

# THE POLITICAL GRAMMAR OF EARLY CONSTITUTIONAL LAW

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*In this Article, Professor H. Jefferson Powell discusses the United States Constitution and the historical era during which it was written and adopted. He analyzes the Constitution not as a set of rules creating and organizing the federal government, but as a document that inspired political debate and the culture out of which our notions and understandings of constitutionalism grew. Professor Powell asserts that the “creation of a shared political and legal language” is perhaps one of the greatest achievements of founding-era Americans. Because deep political disagreement existed at the time, Professor Powell suggests that when we look to the founding-era period for insight into current constitutional questions, we should not search primarily for the founders’ original intent. Instead, we can gain more insight from the study of the common terms and language—the political grammar of early constitutional law—in which debate was voiced.*

In 1792, American diplomat and writer Joel Barlow published a critical analysis of the French Constitution which had been drafted the previous year.<sup>1</sup> Drawing on the American experience with constitution making and interpreting, Barlow argued that the proper purpose of a constitution was to establish “the great fundamental principle *that all men are equal in their rights*” and to create basic safeguards for that principle.<sup>2</sup> The value of a properly devised constitution, however, went beyond establishing the rules within which government was obliged to act: Barlow thought that a constitution “ought to serve not only as a guide to

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1. Joel Barlow, A Letter to the National Convention of France on the Defects in the Constitution of 1791 (New York 1792), *reprinted in* 2 *AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA 1760-1815*, at 812-38 (Charles S. Hyneman & Donald S. Lutz eds., 1983) [hereinafter *AMERICAN POLITICAL WRITING*].

2. *Id.* at 823-24. Later in the letter, Barlow described the task of a constitutional convention as “tracing the outlines of your constitution, according to your present ideas, and proclaiming it in the most solemn manner, as the foundation of law and right.” *Id.* at 838.

the legislative body, but as a political grammar to all the citizens. The greatest service to be expected from it is, that it should concentrate the maxims, and form the habits of thinking, for the whole community."<sup>3</sup>

Barlow's recommendation to the French Assembly that it write a constitution that could serve as "the political grammar" of society captured a central element of the founding-era American experience with constitutionalism.<sup>4</sup> Their state and federal constitutions, Americans quickly discovered, were not merely sets of rules organizing and limiting the institutions of government. Indeed, to the extent that the constitutions contained rules, those rules all too frequently were ambiguous, as likely to create disputes as to settle them. The American constitutions shaped a public culture much as Barlow thought a constitution should, but it was a culture of debate. The possession of a common "political grammar" did not eliminate deep political disagreement in the early United States; instead, constitutionalism served as the language through which those disagreements could be articulated.

The founders' constitutional disputes were worrisome and even exasperating at the time.<sup>5</sup> The existence of "original disagreement" also troubles many late twentieth-century American constitutionalists, in part because it renders problematic the invocation of "the founders" in constitutional debate. The hypothesis underlying this Article is that our tendency to search for the constitutional views founding-era Americans generally shared has led us to ignore what was perhaps their greatest achievement—the creation of a shared political and legal language that made reasoned debate possible.<sup>6</sup> It was the "political grammar" of the founding era that decisively shaped "the habits of thinking" and acting of later Americans. Constitutional historians, therefore, would do well to

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3. *Id.* at 823. Thomas Paine used the same metaphor a year before Barlow. See PAINE, *THE RIGHTS OF MAN* (1791), reprinted in 1 *THE COMPLETE WRITINGS OF THOMAS PAINE* 300 (Philip S. Foner ed., 1969): "The American Constitutions were to liberty, what a grammar is to language: they define its parts of speech, and practically construct them into syntax."

4. This article deals with the constitutional discourse of the period roughly between the ratification of the federal Constitution and the "market revolution" of the Jacksonian period. See generally CHARLES SELLERS, *THE MARKET REVOLUTION, 1815-1846* (1991) (discussing the continuities and differences between pre-Jacksonian and Jacksonian America).

5. An anonymous pamphleteer of the period sarcastically remarked that the creators of the Federal Constitution were "[s]o far . . . from boasting of an inspiration in this work, that neither two of them can agree to understand the instrument in the same sense." An Impartial Citizen, *A Dissertation Upon the Constitutional Freedom of the Press* (Boston 1801), reprinted in 2 *AMERICAN POLITICAL WRITING*, *supra* note 1, at 1126, 1128.

6. I am indebted to Professor Sanford Levinson's provocative work for my understanding of constitutionalism as a language. See SANFORD LEVINSON, *CONSTITUTIONAL FAITH* 191-92 (1988).

attend to the vocabulary and structure of founding-era discussion if they are to understand that era's legacy.

The purpose of this Article is to contribute to the growing body of scholarship that focuses on the terms rather than the particular outcomes of early constitutional debate.<sup>7</sup> The Article examines some of the terms and patterns of argument founding-era Americans employed in constitutional discussion:<sup>8</sup> the role of concepts of "text," meaning, and precedent in constitutional interpretation;<sup>9</sup> the significance of ascribing interpretive authority to various institutions;<sup>10</sup> and the complex of questions surrounding the notions of "sovereignty" and "discretion."<sup>11</sup> The portrait of early constitutionalism that this Article identifies is very similar to Barlow's metaphor of a "political grammar." The concluding section of the Article suggests that the contemporary interest in constructing determinate theories of constitutional meaning is fundamentally alien to the constitutionalism created by the founding-era.<sup>12</sup>

## I. THE SOURCES OF CONSTITUTIONAL ARGUMENT

A fundamental question often raised in early constitutional argument—as it has been again today—concerned the sources of constitutional argument. In discussing the scope of legislative or executive authority or the validity of an asserted individual right, founding-era Americans often turned to the logically prior question of what modalities of argument<sup>13</sup> were permissible in constitutional debate. Substantive

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7. Two outstanding examples are 3-4 G. EDWARD WHITE, *THE OLIVER WENDELL HOLMES DEVISE: HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE MARSHALL COURT AND CULTURAL CHANGE, 1815-35* (1988) & STEPHEN B. PRESSER, *THE ORIGINAL MISUNDERSTANDING* (1991).

