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# RECONCEIVING INTERPRETIVE AUTONOMY: INSIGHTS FROM THE VIRGINIA AND KENTUCKY RESOLUTIONS*

*Wayne D. Moore***

Judges are not the only constitutional decisionmakers in the United States. It is necessary, therefore, to move beyond widespread preoccupation with the Constitution's *judicial* interpretation and enforcement. Judicial review is certainly an important practice in America, one closely identified with commitment to the rule of law. But excessive attention to issues surrounding judicial articulation of constitutional norms has obscured and distorted analysis of other, equally fundamental components of American constitutionalism. A variety of political actors in addition to judges have had pivotal roles in creating, sustaining and enforcing the supreme law.

Judges have, at times, been central players in conflicts over the character and scope of federal and state powers. From the late 1800s through 1937, for example, judges repeatedly invalidated exercises of national power in reliance on the Tenth Amendment's reservation of powers to the states.[1] Since the "constitutional revolution" surrounding the New Deal, however, judges and scholars have not typically regarded the Tenth Amendment as a formidable obstacle.[2] Certainly there are good reasons for thinking about whether recent cases, such as *New*

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* Copyright © 1994 by Wayne D. Moore. All rights reserved. I am indebted to Christopher L. Eisgruber and Mark E. Brandon for comments and questions on drafts of this essay and to Walter F. Murphy, William F. Harris, II, and an anonymous reviewer for Princeton University Press for comments and questions on parts of a book manuscript from which this article derives. I am also grateful for opportunities to discuss issues raised by this piece with Karen M. Hult and Stephen K. White. I dedicate this article to the memory of my father, Maynard L. Moore, Jr.

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1. See, e.g., *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

2. See, e.g., Edward S. Corwin, *Constitutional Revolution, Ltd.* (Claremont Colleges Press, 1941), for a description of the central components of this "constitutional revolution."

*York v. United States*,[3] might foreshadow renewed judicial concern with limits on national authority;[4] but it would be wrong to assume that principles of federalism, including important forms of state autonomy, depend primarily on how judges exercise their powers.

The Virginia and Kentucky Resolutions of 1798 and 1799 provide contexts for examining problems of constitutional meaning and authority that are typically obscured by forms of analysis that center on the Constitution's judicial enforcement. The legislatures of two states passed resolutions that condemned the federal government's making and enforcing the Alien and Sedition Acts of 1798. These two states' actions raised serious questions about the character and reach of the United States Constitution and powers delegated by it, the location of sovereignty within America, arrangements of interpretive authority among institutions of federal and state government, and relationships among powers of governmental officials and rights and powers of the people at large.

The Kentucky and Virginia Resolutions, along with drafts and responses to them, are especially valuable because they demonstrate how problems of interpretive authority cut across other forms of normative disagreement. Controversy over the Alien and Sedition Acts posed two main sets of constitutional issues: whether the Alien and Sedition Acts were valid, and whether efforts by two states to oppose them were valid. Much may be gained from paying attention not only to *how* various persons were interpreting the Constitution and *what* positions they took on these two issues, but also to *whose* positions were constitutionally authoritative. Accordingly, the focus of this essay is relationships among federal and state interpretive prerogatives.

The Virginia and Kentucky Resolutions were radical when written: They dealt with foundational issues of American constitutionalism and called into question opposing conceptions of constitutional meaning and authority. Over the past two centuries, these documents have become even more radical (or have

3. 112 S. Ct. 2408 (1992). See also H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 Va. L. Rev. 633, 689 (1993) (suggested, in the context of commenting on *New York v. United States*, that principles and structures of federalism have "no legal substance" if not enforced by judges).

4. A majority of the Supreme Court repudiated earlier efforts to revive principles of federalism, which culminated in *National League of Cities v. Usery*, 426 U.S. 833 (1976), by reversing that precedent in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).

become radical in a new way): They identify interpretive options that have become increasingly obscured by current ways of thinking. It is useful to consider seriously whether these radical perspectives warrant contemporary ratification as part of America's fundamental law.

## I. THREE FORMS OF PROTEST

The Alien and Sedition Acts of 1798 resulted from, and exacerbated, divisions between the Federalist and Republican parties that formed during the Republic's early years.[5] John Adams, a leading Federalist, defeated Thomas Jefferson, a leading Republican, in the presidential election of 1796. Jefferson became Vice President pursuant to electoral rules that were in effect at the time.

In anticipation of a possible war with France, the predominantly Federalist Congress enacted four laws in 1798, known popularly as the Alien and Sedition Acts. Two of these were especially controversial: the Alien Friends Law ("An Act concerning Aliens"), which allowed the President to order deportation of aliens; and the Sedition Law, which made seditious libel a criminal offense. The latter was directed primarily toward Republican critics of the Federalist administration. (Federalists sought to characterize the Republicans as sympathetic with the French and with movements underlying the 1789 French Revolution.) Federal judges, who were also predominantly Federalist, were more than willing to enforce the acts, particularly against Republicans and their alien allies.[6]

5. See Kenneth R. Bowling, *Politics in the First Congress, 1789-1791* (Garland Publishing, Inc., 1990), for an examination of the historical origins of the Federalist and Republican parties, including their relationships to divisions between the Federalists and Anti-Federalists of the 1780's.

6. Except where otherwise specified, the remainder of this essay refers to the Alien Friends Act and the Sedition Law as "the Alien and Sedition Acts." James Morton Smith, *Freedom's Fetters: The Alien and Sedition Laws and American Civil Liberties* (Cornell U. Press, 1956), reprints these acts and gives an account of the historical circumstances surrounding their adoption and enforcement, along with similar information on the Naturalization Act and the Alien Enemies Law of 1798. For other historical analyses of the Alien and Sedition Acts and their enforcement, see also Walter Berns, *Freedom of the Press and the Alien and Sedition Laws: A Reappraisal*, 1970 Sup. Ct. Rev. 109 (1970); Adrienne Koch and Harry Ammon, *The Virginia and Kentucky Resolutions: An Episode in Jefferson's and Madison's Defense of Civil Liberties*, 5 Wm. & Mary Q. (3rd. ser.) 145 (1948); John C. Miller, *Crisis in Freedom: The Alien and Sedition Acts* (Little, Brown & Co., 1951); Nathan Schachner, 2 *Thomas Jefferson: A Biography* ch. 43 (Appleton-Century-Crofts, Inc., 1951); Stephen B. Presser, *The Original Misunderstanding: The English, the Americans and the Dialectic of Federalist Jurisprudence* chs. 7 & 8 (Carolina Academic Press, 1991); Ethelbert D. Warfield, *The Kentucky Resolutions of 1798: An Historical Study* (G.P. Putnam's Sons, 1894).

Jefferson was in a peculiar predicament. He opposed the laws and their enforcement, but he was not in a good position to challenge federal authority openly. The Vice President thus turned to one of the "external" checks contemplated by the authors of *The Federalist Papers*: state legislatures.[7] He secretly drafted a set of resolutions for adoption by the North Carolina legislature, which he sought to use as a vehicle for voicing opposition to the Alien and Sedition Acts.

Jefferson's messenger, Wilson Cary Nicholas, apparently gave the draft to John Breckinridge of Kentucky for consideration by that state's legislature instead of North Carolina's. The Kentucky legislature approved some but not all of the resolutions in Jefferson's draft. (The draft, though written for adoption by North Carolina's legislature, is now generally identified as Jefferson's draft of the Kentucky Resolutions.) As approved, the Kentucky Resolutions of 1798 took a more modest position than Jefferson's draft on the state legislature's powers of protest.

The same year, 1798, Virginia's legislature approved resolutions that had been drafted by Madison, who had joined Jefferson in opposing the Federalists (with many of whom, ironically, Madison had been allied in debates over the Constitution's ratification). In addition, the following year, 1799, the Kentucky legislature endorsed a variation of the stronger claims of state authority that had been in Jefferson's draft but deleted from the resolutions approved by that state's legislature in 1798. These various drafts, along with responses to them and subsequent analyses, identify at least three forms of state protest against federal governmental actions: nullification, reversal, and interposition. I deal with each in turn.[8]

7. See notes 22, 50-52 & 56-57, infra, and the accompanying text. John C. Calhoun adopted a similar strategy to oppose tariffs when he was Vice President under Andrew Jackson. See William W. Freehling, *Prelude to Civil War: The Nullification Controversy in South Carolina, 1816-1836* 154-73 (Harper & Row, 1966).

8. Jefferson wrote two drafts of the resolutions, both of which are reprinted in Paul L. Ford, ed., 7 *Writings of Thomas Jefferson* 289-309 (G.P. Putnam's Sons, 10 vols., 1892-99), along with a facsimile of the resolutions approved by the Kentucky legislature in 1798. The "fair" copy to which this essay refers is also reprinted in Merrill D. Peterson, ed., *The Portable Thomas Jefferson* 281-89 (Viking Press, 1975). The Kentucky Resolutions of 1798 and 1799, as approved, are reprinted in Jonathan Elliot, ed., 4 *Debates in the Several State Conventions on the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia, in 1787* at 540-45 (J.B. Lippincott & Co., 2nd ed., 1888) ("*Debates*"), except that Elliot omitted the phrase, "its co-states forming, as to itself, the other party," from paragraph 1 of his reprint of the Resolutions of 1798. The Virginia Resolutions, which were almost identical to a draft prepared by Madison, are reprinted in 17 *Papers of James Madison* 188-90 (U. Chi. Press, vols. 1-10, 1962-77; and U. Press of Va., vols. 11-17, 1977-92); and in Gaillard Hunt, ed., 6 *Writings of James Madison* 326-31 (G.P. Putnam's Sons, 9 vols., 1900-10); and 4 *Debates* at 528-29.

A

In his draft of the Kentucky Resolutions, Jefferson claimed that the states had authority to nullify acts of Congress, at least for some purposes and in some contexts, whether or not the Supreme Court concurred that the acts were unconstitutional. He distinguished "cases of an abuse of the delegated powers" from cases in which "powers are assumed which have not been delegated." Apparently referring to federal electoral processes, he claimed that a "change by the people" was the "constitutional remedy" for the former abuse. But his resolutions declared that if the federal government usurped powers other than those delegated to it by the Constitution, "a nullification of the act [was] the rightful remedy."[9]

Jefferson's position on interpretive authority, therefore, paralleled his conception of constitutional boundaries. He characterized the Constitution as a "compact" among "the several States composing the United States of America." He claimed that the states "constituted a general government for special purposes" and "delegated to that government certain definite powers." Accordingly, he argued that "whensoever the general government assumes undelegated powers, its acts are unauthoritative, void, and of no force."[10]

Jefferson ran together his analysis of the states' and the people's prerogatives. Part of this imprecision may be attributed to the fact that his principal objective was to articulate bounds of federal power rather than to distinguish the people's rights from state powers. He placed the people and the states on the same side of the boundary that most concerned him. In addition, he assumed that institutions of state government were accountable to the states' citizens, had primary responsibility to secure rights over which the federal government had no power, and were authorized to voice the people's collective determinations.[11]

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9. Jefferson's draft of the Kentucky Resolutions (Nov. 1798), reprinted in 7 *Writings of Thomas Jefferson* at 301 (cited in note 8).

