one that is often overlooked. As I have tried to show in this introduction, *A View* reflects a par-

81. See his discussion at pages 46–47. Recent scholars have taken into account Rawle's considered discussion of this issue. See, e.g., Adrian Vermeule, *The Constitutional Law of Congressional Procedure*, 71 U. Chi. L. Rev. 361, 388–89 (2004).

ticular stance toward the task of constitutional interpretation. Rawle took very seriously the Constitution as a written document and as a form of law, but he approached constitutional issues neither in a rigidly textualist nor an overly legalistic manner. He showed a strong (some would say naive) confidence in the ability of the interpreter to make rational sense out of the Constitution as a set of shared political principles without simply turning it into an excuse to promote one's own. He put great weight on the importance of public officials addressing their constitutional duties as matters of personal commitment transcending their immediate goals, which implies that American constitutionalism rests not only on checking power but also in trusting it within the bounds the community has set.

Is there any foundation for the position, that in a republic the people are naturally betrayed by those in whom they trust?

Is it true that personal power and independence in the magistrate, being the immediate consequence of the favour of the people, they are under an unavoidable necessity of being betrayed?

Were this objection well founded, we should shrink with horror from the formation of a republic (284).

Rawle thought it obvious that the United States Constitution makes sense only on the belief that this objection is erroneous. His invocations of George Washington, which I suspect the modern reader is tempted to pass over as civic pieties, are in fact a key to a crucial aspect of Rawle's constitutional vision: it was Washington's conscientious exercise of his powers as a public official, and not merely his observance of rules, which "proved that the excellencies of the Constitution consisted not merely in theory and contemplation, but could be realized in practice" (198). Whatever we think of Washington—or Rawle—I believe that his understanding of American constitutionalism presents an important challenge to the more cynical assumptions dominant in our era.