8. See JOHN G.A. POCOCK, *POLITICS, LANGUAGE AND TIME* 3-41 (1973) (discussing the value of studying the underlying structures of political discourse). "The historian's first problem, then, is to identify the 'language' or 'vocabulary' with and within which the author operated, and to show how it functioned paradigmatically to prescribe what he might say and how he might say it." *Id.* at 25.

9. See *infra* notes 30-150 and accompanying text.

10. See *infra* notes 151-218 and accompanying text.

11. See *infra* notes 219-375 and accompanying text.

12. See *infra* notes 376-82 and accompanying text.

13. I borrow the concept of modalities of interpretation from Philip Bobbitt's great book, PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* (1991). Bobbitt defines "constitutional modalities" as "the ways in which legal propositions are characterized as true from a constitutional point of view." *Id.* at 12. He identifies six basic modalities in modern constitutional law:

the historical (relying on the intentions of the framers and ratifiers of the Constitution); textual (looking to the meaning of the words of the Constitution alone, as they would be interpreted by the average contemporary "man on the street"); structural (inferring rules from the relationships that the Constitution mandates among the

constitutional disagreements often turned on conflict over the propriety of a particular type of constitutional-law argument.

#### A. *The Role of Constitutional Text*

The primary and superficially uncontroversial founding-era modality of interpretation was textual: virtually everyone agreed that the defining characteristic of American constitutionalism was the existence of written constitutional instruments.<sup>14</sup> Judge St. George Tucker stated in 1794 that before the American Revolution the world had not truly understood the notion of a constitution:

What the *constitution* of any country *was* or rather *was supposed to be*, could only be collected from what the *government had at any time done*; what had been *acquiesced* in by the people, or other component parts of the government; or what had been *resisted* by either of them. Whatever the government or any branch of it had *once done*, it was inferred they had a *right to do again*.<sup>15</sup>

But Americans, Tucker went on to say, had changed all that by writing down their fundamental laws. “[W]ith us, the constitution is not an ‘ideal thing, but a real existence: it can be produced in a visible form:’ its principles can be ascertained from the living letter, not from obscure reasoning or deductions only.”<sup>16</sup> The Federal Constitution, Representative Peter Porter reminded the House in 1811, was “a *printed Constitution* . . . drawn up with the greatest care and deliberation; with the utmost attention to perspicuity and precision.”<sup>17</sup>

From the basic premise of the textuality of American constitutions, founding-era Americans drew the corollary that an American constitution is “the first law of the land.”<sup>18</sup> Unlike, for example, the English Bill of Rights of 1689, which put legal constraints only on the Crown and not on Parliament, an American constitution

is to the *governors*, or rather to the departments of government, what a law is to individuals—nay, it is not only a *rule of action*

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structures it sets up); doctrinal (applying rules generated by precedent); ethical (deriving rules from those moral commitments of the American ethos that are reflected in the Constitution); and prudential (seeking to balance the costs and benefits of a particular rule).

*Id.* at 12-13.

14. On the theoretical importance of the textual nature of American constitutions, see *id.* at 3-5.

15. *Kamper v. Hawkins*, 3 Va. (1 Va. Cas.) 20, 78 (Gen. Ct. 1793) (Tucker, J.).

16. *Id.*

17. 22 ANNALS OF CONG. 643 (1811).

18. *Kamper*, 3 Va. (1 Va. Cas.) at 78 (Tucker, J.).

to the branches of government, but it is that from which their existence flows, and by which the powers . . . which may have been committed to them, are prescribed—It is their commission—nay, it is their *creator*.<sup>19</sup>

John Marshall said nothing controversial in deciding *Marbury v. Madison* when he asserted that the status of “fundamental and paramount law” is “essentially attached to a written constitution.”<sup>20</sup> Again and again, throughout the founding period, constitutionalists affirmed the connection between the American constitutions’ written nature, their supreme legal authority, and their capacity to render definite and fixed the forms and limits of governmental power. As an anonymous essayist wrote early in the Revolution, “individuals by agreeing to erect forms of government . . . must give up some part of their liberty for that purpose; and it is the particular business of a Constitution to make out *how much* they shall give up” by express provisions “say[ing] to the legislative powers, ‘Thus far shalt thou go, and no further.’”<sup>21</sup>

The importance of the connection between textualism and the distribution and limitation of power was evident in the undercurrent of worry that sometimes can be detected about the ambiguity of constitutional texts. While the Constitution was being drafted, Madison repeatedly argued for the need to give Congress an institutional check on state legislation violating the Constitution’s restrictions on state power. “[T]he impossibility of dividing powers of legislation in such a manner, as to be free from different constructions by different interests, or even from ambiguity in the judgment of the impartial, requires some such expedient.”<sup>22</sup> The great Anti-federalist writer “Brutus” argued that the very tools of textual construction applied by an impartial interpreter would break down all limits on federal power if applied to the proposed Constitution: “It is a rule in construing a law to consider the objects the legislature had in view in passing it, and to give it such an explanation as to promote their intention. The same rule will apply in explaining a constitution.” But applying such a rule to the Constitution, “Brutus” contended, would legitimate congressional authority “to make all laws which they shall judge necessary for the common safety, and to promote the general welfare.” Textual construction, in other words, could subvert the very limiting function of making a constitution into a text: “This

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19. *Id.* at 24 (Nelson, J.).

20. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803).

21. Anonymous, *Four Letters on Interesting Subjects* (Philadelphia 1776), *reprinted in* 1 *AMERICAN POLITICAL WRITING*, *supra* note 1, at 368, 385.

22. Letter to Thomas Jefferson (Oct. 24, 1787), *in* 10 *PAPERS OF JAMES MADISON* 205, 211 (Robert A. Rutland et al. eds., 1977) [hereinafter *MADISON PAPERS*] (discussing Madison’s struggle to include a congressional check on state legislation).

amounts to a power to make laws at discretion."<sup>23</sup>

For many founding-era Americans the textual nature of American constitutionalism brought with it institutional implications. The centrality of constitutional documents, for example, often provided the basis for asserting or accepting the legitimacy of some form of judicial review. In 1808, Judge John Davis held that the judicial power to declare statutes "void exists, only, in cases of contravention, opposition or repugnancy, to some *express* restrictions or provisions contained in the constitution."<sup>24</sup> Davis rejected the argument that a federal court could hold unconstitutional an exercise of congressional authority solely on the basis of the claim that Congress had exceeded the scope of a textually delegated power as "extremely difficult, if not impracticable, in execution."<sup>25</sup> On the other hand, "[a]ffirmative provisions and express restrictions, contained in the constitution, are sufficiently definite to render decisions, probably in all cases, satisfactory."<sup>26</sup> By creating written constitutions Americans had rendered constitutional debate susceptible to legal resolution: As James Kent explained to his law students in 1794, "the interpretation or construction of the Constitution is as much as a *judicial* act, and requires the exercise of the same *legal discretion*, as the interpretation or construction of a Law."<sup>27</sup>

Almost a quarter century later, James Madison explained his veto of an internal improvements bill as a defense of the United States Constitution's written nature and thus of the federal courts' power of judicial review. The bill's supporters justified its legitimacy on the ground that the bill's effects would be beneficial to the nation,<sup>28</sup> but Madison rejected this reasoning as subversive both of the nature of the Constitution and of the existence of judicial review as a safeguard of the Constitution. If Congress were not limited to the powers textually delegated to it but were free to legislate on all issues involving the common defense and general welfare, Madison explained, "the effect" would be to "exclud[e] the judicial authority of the United States from its participation in guarding the boundary between the legislative powers of the General and the State Governments, inasmuch as questions relating to the general wel-

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23. Brutus V, *To the People of the State of New York* (Dec. 13, 1787), in 2 HERBERT J. STORING, *THE COMPLETE ANTI-FEDERALIST* § 9.57 (1981).

24. *United States v. The William*, 28 F. Cas. 614, 619 (D. Mass. 1808) (No. 16,700) (emphasis added).

25. *Id.* at 620.

26. *Id.*

27. James Kent, *Introductory Lecture to a Course of Law Lectures* (New York Nov. 17, 1794), in 2 *AMERICAN POLITICAL WRITING*, *supra* note 1, at 936, 942.

28. See SELLERS, *supra* note 4, at 76-79 (discussing the debate over the bill's constitutionality).

fare, being questions of policy and expediency, are unsusceptible of judicial cognizance and decision.”<sup>29</sup>

### B. *Methods of Textual Interpretation*

The emergence of severe disagreement on the interpretation of the Federal Constitution in the early 1790s produced extensive debate over the appropriate methods of interpreting the constitutional text.<sup>30</sup> Opponents of expansive views of congressional power seized upon the Federal Constitution’s textuality from the beginning as a major component of their argument against Alexander Hamilton’s nationalist political program.<sup>31</sup> Madison’s great 1791 speech attacking Hamilton’s bank bill<sup>32</sup>

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29. James Madison, Veto Message (Mar. 3, 1817), in 1 MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897, at 584, 585 (James D. Richardson ed., 1896) [hereinafter MESSAGES AND PAPERS].

30. The political labels of the founding era create terminological problems for the modern reader. During the struggle over ratification, the Constitution’s proponents appropriated the term “Federalist,” successfully relegating their protesting opponents to the negative “Anti-federalist.” When the original Federalists divided over political and constitutional differences in the early 1790s, the supporters of President Washington’s administration and of Alexander Hamilton’s legislative proposals adopted the “Federalist” label in an effort to brand their foes as enemies of the Constitution. The latter, many of whom had been fervent supporters of ratification, came to describe themselves by the middle of the decade as “Republicans” in an effort to brand Hamilton and his allies as crypto-Tories and monarchists. Thus, James Madison was a “Federalist” of 1788, but a “Republican” of 1795, while Patrick Henry, a leading “Anti-federalist” of the ratification period, was by the late 1790s a “Federalist.” During the 1790s, Federalists generally endorsed expansive views of federal power and executive authority, while Republicans usually insisted on a narrow construction of federal power and on legislative supremacy. With the Republican capture of the Presidency and Congress in the election of 1800, a takeover that proved permanent, Republicans tended to become less wary of national power and Federalists more enthusiastic about decentralized government. By the second decade of the nineteenth century, the mainstream leadership of the Republicans endorsed nationalist constitutional views, and opposition to centralized power characterized New England Federalists but only a minority of the Republican party.