10. Id. at 289-91.

11. For example, Jefferson argued in reliance on the Tenth Amendment that because "no power over the freedom of religion, freedom of speech, or freedom of the press [was] delegated to the United States by the Constitution, nor prohibited by it to the States, all lawful powers respecting the same did of right remain, and were reserved to the States or the people." Similarly, he cited the First Amendment and claimed that because "libels, falsehood, and defamation, equally with heresy and false religion, are withheld from the cognizance of federal tribunals," the states and the people "retain to themselves the right of judging how far the licentiousness of speech and of the press may be abridged without lessening their useful freedom, and how far those abuses which cannot be separated from their use should be tolerated, rather than the use be destroyed." He elabo-

Jefferson argued that unless the states had authority to "nullify" the federal government's assumptions of undelegated power, the states and their residents "would be under the dominion, absolute and unlimited, of whosoever might exercise this right of judgment for them." He asserted that Congress could not have this authority because it was "not a party, but merely the creature of the compact." Similarly, he characterized federal courts as part of "the government created by this compact." He claimed that no part of this government could be "the exclusive or final judge of the extent of the powers delegated to itself; since that would have made its discretion, and not the Constitution, the measure of its powers." On the other hand, he argued that the states alone were "parties to the compact." In the absence of a "common judge," he submitted, the states were "solely authorized to judge in the last resort of the powers exercised under [the Constitution]."[12]

Jefferson equivocated on whether *each* state had authority to nullify as *ultra vires* actions by the federal government or whether the states could only do so *collectively*. Suggesting the former but referring to the states plurally, he argued: "[E]very 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."[13] The draft provided that it would "nevertheless" be communicated from one state to its "co-States" out of "regard and respect." Furthermore, the resolutions sought the other states' "concur[rence] in declaring these

rated on his reference to "themselves" in the context of discussing powers over religion. He referred to the people of the states, acting through their legislatures and/or limiting them, and declared that "*they* guarded against all abridgment by the United States of the freedom of religious opinions and exercises, and retained to *themselves* the right of protecting the same, as this State, by a law passed on the general demand of its citizens, had already protected them from all human restraint or interference." Id. at 294-95 (emphasis added). Compare Koch and Ammon, 5 Wm. & Mary Q. (cited in note 6) (underscored linkages among state prerogatives and those of the people at large).

But see Leonard W. Levy, *Emergence of a Free Press*, (Oxford U. Press, 1985), for an argument that the main concern of those opposed to the Alien and Sedition Acts, at least initially, was to resist encroachment on state prerogatives rather than retained rights. Walter Berns, 1970 Sup. Ct. Rev. (cited in note 6), placed even greater emphasis on issues of federalism. (Although Berns linked Jefferson's position on state independence to his arguments concerning the nature of the federal compact, these arguments were conceptually distinct. Jefferson's claim of limited federal powers did not depend on an assumption that the federal government had no powers that could preempt separate determinations by states and the people—i.e., in cases of the federal government's acting within delegated authority. In addition, issues of state authority and the people's rights overlapped more than Berns conceded.)

12. 7 *Writings of Thomas Jefferson* at 291-92, 301-02 (cited in note 8).

13. Id. at 301 (emphasis added). As explained below, this provision was deleted by the Kentucky legislature in 1798 but then affirmed in 1799.

acts void, and of no force." Jefferson attached importance to collective action by the states, but anticipated that each state could legitimately "take measures of its own for providing that neither these acts, nor any others of the General Government not plainly and intentionally authorized by the Constitution, shall be exercised within their respective territories."[14]

Although Madison later argued that Jefferson had not claimed that a single state could unilaterally nullify a congressional enactment,[15] his draft of the Kentucky Resolutions leaves little doubt that he was taking a position that the states collectively had authority to take such an action.[16] Furthermore, at a time when the Union depended heavily on cooperation by state governments for enforcing federal laws, Jefferson apparently contemplated disregard by state officials of the Alien and Sedition Acts.[17] In sum, he sanctioned independent action by the states based in part on the state legislature's interpretation of its reserved prerogatives.

### B

As indicated above, the Kentucky legislature adopted two versions of Jefferson's draft. The initial version, the Kentucky Resolutions of 1798, made two significant changes to Jefferson's draft. First, the Resolutions of 1798 did not claim that the states had authority, either separately or collectively, to nullify congressional enactments. The legislature eventually embraced Jeffer-

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14. Id. at 301, 306.

15. James Madison, *Letter to _____ Townsend*, October 18, 1831, reprinted in 4 *Letters and Other Writings of James Madison* at 198-200 (J.B. Lippincott & Co., 1865).

16. See Koch and Ammon, 5 Wm. & Mary Q. (cited in note 6); Schachner, *Thomas Jefferson: A Biography* (cited in note 6).

17. It is not clear whether Jefferson also approved more direct forms of interference with the laws' enforcement such as releasing prisoners from jails. (Compare later controversies over extradition or rendition of slaves or other persons charged with breaking fugitive slave laws.) According to Warfield, there was not a single prosecution in Kentucky under the Alien and Sedition Acts, and "[t]he situation in Virginia, though different, was never serious enough to lead to any thing like organized resistance. Indeed, it is now impossible to decide just how far and in just what form resistance was contemplated by these Resolutions." Warfield, *The Kentucky Resolutions of 1798: An Historical Study* at 110 (cited in note 6). See also Jefferson's letter to Wilson C. Nicholas of August 23, 1799, in which Jefferson affirmed the importance of the principles involved, considered possible forms of resistance, and indicated that he wished to preserve as many options as possible—to be able to do "whatever we might now rightfully do." The letter is reprinted in 7 *Writings of Thomas Jefferson* at 389-92 (cited in note 8). For analyses of patterns of federal enforcement of the Alien and Sedition Acts, see Frank M. Anderson, *The Enforcement of the Alien and Sedition Laws, Annual Report of the American Historical Association for 1912* at 115-26 (Washington, D.C., 1914); Smith, *Freedom's Fetters: The Alien and Sedition Laws and American Civil Liberties* chs. 9-17, esp. ch. 15 (cited in note 6) (on enforcement of the Sedition Act in Virginia).

son's position, however, in a second set of resolutions that were adopted in 1799. I discuss this reversal more thoroughly below.

Second, the Kentucky Resolutions of 1798 were submitted to the state's Senators and Representatives in Congress, and other states were requested to "unite with this commonwealth in requesting the[ ] repeal at the next session of Congress" of the "unconstitutional and obnoxious acts." (Jefferson's draft had not been addressed to Congress. He claimed it was only proper for the states to communicate with one another, "they alone being parties to the compact.") Whereas Jefferson had presumed that the states could nullify unconstitutional laws on their own authority, the Kentucky legislature initially placed greater reliance on established federal structures such as repeal by Congress or a declaration of unconstitutionality by the United States Supreme Court.[18]

The Resolutions of 1798 were a type of communication, or petition. They functioned, among other things, to communicate the state's purported determination that the Alien and Sedition Acts were unconstitutional. The Resolutions did not, however, claim to oblige the state's representatives in Congress to vote for repeal of the acts.[19] Instead, the state legislature "enjoined" the state's Senators and Congressmen to "use their best endeavors" to procure a repeal of the "unconstitutional and obnoxious acts."[20]

The Kentucky Resolutions of 1798 were nevertheless significant, because they asserted the state's *interpretive* independence. The Resolutions did not presuppose that Congress or the Supreme Court had preclusive interpretive authority on issues of constitutional meaning. Instead, the Resolutions included a provision from Jefferson's draft that asserted each state's authority to "judge for itself" both whether the federal government had exceeded its legitimate powers and how to remedy any such infraction.

18. Kentucky Resolutions (Nov. 10, 1798), reprinted in 4 *Debates* at 542-44.

19. Compare debates in the First Congress over whether to add to the First Amendment's precursor a declaration that the people had a right "to instruct their Representatives." See 1 *Annals of Congress* 733 (Aug. 15, 1789) (Gales and Seaton ed., 1834). This proposal sparked more controversy, measured by the volume of discussion reported in the *Annals*, than any other single provision. The *Journal of the Senate* for September 3, 1789 (volume 1, at 117) indicates that a similar motion was made and rejected in the Senate on September 3, 1789, but there are no records of the Senate's debates or other proceedings on this matter. These proposals had broad importance: whether constituents had a constitutional right or power, through instructions, to preempt or otherwise constrain choices by governmental officials—including official positions on issues of constitutional interpretation.

20. 4 *Debates* at 542.

Under the circumstances, the Kentucky legislators apparently thought the most appropriate remedy was congressional repeal rather than formal state nullification.[21] The legislators sought to influence all of the state's representatives: those selected by the state legislature and those elected by the people directly. The legislature acted on its own behalf by enjoining the state's Senators to represent the legislature's considered position and acted on behalf of the people of the state in taking a similar position vis-à-vis members of the House of Representatives. Madison and Hamilton had contemplated both possibilities in *The Federalist*: state legislatures acting as representatives on behalf of the states as such and on behalf of their citizens.[22]

The Kentucky legislature's position was partially vindicated. Although Congress did not repeal any of the acts, the Alien Friends Act and the Sedition Act expired according to their terms in 1800 and 1801, respectively. The immediate crisis with France passed; and after the Republicans' electoral successes in 1800, the Federalists had no interest in renewing the Sedition Act. The Naturalization Act and the Alien Enemies Act remained in effect, but they had not been the main objects of Republican opposition.

Before the two objectionable acts expired, however, a majority of the other states criticized the Kentucky Resolutions of 1798 and Madison's "Virginia Resolutions." At issue was the states' powers of protest, not just the validity of the acts in question. Thus it is important to consider whether the Resolutions of 1798 had any intrinsic effects, independent of subsequent action or inaction by other states or by federal officials.

The Kentucky Resolutions of 1798 were unclear on what formal effect, if any, the state's declaration of unconstitutionality purported to have. Was it only (though significantly) a public

21. For accounts of changes to Jefferson's draft, the introduction of revised resolutions, and their adoption by the Kentucky legislature, see Edward Channing, *Kentucky Resolutions of 1798*, 20 Am. Hist. Rev. 333 (1915); Koch and Ammon, 5 Wm. & Mary Q. at 156-58 (cited in note 6); Schachner, 2 *Thomas Jefferson: A Biography*, at 615-16 (cited in note 6); and Berns, 1970 Sup. Ct. Rev. at 127-28 (cited in note 6). From the sources I have reviewed, there appears to be no conclusive evidence that Breckinridge made the changes to Jefferson's draft, although Schachner and Berns reasonably assumed that he had a major role in making such changes. Moreover, Schachner's work refers to evidence that Breckinridge thought "the several States" had authority to nullify the Alien and Sedition Acts "[i]f, upon representations of the States from whom they derive their powers, [Congress] should nevertheless attempt to enforce [the acts]." The idea of exhausting constitutional means would have been attractive to members of the Kentucky legislature, whether or not at the behest of Breckinridge.

22. Compare, e.g., Madison's arguments in *The Federalist* Nos. 44, 45, 46, and 51; and Hamilton's arguments in *The Federalist* Nos. 26, 28, 32, 33, and 60.

utterance, or type of petition, designed to influence Kentucky's co-states and their federal representatives? Or did it also authorize state officials to ignore the laws or interfere more actively with their enforcement? Did the declaration authorize the state's residents to disobey the laws? Did it have any other legal effects, short of formal nullification? For all practical purposes, did it even nullify the acts, or suspend their enforceability within the state, notwithstanding the omission of an explicit claim to do so?

The Kentucky legislature finessed these questions in 1798 by relying directly on Jefferson's idea that the Alien and Sedition Acts were "not law" and thus were "altogether void, and of no force."[23] This position rested on a premise that the Constitution had meaning independent of any person's or institution's interpretations of it. If the acts of Congress were not enacted in pursuance of the Constitution, they were not valid, measured by the criteria set forth in the constitutional text itself.

According to this line of reasoning, the Alien and Sedition Acts were void and unenforceable even if the state legislature did not formally nullify them or Congress did not repeal them. In 1798, the state officials were apparently unsure of whether they had authority to nullify the acts, and for practical reasons the legislators favored repeal. But they did not make their declaration of unconstitutionality dependent on any such future actions. Furthermore, the legislators evidently thought the state had justification, whether based on the Kentucky Resolutions or otherwise, to oppose enforcement of the laws within the state's borders.

This position raised but did not resolve important practical dilemmas. Assuming the Alien and Sedition Acts were unconstitutional and thus void and unenforceable even absent their formal nullification, what was the "supreme law of the land" in this context? How could persons ascertain the requirements of "supreme law" for purposes of guiding their behavior if the Constitution's meaning transcended any particular person's or institution's interpretations of the law? Did each person have constitutional authority to act based on his or her analyses of constitutional meanings and their implications in particular circumstances? Alternatively, did the Constitution give governmental officials some sort of final authority to resolve interpretive disputes at least pending formal reconsideration of such decisions or change in the law? What recourse did states and their residents have if federal officials used institutions of

23. 4 *Debates* at 540-41.

collective power to enforce what may have been an unconstitutional law?[24]

Other states' responses to the Kentucky and Virginia Resolutions of 1798 and Madison's defense of the latter resolutions against the other states' criticisms shed light on these issues. These materials also provide criteria for evaluating some of the differences between Jefferson's draft and the Kentucky Resolutions of 1798 (or, what amounts to much the same thing, differences between the Kentucky Resolutions of 1798 and 1799). Moreover, the Virginia Resolutions and Madison's defense of them presented intermediate positions on several issues of constitutional resistance, thus providing a third model that is worth considering along with the stronger and weaker versions of the Kentucky Resolutions.

### C

Madison expressed to Jefferson some important concerns about whether state legislatures had authority to nullify federal legislation. Madison wrote to his friend and mentor:

> 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.[25]

Madison sought to protect himself against this same criticism in his draft of resolutions for adoption by the Virginia legislature:

> 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 [of Virginia] agst. the charge of Usurpation in the very act of protesting agst. the usurpations of Congress.[26]

The Virginia Resolutions appealed to "the like disposition of the other States, in confidence that they will concur with this Com-

24. Compare Sanford Levinson's discussion of "protestant" and "catholic" conceptions of the Constitution's arrangement of interpretive authority in Sanford Levinson, *Constitutional Faith* ch. 1 (Princeton U. Press, 1988).

25. James Madison, Letter to Thomas Jefferson, December 29, 1798, reprinted in 17 *Papers of James Madison* at 191-92 (cited in note 8) (emphasis in original). Madison was apparently responding to Jefferson's criticism of his draft, which is cited in note 29.

26. Id.

monwealth in declaring, as it does hereby declare, that the [Alien and Sedition] acts . . . are unconstitutional."[27]

Madison drafted the Virginia Resolutions for adoption by the state's legislature rather than a state convention. He presumed, as had Jefferson, that state legislatures could speak on behalf of the respective states. But in place of Jefferson's claims of state authority to "nullify" the federal laws, Madison used the rhetoric of "interposition." The resolutions "interposed" the state's authority, expressed by its legislature, between the people of the state, on the one hand, and the federal government, on the other. In this manner, he apparently sought to ground the legislature's opposition to the Alien and Sedition Acts more solidly in the authority of the people of the state.

Although he left open the possibility that the states might have had collective nullifying authority, he concentrated on less extraordinary measures. The Virginia Resolutions had four main components. First, the legislature "declare[d]" the Alien and Sedition Acts "unconstitutional."[28] Apparently at Jefferson's urging, a draft of the Resolutions also declared the acts "not law, but utterly null, void and of no force or effect."[29] The legislature struck those words, making the final Resolutions silent on whether the federal laws continued in effect or were void based on constitutional standards alone.

Second, the Virginia Resolutions declared that the state would take "necessary and proper" measures to "maintain[ ]

27. Virginia Resolutions (December 21, 1798), reprinted in id. at 188, 190. The Virginia Resolutions provided that a copy of the document be transmitted to "the Executive authority of each of the other States, with a request that the same may be communicated to the Legislature thereof." Id. at 190. Jefferson's draft of the Kentucky Resolutions was comparable on these issues. It provided for transmission of the resolutions by a conference committee to "the Legislatures of the several States" but also invited the "co-States" (not their legislatures) to concur in Kentucky's declaration of unconstitutionality. See 7 *Writings of Thomas Jefferson* at 300, 301-02, 305-06 (cited in note 8).

28. 17 *Papers of James Madison* at 190 (cited in note 8).

29. See 17 *Papers of James Madison* at 185-88, 191 n.2 (cited in note 8). According to this source, the words had not been in Madison's original draft but were added by Wilson Cary Nicholas, at Jefferson's request, before John Taylor introduced the resolutions into the Virginia General Assembly. This position, suggested by Koch and Ammon, 5 Wm. & Mary Q. at 159-60 (cited in note 6), is based largely on a letter from Jefferson to Nicholas, dated November 29, 1798, which is reprinted in 7 *Writings of Thomas Jefferson* at 312-13 (cited in note 8). Jefferson urged that "instead of the invitation to cooperate in the annulment of the acts," it would be better to make the resolutions "an invitation 'to concur with this commonwealth in declaring, as it does hereby declare, that the said acts are, and were *ab initio*, null, void and of no force, or effect.' " But Gaillard Hunt, 6 *Writings of James Madison* at 326-27 n.1 (cited in note 8), claimed that the draft, "as Madison prepared it," declared the acts "unconstitutional, *null, void and of no effect*." According to Hunt, "the words in italics [were] struck out as unnecessary repetition." Id. The available evidence is inconclusive.

unimpaired the authorities, rights, and liberties, reserved to the States respectively, or to the people." The legislature called for "universal alarm" and urged that it would be "reproachful inconsistency and criminal degeneracy, if an indifference were now shown to the most palpable violation[s]" of rights so anxiously secured by constitutional amendment.[30] The resolutions were silent, however, on what measures state officials had authority to take in protecting those rights. The document again asserted the state's interpretive independence and implied that those officials had no obligation to enforce the Alien and Sedition Acts, but did not address whether any person had authority to interfere with federal enforcement.

Third, the legislature appealed to other states to join Virginia in declaring the Alien and Sedition Acts unconstitutional and in protecting reserved prerogatives of the states and the people. The legislature pledged its "mutual friendship" in maintaining "a scrupulous fidelity to [the] Constitution" and appealed to "the like dispositions of the other States."[31] Among other things, these passages reflect Madison's commitment to joint as well as separate action.

Finally, unlike Jefferson's resolutions, but like those adopted by the Kentucky legislature in 1798, copies of the Virginia Resolutions were transmitted to "each of the Senators and Representatives, representing this State in the Congress of the United States."[32] Like a majority of the Kentucky legislators in 1798, Madison sought formal change through established institutions of federal government. His aspirations, like those of the Kentucky legislators, were realized in some form through the Republican party's rise to power and the demise of the Alien and Sedition Acts.

In the shorter term, however, concurrence and reversal were not forthcoming. On the contrary, a majority of co-states criticized the Kentucky and Virginia legislatures' claims of interpretive independence. Madison was asked to defend the Virginia Resolutions against the other states' criticisms, which he did by drafting a "Report on the Virginia Resolutions." Before study-

30. 17 *Papers of James Madison* at 189-90. Madison was referring, of course, to the First Amendment. His draft emphasized that the Alien and Sedition Acts were "levelled against that 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." Id.

31. Id. at 190.

32. Id.

ing that report, it is helpful to review the charges to which Madison was responding and some of the dilemmas he faced.

## II. REJOINDERS

### A

Ten of the existing sixteen states' legislatures formally or informally rejected the Kentucky and Virginia Resolutions of 1798.[33] Seven states responded directly by returning formal resolutions. Five of these states' legislatures asserted that federal courts held the prerogative that Jefferson had claimed the states held: authority to invalidate federal legislation as unconstitutional.[34] The legislatures' positions on this issue were remarkably confident, considering that the controversy over the Alien and Sedition Acts preceded *Marbury v. Madison*.[35] Two other states' legislatures affirmed principles of federal supremacy more generally by asserting that the Virginia Resolutions unjustifiably interfered with the "constituted authorities" of the United States.[36] Three states rejected the resolutions without returning formal protests,[37] and four states were silent.[38]

33. The formal responses are reprinted in 4 *Debates* at 532-39 (cited in note 8). Other responses are described and reprinted in Frank M. Anderson, *Contemporary Opinion of the Virginia and Kentucky Resolutions*, 5 Am. Hist. Rev. 45 (1890); 5 id. at 225.

34. The General Assembly of Rhode Island claimed that the United States Supreme Court had ultimate authority to decide on "the constitutionality of any act or law of the Congress of the United States." The Massachusetts legislature was less direct but clearly implied that the Supreme Court had ultimate authority to decide on the constitutionality of federal legislation. The New York legislature indicated that states were bound by decisions of federal courts and denied that state legislatures had authority "to supervise the acts of the general government." The New Hampshire legislature claimed that the duty to decide on the constitutionality of "laws of the general government . . . is properly and exclusively confided to the judicial department" of that government. Finally, the Vermont legislature asserted that power "to decide on the constitutionality of laws made by the general government [was] exclusively vested in the judiciary courts of the Union." 4 *Debates* at 533-39.

35. *Marbury* was decided in 1803. But see *Calder v. Bull*, 3 U.S. (Dall.) 386 (1798), in which the Supreme Court assumed authority to review the constitutionality of state legislation. Compare generally James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv. L. Rev. 129 (1893); Edward S. Corwin, *The Establishment of Judicial Review*, 9 Mich. L. Rev. 102, 102-25, 283-316 (1910).

36. The General Assembly of Delaware tersely characterized the resolutions of 1798 as "a very unjustifiable interference with the general government and constituted authorities of the United States, and of dangerous tendency." The General Assembly of Connecticut expressed its approval of the constitutionality of the Alien and Sedition Acts and declared that they had been enacted by "the constituted authorities." 4 *Debates* at 532, 538.

37. The legislatures of Maryland, New Jersey, and Pennsylvania took actions that opposed the Kentucky and Virginia Resolutions but did not return formal responses. See Anderson, 5 Am. Hist. Rev. at 46-52 and app. (cited in note 33).