31. Hamilton and his allies in the First Congress implemented an ambitious legislative program intended to secure the Federal Union and place it on the road to becoming a strong, centralized commercial republic. Their immediate goals were to create an efficient federal administrative apparatus and to restore the public credit of the United States by federal assumption of the states’ debts and the creation of a sound federal fiscal system. The establishment of a national bank was of central importance to this program. See FORREST McDONALD, ALEXANDER HAMILTON: A BIOGRAPHY 117-210 (1979) (describing the nationalist program). By interweaving the new federal government with society’s commercial growth, the nationalists hoped to insure the strength and safety of both. *Id.* at 122.

32. Madison’s attack on Hamilton’s bill was the opening shot in a several decades-long debate over the constitutionality of a national bank. Despite Madison’s opposition, Congress passed the bill in early 1791, and President Washington signed it over the written objections of Secretary of State Thomas Jefferson and Attorney General Edmund Randolph. BRAY HAMMOND, BANKS AND POLITICS IN AMERICA FROM THE REVOLUTION TO THE CIVIL WAR 116-22 (1957). The bill provided that the charter of the Bank of the United States would expire in 1811, and the efforts of the Bank’s supporters to renew the charter failed in that year when Vice President George Clinton cast the deciding vote in the Senate against renewal on constitu-

began with what was virtually a mini-treatise on the construction of a written constitution; for Madison, proper constitutional argument depended on obedience to a definable set of interpretive principles. Madison laid particular emphasis on his claim that the bank bill could be justified only by a reading of the text that would "render nugatory the enumeration of particular powers."<sup>33</sup> Madison did not deny that Congress legitimately might exercise "accessory or subaltern" powers, not enumerated in the text, that were "necessary and proper for executing the enumerated powers." He maintained, however, that it was illegitimate for Congress to wield a nontextual "great and important power" simply because that power was "necessary and proper for the government or union."<sup>34</sup> In his cabinet opinion rejecting the constitutionality of the bank, Thomas Jefferson was, if possible, even more insistent that Congress be confined by the text ("[i]t was intended to lace them up straitly," he wrote) to its "enumerated powers, and those without which, as means, these powers could not be carried into effect."<sup>35</sup> For an implied power to fit within the confines of Jefferson's necessary and proper clause, it thus had to be one "without which [a textual] grant of power would be nugatory."<sup>36</sup> For both Madison and Jefferson, the Constitution's political grammar was essentially restrictive, intended to cabin in the dangers of governmental power.

Supporters of an expansive view of federal power responded not by denying the Constitution's textual nature but by criticizing the interpretive practices of their opponents. Representative Fisher Ames attacked Madison's claim of unique loyalty to the Constitution's textual limits on

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tional grounds. *Id.* at 222. However, with the support of President Madison (who by now had accepted that precedent established the constitutionality of a national bank), a new bank act passed in 1816; a 1834 bill to renew the second Bank's charter was vetoed by President Andrew Jackson for constitutional and other reasons. *Id.* at 438. Efforts to charter a third Bank were stymied by two constitutionally based vetoes of President John Tyler in 1841. *Id.* at 543.

33. James Madison, Speech in the U.S. House of Representatives (Feb. 2, 1791), in 13 MADISON PAPERS, *supra* note 22, at 372, 375.

34. *Id.* at 378, 379.

35. Thomas Jefferson, Opinion on the Constitutionality of the Bill for Establishing a National Bank (Feb. 15, 1791) [hereinafter Bank Opinion], in THOMAS JEFFERSON: WRITINGS 416, 418 (Merrill D. Peterson ed., 1984).

36. Years later, Jefferson's vigorous call for a narrow reading of the Federal Constitution's grants of power was to cause him some embarrassment as his administration and its congressional allies exercised power (most notably to purchase the Louisiana Territory) that arguably appeared to be neither textually delegated nor properly adjunct to some enumerated power. Jefferson's consistent justification of the purchase, which he privately viewed at the time as unconstitutional, was that he and the congressional majority had acted beyond the law in the best interests of the country, in a matter of the greatest urgency, and, being willing to "throw [themselves] on the justice of [their] country," were vindicated by popular approval. Letter from Thomas Jefferson to John B. Colvin (Sept. 20, 1810), in 9 THE WRITINGS OF THOMAS JEFFERSON 282 (Paul C. Ford ed., 1898) [hereinafter JEFFERSON WRITINGS].



power as false. Do “the opposers of the bank,” he asked, “mark out the limits of power which they will leave to us with more certainty than is done by the advocates of the bank? Their rules of interpretation . . . will be found as obscure, and of course as formidable as that which they condemn.”<sup>37</sup> Ames flatly refused to concede that Madison and his allies had the constitutional text on their side: “[T]hey only set up one construction against another.”<sup>38</sup> Hamilton himself crafted an elaborate argument in support of the bank bill in his cabinet opinion. Jefferson’s strict interpretation of “necessary” in the Necessary and Proper Clause<sup>39</sup> was required neither by “the grammatical, nor popular sense of the term,” whereas the “whole turn of the clause containing it, indicates, that it was the intent of the convention, by that clause to give a liberal latitude to the exercise of the specified powers.”<sup>40</sup> Jefferson’s apparent hostility toward congressional power rested not on the requirements of the text but on the busy activity of the “[i]magination,”<sup>41</sup> Hamilton insisted. A true respect for the written Constitution required instead the application of the “sound maxim of construction” that governmental powers “ought to be construed liberally in advancement of the public good.”<sup>42</sup> Ames and Hamilton found in the Constitution an endorsement of governmental action for the benefit of society; their political grammar was expansive, open-ended, linked to the benign purposes of the Constitution rather than to its textual details.<sup>43</sup>

Throughout the founding period, nationalists and their opponents battled over who could lay proper claim to the text in support of their constitutional views. Representative Alexander Smyth confidently assumed in 1818 that faithfulness to the text required a narrow reading of federal authority—he described “liberal construction” as “a stretch of

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37. Fisher Ames, Speech in the U.S. House of Representatives (Feb. 3, 1791), in 2 WORKS OF FISHER AMES 850, 854 (W.B. Allen ed., 1983).