38. The four silent states were from the South: North Carolina, South Carolina, Georgia, and Tennessee. See id. at 235-36 for a summary of the meager evidence of

It is not surprising that a majority of the states sided with the federal government. Representative structures made that result likely. Although Congress had means of rising above or sinking below majority sentiment, the national legislature was also designed to be responsive to its constituents. Furthermore, executive and judicial officials were not isolated from pressures or sentiments that presumably had led to passage of the Alien and Sedition Acts. Each state had interests in backing the federal government's enforcement of laws benefitting them, and federal structures provided no formal means for dissenting states to go against collective determinations. Instead, the concept of national supremacy weighed against particular states impeding the enactment and enforcement of laws that were backed by at least a majority of the states' legislatures (and presumably the people at large).

Hence the feature that made the concept of national supremacy most attractive, the principle of subordinating separate to collective prerogatives, also posed the greatest threat to principles of limited government. There was a danger that those entrusted with instruments of collective power would use them to enforce compliance with decisions on matters that were reserved by the Constitution for separate determination. These principles applied to rights and powers reserved to the people separately, not just to powers of the states. In each case, it was problematic to rely on institutions that held collective power to define the scope of their authority and limitations on its exercise.

It made sense, therefore, for the dissenting states not to make their opposition to the Alien and Sedition Acts contingent on other states' concurrence. Accordingly, the Virginia and Kentucky legislatures asserted that the acts were unconstitutional *even if* a majority of the states supported them. If the laws *were* unconstitutional, and if a majority of the states *did* favor them, there would have been a failure of constitutionalism, and dissenting states would have been in a perilous predicament.

The two dissenting states' legislatures argued, in essence, that there had been a form of constitutional breakdown but tempered opposition to federal representational processes with recognition of the need to give such structures a chance to correct themselves. The Kentucky and Virginia legislatures primarily emphasized an established means of constitutional correction: re-

proceedings in such states with respect to the Kentucky and Virginia Resolutions. Anderson reasonably speculated that some Southern legislators may have been uncertain what remedies were appropriate even if such persons were sympathetic with the Kentucky and Virginia legislatures' opposition to the Alien and Sedition Acts.

peal by Congress. But these two legislatures also asserted that interim or alternative measures were necessary to protect the people's rights within the states' borders.[39] The Resolutions apparently sanctioned disregard of the Alien and Sedition Acts by state citizens and public officials. Perhaps the legislators also sought to reinforce opposition, in practice, to enforcement of the laws by federal officials.

The Republican party's electoral victories in 1800 did not negate the importance of the Kentucky and Virginia legislatures' efforts to oppose the objectionable acts' enforcement even prior to their expiration. These forms of resistance were comparable to individuals' disobeying laws prior to their repeal or judicial declarations of unconstitutionality. In many cases, disregard of laws has been a predicate to judicial review, stimulated political discourse, or otherwise influenced legislative reconsideration.[40] Similar forms of resistance by institutions of state government have also been warranted under appropriate circumstances. In each case, later reversals have affirmed rather than mooted challenges on constitutional grounds.[41]

B

Jefferson's draft was solidly grounded to the extent it asserted the states' interpretive independence. But the draft was

39. The Kentucky Resolutions of 1798, like Jefferson's draft, placed less emphasis on the possibility of correction by the federal judiciary, but neither set of resolutions ruled out that possibility. As indicated in the text, judicial review is best viewed as an alternative means of constitutional correction. It has important advantages over ordinary legislative processes: its interim character (it does not depend on elections), and the fact that it operates through ordinary constitutional forms (adjudication) rather than extraordinary forms (such as constitutional amendment). The principal disadvantage of judicial review, of course, is that it permits legislators to escape responsibility for repealing unconstitutional acts.

40. Compare Robert M. Cover's argument, in *The Supreme Court, 1982 Term: Foreword:* Nomos *and Narrative*, 97 Harv. L. Rev 4, 46-47 (1983), that those who disregard laws as unconstitutional do not necessarily regard their actions as forms of "civil disobedience" but as means of being faithful to higher law standards of the Constitution itself. To treat such actions as forms of "civil disobedience" privileges official interpretations that may be erroneous.

41. Claims of constitutional prerogative to resist enforcement of laws do not necessarily depend, however, on any particular governmental officials' subsequently endorsing such positions. An analogous example is the late Frederick Douglass' efforts to interpret the Constitution during the antebellum period as inconsistent with slavery. (Douglass initially endorsed William Garrison's position that the Constitution was pro-slavery.) One may affirm Douglass' radical anti-slavery interpretive positions and regard them as constitutionally authoritative, even though they never received official endorsement by the Supreme Court or other federal institutions. It took a Civil War and formal amendments, not just reinterpretations of existing norms, before anti-slavery constitutionalism received official prominence.

on more tenuous ground insofar as it went further and claimed to have greater formal significance than the resolutions actually approved by the Kentucky and Virginia legislatures in 1798. Jefferson's version of the Kentucky Resolutions claimed to do within the state what several of the states assumed judicial review could do within the nation: formally invalidate, or annul, acts of legislation on constitutional grounds prior to legislative repeal or expiration.

Both methods would have utilized established constitutional forms: state legislatures or federal courts. Both would have been means of vindicating individual rights and other constitutional prerogatives that were vulnerable to majoritarian infringement. There was textual support for each position: the Tenth Amendment and Articles III and VI of the original text.[42] But these two means of nullification presupposed radically different conceptions of the proper methods for correcting constitutional mistakes at the federal level.

The Kentucky legislature eventually embraced Jefferson's claim that the states had authority to nullify the Alien and Sedition Acts. After a majority of the states rejected Kentucky's and Virginia's overtures, the Kentucky legislature adopted a second set of resolutions in 1799 that included provisions on nullification comparable to those in Jefferson's original draft but deleted from the Kentucky Resolutions of 1798. In 1799, the Kentucky legislature resolved:

> That the several states who formed [the Constitution], being sovereign and independent, have the unquestionable right to judge of the infraction; and, *That a nullification, by those sovereignties, of all unauthorized acts done under color of that instrument, is the rightful remedy.*[43]

These resolutions reflect a significantly stronger conception of state authority than the Resolutions of 1798.

As with Jefferson's draft, it is not clear whether the Kentucky legislators were claiming in 1799 that they had authority to nullify the Alien and Sedition Acts unilaterally or whether the legislators presupposed only that the states collectively had such authority. The Kentucky legislature expressed its unwillingness to "surrender its opinion to a majority of its sister states" on this "momentous" issue. In any event, the legislators apparently con-

42. The constitutional text does not, however, explicitly delegate the power of judicial review.

43. See 4 *Debates* at 545 (cited in note 8) (emphasis in original). Compare Jefferson's draft, reprinted in 7 *Writings of Thomas Jefferson* at 301 (cited in note 8).

cluded that they had exhausted all other appropriate interim remedies and no longer looked to statutory repeal or constitutional amendment as likely means of redress. They vowed to "oppose, in a constitutional manner, every attempt, at what quarter soever offered, to violate [the federal] compact."[44]

The state legislature's assertion of authority to disregard decisions by federal officials was in tension with principles of constitutional representation. The Constitution's authority purported to flow from the people of the United States as a collectivity and/or from the states acting collectively, not from the states separately or their legislatures. The Constitution, in turn, has entrusted a range of governing authority to institutions that have purportedly represented the whole people and all the states. Principles of legal supremacy have required the subordination of separately held prerogatives to laws made by such institutions. It would have been anomalous if state officials, acting on behalf of a state, could legitimately preempt decisions made by federal officials on behalf of the entire United States. Similar principles have applied to relationships between assertions of individual rights or powers and exercises of federal or state governmental powers.[45]

The Constitution has not, however, given federal officials authority to preempt all separate determinations. On the contrary, it has delegated limited federal powers and reserved some rights and powers to be exercised separately by individuals, groups, and the states as such. Along with arguing that the Alien and Sedition Acts were invalid as *ultra vires*, the Virginia and Kentucky legislatures exercised forms of speech, petitioning, and other means of influencing federal actions. These two legislatures presumed that the Constitution reserved these prerogatives to the respective states rather than precluded their separate exercise.

The Virginia and Kentucky Resolutions did more than assert *the states'* powers of political expression. The two legislatures also claimed to be protecting similar prerogatives of *the people* from abridgement by federal officials. According to the Resolutions, the Alien and Sedition Acts imposed impermissible restraints on citizens' rights of free speech, the press, and the like. Other rights and powers were beneath the surface but no less

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44. 4 *Debates* at 545.

45. In *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), Chief Justice John Marshall developed arguments for national supremacy within the federal government's sphere of delegated authority. The Court reaffirmed these principles in *United States v. Darby Lumber Co.*, 312 U.S. 100 (1941).

significant: voting prerogatives of the people and state legislatures, along with their respective powers to initiate constitutional change through formal amendments.

It is noteworthy that the Constitution did not expressly reserve to the states or their legislatures the authority to act on behalf of the states' residents by the forms of speech, petitioning, and influence that the Kentucky and Virginia Resolutions exemplify. This omission did not imply, however, that the states had no such authority. On the contrary, the Tenth Amendment's reference to the states' reserved powers, like the Ninth and Tenth Amendments' references to unenumerated rights and powers of the people, reinforced the legislatures' positions.

Because the Tenth Amendment is open ended, it no more settled questions concerning the states' powers of protest than it settled arguments over the constitutionality of the acts themselves. These two issues were, of course, distinct: the validity of the Alien and Sedition Acts and the validity of the Kentucky and Virginia legislatures' responses to the federal enactments. Furthermore, as indicated, issues of interpretive authority were equally relevant at both levels. The controversy over the Alien and Sedition Acts not only raised questions about who had authority to decide on the acts' validity; it also raised questions about who had authority to decide on the scope of the states' powers of protest.

## C

In a lengthy "Report on the Virginia Resolutions," which the Virginia General Assembly approved early in 1800, Madison defended the Virginia Resolutions of 1798 against the other states' criticisms.[46] Among other things, the Report revisited the issue of a collective nullifying authority. It also analyzed more thoroughly the constitutional significance of state legislatures' separate determinations.

In the course of defending the state legislature's approval of the Virginia Resolutions, Madison relied on distinctions among the states, their legislatures, and the people thereof. He observed that the term "states" had several meanings:

> It is indeed true that the term "States," is sometimes used in a vague sense, and sometimes in different senses, according to

46. Madison's *Report on the Virginia Resolutions* (January 7, 1800) is reprinted in 17 *Papers of James Madison* at 307-51 (cited in note 8). The Virginia legislature adopted the Report substantially as drafted by Madison, and thus it is not necessary to distinguish his draft from the final version.