38. *Id.*

39. U.S. CONST. art. I, § 8, cl. 18.

40. Alexander Hamilton, Opinion on the Constitutionality on an Act to Establish a Bank (Feb. 23, 1791), in 8 THE PAPERS OF ALEXANDER HAMILTON 63, 102-03 (Harold C. Syrett ed., 1965) [hereinafter HAMILTON PAPERS].

41. *Id.* at 101.

42. *Id.* at 105.

43. Ames stated that

Congress may do what is necessary to the end for which the Constitution was adopted, provided it is not repugnant to the natural rights of man, or to those which they have expressly reserved to themselves, or to the powers which are assigned to the states. . . . That construction may be maintained to be a safe one which promotes the good of society, and the ends for which the government was adopted, without impairing the rights of any man, or the powers of any state.

Ames, *supra* note 37, at 856.

the Constitution” and a “usurpation” of power.<sup>44</sup> But Justice Joseph Story was equally confident, writing two years before, that “a reasonable construction, according to the import of [the Constitution’s] terms,” supported his own nationalist views.<sup>45</sup> Other debates concerned the relationship between the Constitution’s text and political concepts such as that of the separation of powers, or the “mixed” constitution. Albert Gallatin, for example, assured the House of Representatives in 1798 that the Constitution embodied a system of checks and balances: “We have always been taught to believe that, in all mixed Governments and especially in our own, the different departments mutually operated as checks one upon the other.”<sup>46</sup> Others rejected the application of concepts drawn from political theory as an interpretive mistake: William Branch Giles argued in 1808 that “[i]t was his wish to discard these technical, general terms, which rather embarrass than assist us in the correct interpretation of the Constitution. . . . [T]he Constitution, as it is, should be a standard of interpretation, not what it is described to be by general borrowed mis-applied phrases.”<sup>47</sup>

The interminable debate over how to read constitutional language produced a variety of attempts to capture the political grammar of the Constitution in a formula. In the 1790s nationalistic Federalists tended to emphasize the purposive nature of the text, its orientation toward authorizing certain ends and achieving certain purposes. Ames was representative: “Congress may do what is necessary to the end for which the Constitution was adopted, provided it is not repugnant to the natural rights of man or to those which they have expressly reserved to themselves or to the powers which are assigned to the states.”<sup>48</sup> Opposition constitutionalists, not surprisingly, focused on the Constitution’s limiting functions; in 1803, Tucker wrote that

[a]s federal it is to be construed strictly, in all cases where the antecedent rights of a *state* may be drawn in question; as a social compact it ought likewise to receive the same strict construction, wherever the right of personal liberty, of personal security, or of private property may become the subject of dispute.<sup>49</sup>

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44. 31 ANNALS OF CONG. 1146 (1818).

45. *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 326 (1816).

46. 8 ANNALS OF CONG. 1121-22 (1798).

47. 17 ANNALS OF CONG. 115-16 (1808).

48. Ames, *supra* note 37, at 856.

49. St. George Tucker, *View of the Constitution of the United States*, in 1 WILLIAM BLACKSTONE, COMMENTARIES WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND THE COMMONWEALTH OF VIRGINIA app. at 140, 151 (St. George Tucker 1803). The connection the opposition

The emergence of Republican nationalism in the wake of the War of 1812 brought with it new and creative efforts to explicate standards for constitutional interpretation.<sup>50</sup> As Henry Clay insisted in 1818, these new nationalists regarded themselves as faithful heirs of “the principles of ’98”;<sup>51</sup> Clay cited Madison’s *Report of 1800* and then explained that “from that paper, and from others of analogous principles, he had imbibed those constitutional principles which had influenced his political course.”<sup>52</sup> But Clay, like most other Republican leaders in post-war Washington, had come to fear federal weakness more than federal oppression. As a consequence, his formulation of the proper approach to construing the Federal Constitution was an attempt to reconcile nationalist goals with Republican principles. Clay explained:

In expounding the instrument, constructions unfavorable to personal freedom, or those which might lead to great abuse, ought to be carefully avoided. But if, on the contrary, the construction insisted upon was, in all its effects and consequences, beneficent; if it were free from the danger of abuse; if it promoted and advanced all the great objects which led to the confederacy; if it materially tended to effect the greatest of all those objects—the cementing of the Union, the construction was recommended by the most favorable considerations.<sup>53</sup>

The Republican Clay’s standard of interpretation, and indeed his application of it, scarcely differed from that enunciated a year later by the Federalist Chief Justice John Marshall:<sup>54</sup> “Let the end be legitimate, let

Republicans drew between the *Federal* Constitution’s textuality and its bias (as they saw it) against power logically might have influenced in a libertarian direction their treatment of state constitutions (which, for the most part, were entirely instruments of restraint rather than specifications of authority). Although there were occasional hints of this, *see* Chancellor George Wythe’s unreported opinion in *Hudgins v. Wright*, discussed in *Hudgins*, 11 Va. (1 Hen. & M.) 133, 134 (1806), there seem to have been few systematic differences in this period between Republicans and Federalists on state constitutional issues. *See, e.g.*, *People v. Croswell*, 3 Johns. Cas. 337 (N.Y. 1804) (a famous freedom of speech case where a Republican judge joined the lone Federalist on the bench in accepting Alexander Hamilton’s argument in defense of free speech; the other two Republican judges rejected the speech argument).