> the subject to which it is applied. 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.[47]

He claimed that "all will at least concur" that the "States," in the last sense, were parties to the Constitution because it was submitted to the people of the states and they ratified it in their highest sovereign capacity.[48]

Madison extended this line of reasoning, with its emphasis on the states' foundational political powers, by arguing explicitly what he had only suggested before. He argued that the states, as sovereign entities, had authority to overrule usurpations of power by federal officials. Echoing Jefferson's position in his draft of the Kentucky Resolutions, Madison asserted that the Constitution, like other compacts, was governed by the "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." Because "the states [were] parties to the constitutional compact, and in their sovereign capacity," Madison reasoned, "there can be no tribunal above their authority, to decide in the last resort, whether the compact made by them be violated." Thus he concluded that the states "must themselves decide in the last resort, such questions as may be of sufficient magnitude to require their interposition."[49]

Accordingly, Madison denied that the United States Supreme Court was, as several of the state legislatures had claimed, "the sole expositor of the constitution, in the last resort." Again echoing Jefferson's position, Madison explained that "this resort must necessarily be deemed the last 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, from which the judicial as well as the other departments hold their delegated trusts." Even the judiciary might "exercise or sanction dangerous powers beyond the grant of the constitu-

47. Id. at 308-09.
48. Id. at 309.
49. Id. at 309-10.

tion." For this reason, "the ultimate right of the parties to the constitution, to judge whether the compact has been dangerously violated, must extend to violations by one delegated authority, as well as by another; by the judiciary, as well as by the executive, or the legislature."[50]

Later in the Report, however, Madison equivocated on the status of the Virginia legislature's declaration of unconstitutionality. In these later passages, he emphasized the states' powers to act as intermediaries and their power of communication rather than their power to judge authoritatively the validity of federal actions. On the other hand, several passages indicate that he was taking a position that the states collectively had some sort of nullifying power, even if they did not have that authority separately.

In analyzing the states' powers of "interposition," Madison referred to expectations during the founding period that state legislatures would act as intermediaries between the people and the federal government. He alluded to criticisms of the proposed Constitution and pointed out that in response to such criticisms, "the appeal was emphatically made to the intermediate existence of the state governments between the people and [the general] government." More specifically, he observed that state governments had been expected to "descry the first symptoms of usurpation" and to "sound the alarm to the public." It is not clear whether Madison was endorsing the potential role of state legislatures as protectors of the people's rights simply (though profoundly) because there had been an historical understanding on this issue or because he thought it was a good argument, independent of historical expectations. In any event, he linked the states' action to historical expectations.[51]

Other historical sources provided further support for Madison's position. According to the *Annals of Congress*, when he had introduced a proposed bill of rights, Madison had emphasized how the proposed amendments would reinforce the ability of state legislatures to oppose unconstitutional actions by federal officials. His underlying assumption had been that the states' re-

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50. Id. at 311. Madison also explained that interposition by the states was warranted in those "great and extraordinary cases, in which all the forms of the Constitution may prove ineffectual against infractions dangerous to the essential rights of the parties to it." Id. Compare his anticipation in *The Federalist* No. 51, of the need for checks on the federal government by the states.

51. 17 *Papers of James Madison* at 349-50 (cited in note 8). Compare *The Federalist* Nos. 26, 28 & 44. Alexander Hamilton in the 78th *Federalist* and John Marshall in decisions such as *Marbury v. Madison* relied on similar conceptions of representation to defend judicial review. Each grounded the authority of governmental officials on that of "the people."

served powers and the people's retained rights overlapped. Based on that insight, he had claimed that state legislatures would be vigilant in protesting usurpations of power and would thereby serve as "sure guardians of the people's liberty." He had gone so far as to urge that the states acting in that capacity would "be able to resist with more effect every assumption of power, than any other power on earth [could] do."[52]

Madison's "Report on the Virginia Resolutions" thus complemented those Resolutions and earlier arguments that state legislatures could legitimately act on behalf of the states' citizens by opposing unconstitutional federal legislation at least some ways and for some purposes. At a high level of generality, this assertion was obviously correct. The important question, however, was more specifically whether the Virginia Resolutions qualified as a legitimate exercise of such power. That question, in turn, depended on what the Resolutions purported to do.

In some places, Madison attributed limited significance to the Resolutions. His Report indicated that declarations of unconstitutionality by one or more states, whether expressed by their legislatures or otherwise, were merely "expressions of opinion, unaccompanied with any other effect than what they may produce on opinion, by exciting reflection." Such declarations "may lead to a change in the legislative expression of the general will; possibly to a change in the opinion of the judiciary." Madison repeatedly denied that such a declaration would either nullify the Alien and Sedition Acts or adjudicate their validity. He emphasized his point by way of contrast in assuming that "expositions of the judiciary, on the other hand, are carried into immediate effect by force."[53]

He compared communications among state governments to communications among the people themselves:

> [A] free communication among the states, where the constitution imposes no restraint, is as allowable among the state governments, as among other public bodies, or private citizens. This consideration derives a weight, that cannot be denied to it, from the relation of the state legislatures, to the federal legislature, as the immediate constituents of one of its branches.[54]

Madison emphasized how state legislatures were distinctively positioned to act in dual capacities as representatives and as constituents. He argued that state legislatures were responsible for

52. 1 *Annals of Congress* at 439 (June 8, 1789) (cited in note 19).
53. 17 *Papers of James Madison* at 348 (cited in note 8).
54. Id.

fostering communication among their constituents and also needed to communicate among themselves both to ensure their proper representation in the Senate and as predicates to other collective actions.[55]

Madison did not, therefore, view state legislative interposition merely as an exercise of the state's will. He also suggested that such an action could appeal to others' judgment as it might relate to further formal action. He had explained in the 44th *Federalist* that state legislatures could seek congressional repeal of unconstitutional legislation by replacing their Senators and exerting their "local influence" over elections to the House of Representatives.[56] He later extended this reasoning and suggested that state officials might have petitioned Congress to propose an explanatory amendment or applied for a constitutional convention to overrule the Alien and Sedition Acts.[57] These remarks indicate that he thought the success of the Virginia Resolutions would depend largely on their effects on constitutional choices by members of Congress, the federal judiciary, and state legislators.

Madison was unclear, however, on whether he was assuming that the Resolutions were significant only as predicates to other actions or also because they had some sort of intrinsic normative effect. He commented:

> [I]f the other states had concurred in making a like declaration, supported too by the numerous applications flowing immediately from the people, it can scarcely be doubted, that these simple means would have been as sufficient, as they are unexceptionable.[58]

He did not give his views on what the consequences of such concurrence would have been.

There are at least three ways of reading this passage. First, he might have been claiming that applications (or "petitions") from among "the people" at large would have annulled the Alien and Sedition Acts even if the state legislatures' declarations of

55. Madison suggested that communication among states was necessary in connection with their (a) conveying views to their representatives in the Senate, (b) originating constitutional amendments, (c) deciding whether to admit new states, and (d) entering into contracts with one another. See id. The Seventeenth Amendment's adoption in 1913 did not preclude state officials from representing the people in the ways that Madison defended. If anything, this change in constitutional structures increased the importance of institutions acting as intermediaries between the people and the federal government.

56. See *The Federalist* No. 44.

57. 17 *Papers of James Madison* at 349 (cited in note 8). Compare his piece, *Notes On Nullification* (1835-36), reprinted in 9 *Writings of James Madison* at 573-607 (cited in note 8).

58. 17 *Papers of James Madison* at 349 (cited in note 8).

unconstitutionality had not had that effect. Second, he might have thought the concurrence of other state legislatures would have effectively nullified the laws, at least if there was evidence that a preponderance of the people supported the states against the federal government. Third, he might have thought that public opinion would eventually prevail in dictating the choices made by federal representatives even if petitions or resolutions from state legislatures and/or the people at large had not themselves had any intrinsic normative consequences. According to this last reading, the appropriate measure of the resolutions' success would be their effect on public opinion rather than whether they had annulled the federal laws.[59]

The first reading, that the people's separate petitions might nullify the Acts, would have been inconsistent with other positions that Madison had articulated. He would not have considered separate actions by the people at large to be any more effective than separate resolutions by state legislatures. As he had explained to the First Congress, separate bodies of the people could not overturn actions by representatives of the whole people.[60]

The second reading, that collective state action might nullify the Acts, would have best complemented the text of the Virginia Resolutions, Madison's comments to Jefferson, and earlier passages in the "Report on the Virginia Resolutions." These materials presupposed that concurrent actions by at least a majority of the states, acting together on behalf of the people of the respective states and/or the people of the United States in their combined sovereign capacity, would have had normative consequences transcending actions by the states separately and even might have superseded actions by the federal government.

59. Compare Marshall's emphasis in *McCulloch* on federal structures as vehicles for protecting state prerogatives and bringing about constitutional change. See also Justice Blackmun's opinion for the Court in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).

60. In debates over whether the First Congress should add to the First Amendment's precursor a provision guaranteeing a right of the people to instruct their representatives, Madison argued that sovereignty in America was held by the whole American people rather than "detached bodies" of them. He reportedly observed that "the inhabitants of any district" do not "speak the voice of the people; so far from it, their ideas may contradict the sense of the whole people." He indicated that "the people [could] change the constitution if they please[d]," but he claimed that "while the constitution exists, they must conform themselves to its dictates." His position, in other words, was that part of "the people" could not legitimately "contravene an act established by the whole people." He concluded, therefore, that it was "not true" that "the people have a right to instruct their representatives in such a sense as that the delegates are obliged to conform to those instructions." 1 *Annals of Congress* at 738-39 (Aug. 15, 1789) (cited in note 19).

Madison did not, however, fully explore that possibility in his Report because the issue had become moot by then. Between 1798 and 1800, a majority of the states had declined to concur in the Kentucky and Virginia declarations of unconstitutionality.[61]

Nevertheless, it is significant that Madison apparently would have attributed greater authority to joint actions by united states than to actions by the federal government, at least under some circumstances, even if the states had acted outside forms established by the Constitution. Such a concurrent action, claiming to be grounded in the sovereign authority of the American people (whether of the states combined or of the United States as such), would have represented an exercise of power comparable to judicial review but surpassing it in scale. Like judicial review, this determination would not have purported to change constitutional standards. Instead, it allegedly would have reaffirmed existing constitutional norms. The vehicle for making that affirmation, however, would have been state legislatures rather than federal courts. Given the states' roles in adopting and amending the Constitution and their direct and indirect representation in the federal government, the constitutional and political dimensions of such a determination could not have been easily dismissed.

It was unlikely such a combined action would take place unless there was a wide gulf between governmental actions and predominant dispositions among the people at large. At the time of the Constitution's framing, however, many persons appear to have been concerned about precisely that type of possibility. Furthermore, it is conceivable that much of the public at large might have supported combined efforts of several states against the federal government during the Republic's early years if the latter government had egregiously violated foundational principles of American constitutionalism (as the dissenting states understood them). Jefferson and Madison treated the Alien and

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61. Compare Madison's later comment on the Virginia Resolutions in his piece, *Notes On Nullification*, reprinted in 9 *Writings of James Madison* at 592 (cited in note 8):

> It is sometimes asked in what mode the States could interpose in their collective character as parties to the Constitution against usurped power. It was not necessary for the object & reasoning of the resolutions & report, that the mode should be pointed out. It was sufficient to show that the authority to interpose existed, and was a resort beyond that of the Supreme Court of the U.S. or any authority derived from the Constitution. The authority being plenary, the mode was of its own choice, and it is obvious, that, if employed by the States as co-parties to and creators of the Constitution it might either so explain the Constitution or so amend it as to provide a more satisfactory mode within the Constitution itself for guarding it against constructive or other violations.

Sedition Acts as if they might precipitate a constitutional crisis of this seriousness and magnitude.