50. As noted *supra* note 49, Republican constitutional opinion tended to drift in a nationalist direction after the Republicans secured control of the national government in 1801. The War of 1812, which seemed to many to prove the necessity of a centralized government for the health and even survival of the Republic, accelerated this tendency. *See* SELLERS, *supra* note 4, at 70-102 (describing post-war Republican nationalism).

51. Republicans of the early nineteenth century usually professed allegiance to the constitutional doctrines articulated in the famous Virginia and Kentucky Resolutions of 1798 and the *Report of 1800* written by Madison.

52. Henry Clay, Speech on Internal Improvements (March 7, 1818), in 2 THE PAPERS OF HENRY CLAY 448 (James F. Hopkins ed., 1961) [hereinafter CLAY PAPERS].

53. *Id.* at 449.

54. The rapprochement between newly nationalistic Republicans such as Clay and tradi-

it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional."<sup>55</sup> Earlier in his opinion Marshall acknowledged, as Clay had, that cases involving "the great principles of liberty" might require more searching interpretive scrutiny.<sup>56</sup> For Clay and Marshall, the rules governing constitutional argument over the distribution of legitimate governmental power were not identical to those concerning constitutional limitations on power.

On occasion, arguments about the meaning of a constitutional text were couched in terms of a narrow literalism. Delivering his opinion in *Chisholm v. Georgia* on the question of whether Article III of the Constitution<sup>57</sup> authorized a suit against an unwilling state by the citizen of another state, Justice John Blair asserted that "[t]he constitution of the United States is the only fountain from which I shall draw; the only authority to which I shall appeal."<sup>58</sup> For Justice Blair, the question presented in *Chisholm*, therefore, was easy: "A dispute between A. and B. is surely a dispute between B. and A."<sup>59</sup> By contrast, in *Kemper v. Hawkins*, Justice William Nelson was unwilling to draw any certain conclusion from the verbal structure of a sentence in the Virginia Constitution's provision regarding the state judiciary:<sup>60</sup> "[P]erhaps it would be

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tionally nationalistic Federalists such as Marshall was embodied in the person of Marshall's colleague, Joseph Story. Story was a Massachusetts Republican whose adherence to the party of Jefferson was the cause of significant personal disadvantage early in his career; Madison appointed him to the Supreme Court to secure a majority of the seats on the Court for Republicans. See R. KENT NEWMYER, *JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC* 45-52 (1985) (describing Story's problems as a young Republican lawyer in Federalist Massachusetts); *id.* at 70-71 (discussing Story's appointment to the Court). Once on the Court, Story quickly established a position as perhaps the most nationalistic of the Justices, *id.* at 97-114, while retaining at first a partisan self-identification as a Republican. See Letter from Joseph Story to Nathaniel Williams (Feb. 22, 1815), in 1 WILLIAM W. STORY, *LIFE AND LETTERS OF JOSEPH STORY* 254 (1851) (discussing the Republican party's "golden opportunity" to place itself "permanently in power," Story wrote, "I pray God that it may not be thrown away").

55. *M'Culloch v. Maryland*, 17 U.S. (4 Wheat) 316, 421 (1819).

56. *Id.* at 401.

57. The immediately relevant language of Article III was "the judicial power shall extend . . . to controversies . . . between a State and Citizens of another State." U.S. CONST. art. III, § 2, cl. 1.

58. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 450 (1793) (Blair, J.).

59. *Id.*

60. The state constitution directed the legislature to appoint "judges of the supreme court of appeals, and general court, judges in chancery." VA. CONST. art. XIV (1776). Nelson considered but rejected as overnice the argument that the repetition of the word "judges" "evinced an intention that the judges of the general court and those in chancery should be distinct persons." *Kemper v. Hawkins*, 3 Va. (1 Va. Cas.) 20, 33 (Nelson, J. 1793).

unjustifiable to rest such an opinion on so critical a construction.”<sup>61</sup> Indeed, the rejection of literalism sometimes went even further. A literal interpretation of the Ex Post Facto Clause, Justice Samuel Chase concluded in *Calder v. Bull*,<sup>62</sup> was simply impossible; he was “under a necessity to give a construction, or explanation of the words ‘*ex post facto* laws,’ because they have not any certain meaning attached to them.”<sup>63</sup> Justice William Johnson held a similar opinion of the Contracts Clause,<sup>64</sup> expressing regret that “words of less equivocal signification had not been adopted in that Article of the Constitution.”<sup>65</sup> Justice Johnson was confident that the Constitution was not meant to prohibit a great variety of beneficial legislative adjustments of contract law, but professed himself (almost) at a loss about “where to draw the line, or how to define or limit the words, ‘obligation of contracts.’”<sup>66</sup>

Constitutional arguments in this period often rested on the claim that some of the terms used in a constitution had fixed or technical meanings prior to their use there, and that these meanings were “incorporated” into the constitution itself. Despite their dislike for the retrospective state legislative action at issue in *Calder*, the Justices of the United States Supreme Court refused to invalidate it as a violation of the Ex Post Facto Clause. As Justice Chase pointed out, the term “*ex post facto* law,” according to Blackstone, Woodeson (Blackstone’s successor as Vinerian Professor), the *Federalist*, and the constitutions of Massachusetts, Maryland and North Carolina, referred only to laws creating or increasing criminal liability.<sup>67</sup> Since *Calder* did not involve the criminal law, the Court held the Ex Post Facto Clause inapplicable. The Justices believed, as Justice William Paterson explained, that the words of the clause “must be taken in their technical, which is also their common and general acceptance, and are not to be understood in their literal sense.”<sup>68</sup>

The debate over the constitutionality of the Sedition Act of 1798<sup>69</sup>

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61. *Kemper*, 3 Va. (1 Va. Cas.) at 33 (Nelson, J.).

62. 3 U.S. (3 Dall.) 386 (1798).

63. *Id.* at 395 (Chase, J.).

64. U.S. CONST. art. I, § 10, cl. 1.

65. *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 144 (1810) (Johnson, J.).

66. *Id.* at 145 (Johnson, J.).

67. *Calder*, 3 U.S. (3 Dall.) at 391 (Chase, J.).

68. *Id.* at 397 (Paterson, J.).

69. 1 Stat. 596 (1798). A Federalist-controlled Congress passed the Sedition Act as well as three statutes dealing with naturalization and the control of resident aliens. See 1 Stat. 566 (1798) (increasing residency period necessary for naturalization from five to fourteen years); 1 Stat. 570 (1798) (authorizing deportation of aliens the President deemed dangerous); 1 Stat. 577 (1798) (authorizing detention or deportation of alien enemies in wartime). The Sedition Act criminalized the publication of “false, scandalous and malicious . . . writings” defaming the President, Congress, or the federal government generally, during the undeclared naval war

produced a variety of arguments over how to employ the pre-adoption history of language used in the United States Constitution in the interpretation of that instrument. Defending the Act, Representative Harrison Gray Otis used the same form of argument accepted by the Justices in *Calder*. Otis cited Blackstone as well as pre-1789 state law to support his claim that when the First Amendment guaranteed "the freedom of speech, [and] of the press" it had used terminology with "a certain [i.e., fixed] and technical meaning." So understood, "the liberty of the press is merely an exemption from all previous restraints," which restraints, of course, the Sedition Act made no attempt to create.<sup>70</sup> Critics of the Act responded that the profound political differences between "the British government and the American constitutions"<sup>71</sup> rendered this crabbed Blackstonian understanding of freedom of the press inapplicable to an American constitutional provision. Madison's 1798 Virginia Resolutions and his *Report of 1800* added a second argument.<sup>72</sup> The Virginia state convention that ratified the Federal Constitution had submitted with its instrument of ratification both a resolution explaining that it approved the Constitution with the understanding that "the liberty of conscience and of the press, cannot be cancelled, abridged, restrained or modified by any authority of the United States"<sup>73</sup> as well as a proposed amendment (also suggested by other state conventions, Madison added) safeguarding those freedoms.<sup>74</sup> This history, Madison argued, reenforced his claim that according to the "plain sense and intention"<sup>75</sup> of the First Amendment, the Sedition Act was unconstitutional.

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with France of 1798-1801. The Alien and Sedition Acts were motivated at least in part by genuine fears that critics of the government were intentionally preparing the Republic for social revolution or French invasion, but they obviously were susceptible to employment for partisan Federalist purposes. See PRESSER, *supra* note 7, at 118-21 (discussing the Sedition Act's purposes).

70. 8 ANNALS OF CONG. 2147-48 (1798).

71. James Madison, The Report of 1800 (Jan. 7, 1800) [hereinafter Report of 1800], in 17 MADISON PAPERS, *supra* note 22, at 336.

72. In response to the passage of the Alien and Sedition Acts, Jefferson and Madison secretly drafted two sets of resolutions denouncing the constitutionality of the Acts. The Kentucky legislature adopted Jefferson's resolutions, with some modifications, in November 1798, and the Virginia legislature approved Madison's set the following month. To the disappointment of the Republican leadership, no other state endorsed the resolutions, and indeed several Northern state legislatures formally denounced them. The Kentucky legislature adopted a brief reiteration of its position in 1799, and Madison (who entered the Virginia General Assembly for this purpose) wrote a report vindicating the Virginia Resolutions that was approved in January 1800. Politically unsuccessful at the time, the Virginia and Kentucky Resolutions of 1798 and 1799 and Madison's *Report of 1800* enjoyed a prominent afterlife as the official standard of Republican orthodoxy.

73. Report of 1800, *supra* note 71, at 345.

74. *Id.* at 345-46.

75. *Id.* at 308.

The language of “intent(ion),” invoked by Jefferson and Madison in their respective 1798 resolutions, played a varying role in constitutional debate in this period. At times, as in the 1799 Kentucky Resolutions’ reference to the Constitution’s “obvious and real intention,”<sup>76</sup> these terms seem to be little more than synonyms for “meaning,” and to be compatible with various forms of strictly textual argument. On certain, relatively rare occasions, the suggestion was made that the meaning of constitutional language could be established by consulting the history of its creation; such invocations of the modern modality of originalist interpretation seldom if ever went unchallenged.<sup>77</sup> Madison, for example, criticized President Washington for a 1796 message to the House of Representatives, referring to the actions of the Philadelphia framers as misguided because it was the state ratifying conventions that turned the framers’ “draught of a plan, nothing but a dead letter” into a living fundamental law.<sup>78</sup> Madison recalled that his own incidental reference to the framers in a 1791 speech against the national bank bill “was animadverted on by several” other congressmen, including Madison’s fellow-framer Elbridge Gerry, who “protest[ed], in strong terms, against arguments drawn from that source”; indeed, Madison asserted, “he did not believe a single instance could be cited in which the sense of the Convention had been required or admitted as material in any Constitutional question.”<sup>79</sup> For the most part, the attitude of constitutionalists in this period was expressed by Judge Roane interpreting the Virginia Declaration of Rights in an 1804 case. Having “examined the journals of the convention [which drafted and adopted the Declaration] touching the present subject,” Roane explained, he was satisfied that there was “in them nothing varying the construction, arising from the instrument it-

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76. Kentucky Resolutions of 1799 (Nov. 22, 1799), in 4 ANNALS OF AMERICA 106 (William Benton ed., 1968).