The third reading of Madison's remarks, looking to the Resolutions' effects on public opinion, would have complemented the idea of a collective nullifying authority and would have been more practically relevant under the circumstances. Madison recognized that elected officials were ordinarily responsive to constituent demands. Furthermore, public sentiment within much of the nation presumably supported rather than opposed the Alien and Sedition Acts.[62] Madison's awareness of the power of public opinion in a republic such as the United States alerted him to the dangerous tendencies of national sentiment. When commenting on the likely efficacy of a bill of rights, Madison had suggested to Jefferson that majority tyranny was more of a threat to individual rights than was the possibility that representatives might go against their constituents' wishes.[63]

In addition to setting a dangerous precedent for the improper working of governmental institutions, the Alien and Sedition Acts tested popular commitment to principles of representative government. The crisis might have been a turning point on whether the public at large would sanction or oppose exercises of federal power beyond constitutional boundaries. The people's acquiescence in such a transgression would have provided a foundation for future encroachments on rights.[64] That prospect would have deeply troubled Madison.

Much of what we know of Madison's thinking relates to his hope that constitutional structures would elevate government above transient sentiments and allow representatives to make and enforce laws in accordance with the first principles set forth in the Constitution itself. Congress' passage of the Alien and Sedition Acts and the federal judiciary's enforcement of the laws went against these aspirations. Rather than rising above public sentiments, the federal government had led the people away from foundational principles. This crisis thus highlighted the

62. See Anderson, 5 Am. Hist. Rev. (cited in note 33).

63. See Madison's Letter to Jefferson, Oct. 17, 1788, reprinted in 11 *Papers of James Madison* at 295, 298 (cited in note 8) ("In our Governments the real power lies in the majority of the Community, and the invasion of private rights is *chiefly* to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the constituents.") (emphasis in original).

64. Compare Jefferson's Letter to Stephens Thompson Mason, Oct. 11, 1798, reprinted in 7 *Writings of Thomas Jefferson* at 282-83 (cited in note 8) (Jefferson warned that public acquiescence in the Alien and Sedition Acts would set a dangerous precedent).

need for additional precautions against abuses of power. The Bill of Rights had been one such "ancillary precaution," but that "legal check" had failed even in the hands of the federal judiciary.[65] Thus Madison turned to another major check on federal power: state governments.

In addition to having regulatory powers of their own, these governments were uniquely situated to influence public opinion. State officials could also serve one of the same crucial functions that federal structures had been designed to achieve: to recall public opinion to fundamental principles and to encourage the people and their representatives to rise above passing factionalism. Madison was probably aware that his efforts to enlist state legislatures as vehicles for shaping public opinion went against the people's momentary inclinations and those of their federal representatives. But he expressed a conviction that the viability of constitutional government would depend on the success of efforts by him and others of like mind.

## III. PROBLEMS OF CONTINUING VIABILITY

Constitutional developments since the late eighteenth century have brought to the surface at least three sets of issues involving claims of state interpretive autonomy. First, is the idea of dispersed interpretive authority consistent with commitment to the rule of law? Second, is that idea consistent with the Constitution's premise that its authority flows from "the people of the United States"? Third, have constitutional changes made obsolete the idea of state officials exercising powers inconsistent with federal positions?[66]

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65. Compare Thomas Jefferson's Letter to James Madison, March 15, 1789, in which Jefferson suggested that a bill of rights would give judges a "legal check" to enforce against the people's elected representatives. The letter is reprinted in Julian P. Boyd, ed., 14 *Papers of Thomas Jefferson* at 659-62 (Princeton U. Press, 1958). Madison reportedly repeated that argument on June 8, 1789, when he presented proposed amendments to the House of Representatives: He presumed that judges would "consider themselves in a peculiar manner the guardians of those rights" and would be "naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights." See 1 *Annals of Congress* at 439 (cited in note 19). See also Wayne D. Moore, *Written and Unwritten Constitutional Law in the Founding Period: The Early New Jersey Cases*, 7 Const. Comm. 341 (1990).

66. Like Jefferson's and Madison's reliance on institutions of state government to oppose exercises of federal power in 1798, other efforts to assert state autonomy have been tarnished by the association of such arguments with efforts by southern states to preserve slavery and oppose racial integration. Thus some persons may be inclined to regard the South's military defeat in the Civil War, along with the formal defeat of governmentally sponsored racial inequality through the Reconstruction Amendments and their enforcement by federal officials, as constitutionally authoritative repudiations of claims that state officials have the sort of interpretive independence considered above.

A full examination of these issues is beyond the scope of this essay.[67] But some treatment of them is necessary to evaluate the contemporary relevance of the Kentucky and Virginia Resolutions and Madison's defense of the latter. Even if it is not possible to resolve finally problems that are wonderfully open-ended, there are good reasons for suggesting directions for further analysis.

### A

There is no need for detailed analysis here of whether the rule of law is undercut by state officials' expressing, or communicating, positions on constitutional issues. Nor is it within the scope of this essay to examine more closely whether the states, through legislatures or otherwise, may separately invalidate federal laws.[68] But if one reaches a conclusion that representatives of a state may independently interpret the Constitution for some purposes but not others, there is a need to confront questions about how far principles of state interpretive autonomy extend.

There are at least three ways to deal with controversies involving efforts by state officials and/or the people of a state to act inconsistently with federal positions other than through the forms of speech and petitioning defended by Madison. First, one may assume that as a matter of constitutional logic, the Constitution necessarily means what one or more authoritative institutions of the federal government declare it to mean. Jefferson, Madison, and the other authors of the Kentucky and Virginia Resolutions rejected such a skeptical conception of constitutional meaning. They presumed that the Constitution's meaning was

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See, e.g., Walter F. Murphy, *Who Shall Interpret? The Quest for the Ultimate Constitutional Interpreter*, 48 Rev. Pol. 401, 420 n.28 (1986) (suggested that the Civil War "effectively invalidated" claims of "confederated departmentalism," or "nullification," including the forms advocated by Jefferson in the Kentucky Resolutions and by Calhoun and others during the antebellum period).

67. It is also beyond the scope of this essay to examine the practical implications of affirming state interpretive autonomy. My main concern is constitutional norms, which are distinguishable from actual political practices. But these two issues are not completely severable, because constitutional norms are created through political practices, and an important criterion for evaluating the Constitution's normative structures is how they have operated (or are operating) in practice.

68. Interestingly, section 25 of the Judiciary Act of 1789 apparently contemplated state *judges* deciding on the validity of federal treaties, statutes and other exercises of federal power. The Judiciary Act, like its contemporary equivalent, also presumed that Article III gave the Supreme Court authority to review these decisions, among others. Not surprisingly, states have opposed the Supreme Court's exercise of this appellate power. See generally Charles Warren, *Legislative and Judicial Attacks on the Supreme Court of the United States—A History of the Twenty-Fifth Section of the Judiciary Act*, 47 Am. L. Rev. 1 (1913); 47 id. at 161.

independent not only of their positions but also of interpretations by one or more federal officials. Many persons today would likewise deny that the Constitution's meaning is properly reducible to interpretations of it by any particular institution or set of institutions, including the Supreme Court and/or other federal officials.[69]

A second possibility is that the Constitution does not presuppose skepticism regarding its own meaning, but does give legal finality for some purposes to certain types of governmental decisions, such as decisions by courts of last resort, *even when those decisions do not measure up to standards of the Constitution itself.* Writing in the mid-1830's, Madison took such a position in the context of criticizing the South Carolina legislature's claim of a unilateral nullifying authority. In an apparent retreat from his position in the Virginia Resolutions and his defense of them, Madison argued that it would be incoherent for a state to claim a *constitutional* right to disobey "the constitutional authority":

> It remains, however, for the nullifying expositors to specify the right & mode of interposition which the Resolution meant to assign to the States *individually*. . . .
>
> They cannot say that the right meant was a *Constl.* right to resist the Constitutional authy; for that is a contradiction in terms, as much as a legal right to resist a law.[70]

Variations of this argument remain viable. The Supreme Court has treated its own decisions as parts of the "supreme law" that others are bound to obey;[71] and commentators have defended that approach as an essential component of the rule of law.[72]

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69. Arguments for judicial review, as articulated by Alexander Hamilton in the 78th *Federalist* and as asserted by John Marshall in *Marbury v. Madison*, have traditionally rested on an assumption that the Constitution's meaning transcends judicial interpretations. For more recent analyses of this issue from a variety of perspectives, see Sotirios A. Barber, *On What the Constitution Means* (Johns Hopkins U. Press, 1984); William F. Harris, II, *The Interpretable Constitution* (Johns Hopkins U. Press, 1993); Edwin Meese, III, *The Law of the Constitution*, 61 Tul. L. Rev. 979 (1987).

70. Madison, *Notes On Nullification*, included among *The Papers of James Madison*, vol. 89 (Library of Congress, Manuscript Collection) (emphasis in original). Hunt's version incorrectly shows "construction," not "contradiction."

71. See *Cooper v. Aaron*, 358 U.S. 1 (1958); *United States v. Nixon*, 418 U.S. 683 (1974). The former case dealt with relationships between the Supreme Court's interpretations and state officials' constitutional obligations; the latter dealt with whether the President was bound by the Supreme Court's opposing interpretation of the scope of the executive privilege.

72. See, e.g., Burt Neuborne, *The Binding Quality of Supreme Court Precedent*, 61 Tul. L. Rev. 991 (1987); Rex E. Lee, *The Provinces of Constitutional Interpretation*, 61 Tul. L. Rev. 1009 (1987); and Ramsey Clark, *Enduring Constitutional Issues*, 61 Tul. L. Rev. 1093 (1987). For a more general defense of treating decisions by particular governmental

But Madison's reference to "the constitutional authority" raises serious questions about what institution, if any, has final interpretive authority for purposes of resolving contests among institutions of the federal government—whether or not the decisions of that "constitutional authority" are final for other purposes. Andrew Jackson, Abraham Lincoln, Franklin Roosevelt, Frederick Douglass and others have joined Jefferson and the early Madison in denying that the Supreme Court's interpretive precedents preclude presidents and members of Congress from independently interpreting the scope of their delegated powers and limitations on their exercise.[73] These persons treated conflicts among institutions of the federal government as integral components of a constitutional design that has depended on mutually checking exercises of overlapping powers—including interpretive powers.

One might regard interpretive disputes, unlike other conflicting exercises of power, as inconsistent with constitutional ideals. Admittedly, interpretive disputes may represent a form of legal failure, since one or more officials may be acting based on distorted conceptions of constitutional meaning. Doubtless it would be better for federal officials to take fully consistent positions—with each other and with constitutional imperatives.

Both dimensions of consistency are important. The Constitution treats complementary positions as commendable only to the extent they are also consistent with requirements of law. In addition, the constitutional design reflects an assumption that its own norms are more likely to be vindicated through processes that allow for mutually checking exercises of power than through the consolidation of all powers in a single governmental institution. Allowing conflicting exercises of power, including interpretive powers, is thus one means of checking positions that do not measure up to these ideals.[74]

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institutions as legally preclusive (at least for some purposes), see H.L.A. Hart, *The Concept of Law* (Clarendon Press, 1961).

73. See notes 77-79, infra, and the accompanying text. See also Walter F. Murphy, 48 Rev. Pol. (cited in note 66); Levinson, *Constitutional Faith* (cited in note 24); Stephen Macedo, *Liberal Virtues: Citizenship, Virtue and Community in Liberal Constitutionalism* esp. ch. 4 (Oxford U. Press, 1990); Louis Fisher, *Constitutional Dialogues: Interpretation as Political Process* (Princeton U. Press, 1988); Mark Tushnet, *The Supreme Court, the Supreme Law of the Land and Attorney General Meese: A Comment*, 61 Tul. L. Rev. 1017 (1987); Robert F. Nagel, *A Comment on Democratic Constitutionalism*, 61 Tul. L. Rev. 1027 (1987); and Sanford Levinson *Could Meese be Right this Time?*, 61 Tul. L. Rev. 1071 (1987).

74. See, e.g., James Madison's arguments in the 10th and 51st *Federalist* that mutually checking governmental powers would be most likely to result in the making and enforcement of laws to promote the common good without abridging individual rights.

Accordingly, interpretive disputes are signs of constitutional vitality, not just failure, at least when federal officials rely on the Constitution to limit the effects of others' distorted interpretations. Commitment to the rule of law, understood as compliance with the Constitution's own imperatives, undercuts rather than supports federal officials deferring to others' mistaken interpretations of the Constitution itself. In practice, therefore, the rule of law is promoted by the Constitution's being flexible enough to allow different persons, at least at the federal level, to act based on diverging interpretive positions. In short, constitutional government may well presuppose rather than preempt interpretive disagreement among federal officials.[75]

The Kentucky and Virginia Resolutions support an analogous conception of relationships between federal and state interpretive powers. These documents, in various forms, reflect an assumption that the states have authority to interpret and exercise *their* powers even in opposition to authoritative decisions by one or more federal officials. This position offers an alternative to those identified above: skepticism about the independence of constitutional meanings from particular interpretations, or assuming that federal decisions preempt opposing actions even when the decisions are inconsistent with constitutional norms.

Notwithstanding Madison's later claim, it is not inconsistent to argue that states have a constitutional power to disregard unconstitutional federal actions. But there is an important qualification: constitutional logic supports a conclusion that state officials only have authority to exercise *their* powers, not others'. Interpretive conflict may not legitimately arise through *state officials'* purporting to exercise *federal* powers.[76] There are good reasons for concluding, though, that states may interpret and exercise *their* powers independently—with reference to the Constitution itself and not in subordination to applicable federal precedents—even if the result is a conflict, in practice, between state and federal actions.

This approach treats interpretive and other powers as symmetrical. As John Marshall argued in *Marbury v. Madison*, fed-

75. There are doubtless limits, in practice, to the Constitution's ability to accommodate interpretive disagreement—limits that were crossed around the time of the Civil War. It is beyond the scope of this essay to examine these limits. The important point for present purposes is that the Constitution can accommodate *some* interpretive disagreement.

76. As suggested above, however, there may be special circumstances under which *state* judges or other officials may have authority to invalidate federal actions that are alleged to be unconstitutional (based on the standards of the federal Constitution) through the exercise of *state* powers, at least pending federal review of those actions.

eral judges may interpret the Constitution independently for purposes of deciding cases over which they have jurisdiction.[77] Likewise, presidents have the power claimed by Andrew Jackson: authority to decide for themselves on the validity of acts of Congress, at least for purposes of deciding whether to veto them, even if the result is an exercise of presidential power that conflicts with legislative and judicial interpretive precedents.[78] Similar principles support Abraham Lincoln's argument that Congress and the people at large have interpretive powers corresponding to their respective constitutional prerogatives: the Constitution gives Congress authority to interpret its legislative powers, and the people at large may interpret the Constitution independently of governmental officials in deciding how to exercise their rights and powers to political expression, voting, and the like.[79] Although the Constitution obligates the states and their representatives to respect the authority of other persons to exercise their powers, the states (typically through representatives) also may decide for themselves how to exercise their own.

Such an approach would not automatically settle all disputes over constitutional issues or preclude interpretive mistakes. On the contrary, a position that the states (and their representatives) may legitimately exercise their reserved powers in opposition to unconstitutional federal actions, if accepted and acted upon by those who regard federal laws as invalid, might exacerbate inter-

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77. Marshall's primary objective in *Marbury* was to deny claims of legislative interpretive supremacy, a position inconsistent with judges reviewing the validity of legislative acts. It is less clear that Marshall sought to assert judicial interpretive supremacy. Ironically, his premise that other officials might, in practice, act inconsistently with constitutional norms also applies to judges. Thus his claim that judges had authority to interpret the Constitution (particularly its delegation of judicial powers) independently of Congress supports, by analogy, arguments by other officials that they have a constitutional obligation to order their actions with reference to the Constitution even if doing so entails disregarding judicial positions.

78. See Andrew Jackson, *Veto of the Bank Bill*, July 10, 1832, reprinted in James D. Richardson, ed., 2 *A Compilation of the Messages and Papers of the Presidents* 581-82 (Bureau of National Literature and Art, 1908).

79. In his speech at Springfield, Illinois, on July 17, 1858, Lincoln argued: "[Stephen Douglas] would have the citizen conform his vote to [the Supreme Court's decision in *Dred Scott*]; the Member of Congress, his; the President, his use of the veto power. He would make it a rule of political action for the people and all the departments of government. I would not. By resisting it as a political rule, I disturb no right of property, create no disorder, excite no mobs." The speech is reprinted in Roy P. Basler, ed., 2 *The Collected Works of Abraham Lincoln* 504-20 (Rutgers U. Press, 1953); the quote appears at 516. Frederick Douglass had likewise argued in a speech on July 5, 1852, that "every American citizen has a right to form an opinion on the constitution, and to propagate that opinion, and to use all honorable means to make his opinion the prevailing one." Douglass' speech is reprinted by John W. Blassingame, ed., 2 *The Frederick Douglass Papers* 359-88 (Yale U. Press, 1982); the quote appears at 385.

pretive disputes. Some persons might use force, not just reasoning, to back up their positions.[80]

These considerations do not indicate that a diffused or multifaceted conception of interpretive authority is flawed. Paying attention to the states' interpretive prerogatives (along with others') and affirming commitment to them in practice would promote a healthy awareness of the possibilities and consequences of interpretive mistakes. Much constitutional meaning is open ended, and arrangements among federal and state powers (along with relationships among governmental powers and rights and powers of the people at large) are extremely complex. As a result, a large measure of tentativeness in the exercise of political power is appropriate, particularly for those acting in opposition to others' normative claims.

At the same time, principles of constitutional fidelity call for conviction to the imperatives of supreme law.[81] Sometimes those imperatives require persons to oppose others' actions. Being willing to vindicate constitutional norms by acting consistently

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80. One of the goals of the Federalists was to create a central government with enough coercive power to be able to overcome opposition from among the states, not just to be able to enforce laws against individuals. See, e.g., Paul Finkelman, *The Paradox of Bill of Rights Rhetoric, 1787-1791*, in Josephine F. Pacheco, ed., *To Secure the Blessings of Liberty: Rights in American History* 83, 85 (George Mason U. Press, 1993). On this score, the Federalists' vision has largely been achieved. Federal military, fiscal, regulatory, and enforcement powers are capable of imposing serious restraints on state actions. It would be wrong to assume uncritically that all exercises of such powers have been consistent with constitutional ideals, but it would equally wrong to deny that federal coercive powers have often been used to uphold the Constitution. Compare, for example, the United States military's treatment of persons of Japanese ancestry during World War II with President Eisenhower's use of national troops to enforce desegregation in the aftermath of *Brown v. Board of Education.*

It is less clear that the states have had adequate means, in practice, of protecting their separately reserved powers. According to *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), representative processes are adequate to protect state powers from federal abridgement. See also Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum. L. Rev. 543 (1954). Some members of the Supreme Court have been unwilling, however, to assume that ordinary representative processes are adequate to protect state prerogatives. In *National League of Cities v. Usery*, 426 U.S. 833 (1976), for example, Chief Justice Rehnquist compared the states' reserved powers to rights of the people that judges were authorized to enforce as limitations on federal powers. *New York v. United States*, 112 S. Ct. 2408 (1992), represents a renewed effort by judges to safeguard principles of federalism. Without denying the importance of these precedents, the thrust of this article is that persons should not equate constitutional limitations with those enforced by judges.

81. The Civil War is a reminder of the extremes to which individuals and public officials may go when seeking to preserve or establish their normative visions. Constitutional disputes are typically resolved in a more orderly manner, though not necessarily without the use of force. See generally Robert M. Cover, *The Bonds of Constitutional Interpretation: Of the Word, the Deed, and the Role*, 20 Ga. L. Rev. 815 (1986), for analysis of coercive dimensions of legal decision making.

with them, even in the face of opposition, is a sign of constitutional commitment that deserves commendation, not repudiation.[82]

Extending principles of interpretive autonomy to embrace the states' independently interpreting and exercising their reserved powers depends, of course, on an assumption that the Constitution reserves some powers to the states, acting separately. In addition, there are questions about *who* may legitimately claim to act on behalf of a state by exercising powers purportedly reserved to it. These issues also deserve further consideration.

B

The Kentucky and Virginia Resolutions based arguments for state autonomy, including diffused interpretive powers, on a premise that the Constitution was a "compact" among sovereign states. That premise was controversial even in its time. But the basic principles underlying these arguments remain viable: federal officials depend on affirmative delegations of power, and those delegations are limited in scope.

H. Jefferson Powell recently criticized the Kentucky and Virginia Resolutions for ignoring arguments during the founding period that the Constitution would not constitute a "compact." As Powell explained, James Wilson and others had argued that "this system is not a compact or contract; the system itself tells you what it is; it is an ordinance and establishment of the people."[83] According to Powell, "[t]he [Kentucky and Virginia] Resolutions simply ignored the recent and well-known debates over the Constitution's character, as well as the absence within its text of references to a compact or to the states as sovereign contracting parties."[84] Powell also contrasted Jeffersonian positions on the Constitution's character with arguments by John Marshall and

82. The Constitution imposes constraints on how governmental officials may seek to vindicate constitutional norms; and there are corresponding legal limitations on the means available to individuals. For example, governmental officials are obliged to respect principles of due process, and individuals are likewise obliged to respect laws against harming persons, property, and the like. Adding further complication, various actions have differing effects in supporting or undercutting respect for legal institutions and the Constitution itself.

83. H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 Harv. L. Rev. 885, 930 & n.237 (1985) (citing James Wilson's remarks at the Pennsylvania Ratifying Convention on December 11, 1787). These remarks are reprinted by Merrill Jensen, ed., 2 *The Documentary History of the Ratification of the Constitution* 556 (State Historical Society of Wisconsin, 1976).

84. Powell, 98 Harv. L. Rev. at 930 (cited in note 83).

others who subsequently emphasized principles of national supremacy.[85]

It is important not to overstate the differences between Jefferson's and Madison's reliance on the idea of a constitutional "compact" and Wilson's repudiation of contractual analogies during the founding period. Wilson argued that the proposed Constitution would form neither a compact among state governments nor a contract between the people and governmental institutions. Instead, he relied on the preamble and emphasized the constitutional design's dependence on the people's foundational political authority, including the people's authority to recall at any time powers previously delegated by them to state governmental institutions. He likewise argued that the people would continue to hold all sovereign powers after the proposed Constitution's ratification: "Those who ordain and establish have the power, if they think proper, to repeal and annul."[86]

Wilson linked these arguments to claims that the Constitution would delegate limited powers. He took a position that the proposed Constitution, unlike state constitutions, was structured to limit federal officials to exercising enumerated powers. For this reason, he argued that there was no need to enumerate rights in the proposed constitutional text.[87]

He relied on this premise to deny that the federal Constitution would annihilate state governments. He claimed that the people, by approving the Constitution, would transfer some but not all governmental powers from state to federal institutions:

> When the principle is once settled, that the people are the source of authority, the consequence is, that they may take from the subordinate governments powers with which they have hitherto trusted them, and place those powers in the general government, if it is thought that there they will be productive of more good. They can distribute one portion of power to the more contracted circle called state governments; they

85. Id. at 930, 942-48 (cited in note 83). Powell's article focused on historical conceptions of the Constitution's "intent," not interpretive prerogatives.

86. See the account of Wilson's remarks at the Pennsylvania Ratifying Convention, as reprinted by Jensen, ed., 2 *The Documentary History of the Ratification of the Constitution* at 356-63 (Nov. 24, 1787, as reported by Thomas Lloyd) (cited in note 83); id. at 382-84 (Nov. 28, 1787); id. at 554-58 (Dec. 11, 1787). See also id. at 383 ("[H]ere, sir, the fee simple remains in the people at large, and, by this Constitution, they do not part with it."); id. at 362 ("[T]he people may change the constitutions whenever and however they please.").

87. See id. at 387-89 (Nov. 28, 1787).

> can also furnish another proportion to the government of the United States.[88]

He assumed, moreover, that even after the federal Constitution's ratification, state officials would hold all governmental powers not delegated to the federal government. In this connection, significantly, he referred to the party giving up powers to the federal government (in his terms, a "confederate republic," or the "national government") as "the states":

> When a confederate republic is instituted, *the communities, of which it is composed*, surrender to it a part of their political independence, which they before enjoyed as *states*. . . . *The states* should resign, to the national government, that part, and that part only, of their political liberty, which placed in that government will produce more good to the whole than if it had *remained in the several states*.[89]

Finally, he presumed that "[s]ince *states* as well as *citizens* are represented in the Constitution before us, and form the objects on which that Constitution is proposed to operate, it was necessary to notice and define *federal* as well as *civil* liberty."[90] As would Madison, he referred to "the states" as political communities, not just as the governmental institutions representing those communities.

For good reasons, Wilson avoided the rhetoric of "compacts." But his analysis could have been coherently recast as flowing from assumptions that "the people" formed "compacts" among themselves, both as members of states and as members of the United States, and in those capacities delegated governmental powers to institutions at both levels.[91] Whether individuals

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88. Id. at 449 (Dec. 1, 1787). See also id. at 496 (Dec. 4, 1787) (characterized federal and state powers as divided by an imprecise "line").

89. Id. at 359 (Nov. 24, 1787) (emphasis added).

90. Id. (emphasis in original).

91. In *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 471 (1793), Chief Justice John Jay characterized the Constitution as a "compact" among "the people":

> 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 matter.

Significantly, Jay was a leading *Federalist* from *New York*. In a letter to N.P. Trist dated February 15, 1830, Madison explained:

> Although the old idea of a compact between the Government & the people be justly exploded, the idea of a compact among those who are parties to a Government is a fundamental principle of free Government.
>
> The original compact is the one implied or presumed, but nowhere reduced to writing, by which a people agree to form one society. The next is a compact, here for the first time reduced to writing, by which the people in their social state agree to a Government over them. These two compacts may be considered

and states were bound by a particular federal action thus hinged, in his view, on whether power to perform that action had been "surrendered" (even if only tentatively) by them through the Constitution's adoption.

Thus there was substantial overlap among Wilson's arguments and those presented in the Kentucky and Virginia Resolutions. Each depended on an assumption that the Constitution delegated limited powers to institutions of federal government. Each claimed that the Constitution also reserved powers to the respective states and contemplated their exercising these powers separately. Each assumed that the states would be bound by federal actions within the scope of delegated powers but not outside them.

Wilson placed greater emphasis on the authority of "the people," joined as members of a national political community and not just as members of states. Thus he identified important problems with arguments that the Constitution was fundamentally a compact among states. He emphasized how the people at large, not just the states as such, were constituents.

Even so, many of Wilson's arguments were consistent with affirming some forms of state interpretive autonomy. He argued that "the people" had divided governmental powers among federal *and state* institutions. There was no need to assume that the people, acting through the Constitution, had withheld all interpretive powers from the latter institutions. On the contrary, his claim that the Constitution divided governmental powers provided foundations for arguments that it also gave the respective institutions adequate means for exercising those powers. Rather than leading to a conclusion that state officials should have treated federal officials as ultimate interpreters, the concept of popular sovereignty could accommodate arguments that state officials should have subordinated their exercises of power to the superior will of the people, as expressed in the Constitution itself.

## C

There remain serious questions about how "the people" have been politically constituted and how they may authoritatively act. The Virginia and Kentucky Resolutions presumed that "the people" were constituted at least in part as members of states. The Resolutions also assumed that "the people" of a state

as blended in the Constitution of the U.S., which recognises a union or society of States, and makes it the basis of the Government formed by the parties to it.
9 *Writings of James Madison* at 355n. (cited in note 8).

could act, at least in some contexts and for some purposes, through state legislatures. Article VII supports a similar position by contemplating actions by the people of the respective states through conventions, and Article I gave state legislatures authority to act on behalf of the states for purposes of choosing senators. Article V also attaches significance to actions by the people of the states, acting through conventions or state legislatures, as a predicate to amending the constitutional text.

The preamble supports arguments, however, that "the people" are constituted not only as members of states. It purports to rest the Constitution's authority on "the People of the United States." When read with Article VII, moreover, the preamble implies that concurrent actions by conventions among the states would constitute an authoritative action of this more-inclusive "people." Article V also makes national action, by Congress or a national convention, a predicate to amending the constitutional text. In addition, Articles I, II and III authorize federal officials to act on behalf of "the People of the United States" within prescribed limits.

It appears, therefore, that the Constitution presupposes that "the people" have at least two identities: as members of states and as members of the United States.[92] The preamble and Articles V and VII indicate that some forms of formal constitutional change depend on concurrent actions by "the people," acting in both capacities (national and state, through legislatures and/or conventions). Pending such change, the Constitution subordinates ordinary governmental actions, by federal and state officials, to its own imperatives.

These assumptions have not become obsolete. The Constitution has withdrawn some powers from the states, placed additional limitations on powers not withdrawn, and delegated new powers to Congress and other federal institutions. But the ideas of limited federal powers and separately reserved state powers remain viable.

The Fourteenth Amendment's definition of citizenship also supports rather than undercuts arguments that "the people" remain constituted both as members of states and as members of

92. For purposes of this essay, it is not necessary to identify or examine other forms of popular identity, including the Constitution's assumption that "the people" were constituted in part as separate individuals and as members of groups other than "the states" and "the United States." One of the main issues raised by the Alien and Sedition Acts, of course, was whether the First Amendment protected areas of individual autonomy for the benefit of "the people" as individuals and members of political parties and other non-governmental associations, not just as members of states.

the United States. Section 1 defines "persons born or naturalized in the United States and subject to the jurisdiction thereof" as "citizens of the United States and of the State wherein they reside." This Amendment changed the composition of "the people" by expanding formal citizenship, but it did not eliminate dual citizenship: national and state. As with other parts of the Constitution, these provisions contemplate the people's continuing to act not only as members of a national polity and through institutions of federal government, but also as members of states and through institutions of state government.

It is difficult to deny that there have been legitimate shifts in power from the states to the federal government. As a result, the narrow conceptions of federal authority presented in the Kentucky and Virginia Resolutions have become, in a sense, outdated. Expanding federal powers have had wide-reaching normative implications—with effects, among other things, on the attributes (as well as scope) of national and state citizenship.

Arguments for state interpretive autonomy remain severable, however, from conclusions regarding the scope of federal and state governmental powers and their respective relationships to rights and powers of "the people," variously conceived. As long as the Constitution preserves the states as autonomous political units that have distinguishable reserved powers, the idea of corresponding interpretive prerogatives remains coherent. The constitutional design continues to allow state officials and the people of the respective states to play important roles not only in ratifying formal amendments but also in exercising other rights and powers in ways that shape political discourse.[93]

It would be anomalous, indeed, to claim that state action is a prerequisite to formally amending the constitutional text but does not count for purposes of ascertaining the meaning of that text.[94] It is more coherent to attribute to the states important

93. It is important to pay attention to how a variety of state officials, not just legislators, may act on behalf of the people of a state. This issue is especially important since there is increasing diversity among the people of the respective states (which is also a more inclusive category, as a matter of federal constitutional law, than during the founding period).

94. See Bruce A. Ackerman, *Constitutional Politics/Constitutional Law*, 99 Yale L.J. 453 (1989), and Ackerman, *We The People: Foundations* (Belknap Press, 1991), for arguments that the Constitution allows for authoritative change through informal means that go beyond those authorized by Article V. His arguments overlap, to some extent, my presuppositions regarding the possibility of authoritative interpretive change. But Ackerman seems more willing than I to regard state participation in interpretive change as capable of being displaced by forms of national action. See also Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. Chi. L. Rev. 1043 (1988). Amar considers whether "the people" may legitimately amend the Constitution

roles not only in changing the constitutional text, but also in sustaining and otherwise recreating fundamental law through interpretive dialogue.

## CONCLUSION

A move beyond excessive preoccupation with the Constitution's judicial interpretation and enforcement is necessary to place in perspective various efforts to deal with current political dilemmas. It would be wrong, for example, to look to one person or institution to resolve finally controversies over the constitutional validity of health care reform, educational initiatives, environmental policies, changes in criminal and civil laws, or efforts to protect or limit reproductive choices. Instead, there are good reasons for interpreting the Constitution as contemplating far-reaching dialogue on the important issues of the day. There are also good reasons for affirming, rather than undercutting, commitment to constitutional ideals even in the face of their popular denial or official disregard.

Accordingly, constitutional theory and practice should be expanded to embrace the core principles of state interpretive autonomy that are common to the Kentucky and Virginia Resolutions. Although the states acting separately may pose serious threats to principles of American constitutionalism, cutting off the states' contributions to interpretive dialogue would threaten more directly the Constitution itself. Commitment by state officials to constitutional norms, like affirmation of the Constitution's meaning and authority by members of the people at large, deserves commendation rather than repudiation. There are reasons for concern, not celebration, should state officials and the people of the states lose the capacity to interpret and exercise their powers independently of federal officials.[95]

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through popular referenda or other means in addition to those contemplated by Article V. For analysis of several models of representation and their consistency with deliberative ideals, see James S. Fishkin, *Democracy and Deliberation: New Directions for Democratic Reform* (Yale U. Press, 1991).

95. Even if one is only (or primarily) concerned about the ability of the people to sustain principles of American constitutionalism, there are reasons for paying attention to the roles of states in fostering popular political participation. See generally *Symposium: The Republican Civic Tradition*, 97 Yale L.J. 1493-1723 (1988); *Symposium: Roads Not Taken: Undercurrents of Republican Thinking in Modern Constitutional Theory*, 84 Nw. U. L. Rev. 1-249 (1989); Sheldon S. Wolin, *The People's Two Bodies*, 1 democracy 9 (1981).