77. See Hans W. Baade, “Original Intent” in *Historical Perspective: Some Critical Glosses*, 69 TEX. L. REV. 1001, 1103-07 (1991) (discussing historical use of “intent” language). The point is not, of course, that founding-era Americans did not invoke the original and intended meaning of constitutional instruments in argument, but that they did not customarily regard the tools of originalist interpretation (e.g., the records of framing or ratifying conventions) as dispositive of that meaning.

78. James Madison, Speech in the House of Representatives (Apr. 6, 1796), in 16 MADISON PAPERS, *supra* note 22, at 296.

79. *Id.* at 295. Madison also expressed doubts about the value of the records of the state conventions, although those bodies were the legal creators of the Constitution-as-law. The state conventions’ debates, he insisted, were not entirely to be trusted for accuracy: even Virginia’s, the most trustworthy, “contained internal evidence in abundance of chasms, and misconceptions of what was said.” *Id.* Even the conventions’ formal acts—Madison had in view the various proposals for constitutional amendments—lacked “precision and system” and included “apparent inconsistencies” due to “[t]he agitations of the public mind on that occasion” and “the hurry and compromise” in which the amendments were drafted. *Id.* at 296-97.

self.” But Roane had done so solely “as a matter of curiosity,” for he “deem[ed] it right to reject all extraneous information in forming [his] conclusion upon the constitution.”<sup>80</sup> Roane, as we shall see below, was no textual literalist, but neither he nor anyone else in the period regarded the records of a constitution’s origins as the sole determinants of a constitution’s meaning.

### C. *Extra-Textual Constitutional Argument*

American constitutional discourse in this period was not conducted solely in terms of arguments from, or about the meaning of, the texts of the federal and state constitutions. Indeed, a striking feature of early constitutional debate was the invocation of a veritable host of extratextual authorities: “the spirit of the Constitution”; the “fundamental principles” of the constitution, of free government, or of republicanism; “natural justice”; and so on. Such phrases often are difficult to interpret with confidence,<sup>81</sup> although certain general tendencies in their use do seem to be identifiable.

Apparent references to extratextual sources of constitutional meaning often were nothing more than rhetorical modes of rejecting a narrow literalism. In 1793, Attorney General Edmund Randolph argued to the United States Supreme Court that, having shown that he had “the advantage of the letter [of Article III] on [his] side,” he would then “advert to the *spirit* of the Constitution, or rather its *genuine and necessary interpretation*.”<sup>82</sup> Randolph’s subsequent remarks primarily addressed other clauses of the Constitution as well as its overall nature. Randolph’s “spirit of the constitution” seems equivalent to Justice James Wilson’s “general texture of the Constitution” in Wilson’s opinion in the same case.<sup>83</sup> The point of such rhetoric was to insist on the legitimacy of treating the constitutional text as a coherent whole with an overall structure rather than as a collection of isolated and disparate rules. Hamilton’s discussion of “resulting powers” in his 1791 bank opinion is in large part the same sort of argument: The Congress legitimately possesses not only the discrete powers explicitly enumerated in the text, and the (again discrete) implied powers accompanying the former, but also those powers

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80. *Turpin v. Lockett*, 10 Va. (6 Call) 113, 176 (1804) (Roane, J.).

81. For three important, although by no means identical, treatments, see Terry Brennan, *Natural Rights and the Constitution: The Original “Original Intent,”* 15 HARV. J.L. & PUB. POL’Y 965, 1028-29 (1992); Leslie F. Goldstein, *Popular Sovereignty, the Origins of Judicial Review, and the Revival of Unwritten Law*, 48 J. POL. 51, 69 (1986); and Suzanna Sherry, *The Founders’ Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1176-77 (1987).

82. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 421 (1793) (stating argument of counsel).

83. *Id.* at 465 (Wilson, J.).



that “result from the whole mass of the powers of the government” contained in the Constitution.<sup>84</sup> Hamilton went on, however, to refer to a second justification for the existence of the “resulting powers”—“the nature of political society”—which is an example of a second form of argument in extratextual terms.

References to “fundamental principles” and similar phrases frequently seem to allude to those political values, theories, and goals which the speaker or writer believed were the background of a constitutional text, and were therefore somehow embodied in it. This form of argument clearly went beyond textual exegesis without thereby asserting the direct or unmediated constitutional significance of extratextual principle. In 1793 Judge John Tyler defined the Virginia Constitution in successive sentences as “the great contract of the people” and as “[a] system of fundamental principles.”<sup>85</sup> It was a “fundamental principle” of the Virginia Constitution, Judge Tucker asserted in 1804, “that private property shall be sacred and inviolable,”<sup>86</sup> and legislative acts protecting property rights “may be considered as pursuing the injunctions of moral justice.”<sup>87</sup> But this great moral principle did not need to be ascertained through philosophical inquiry, for it could be found in “our bill of rights.”<sup>88</sup> A decade later, North Carolina Chief Justice John Louis Taylor described a state law permitting debtors to obtain stays on the execution of adverse judgments as a violation of “the first principles of justice,”<sup>89</sup> but he plainly did not rest his decision invalidating the law on that basis. Taylor instead described the Federal Constitution as designed to embody the “master principles and comprehensive truths” of political morality and thereby “to give them practical effect.”<sup>90</sup> The North Carolina statute could not be enforced because it was “clearly irreconcilable”<sup>91</sup> with “the plain and natural import of the words of the Constitution of the United States.”<sup>92</sup>

Judges sometimes invoked the “spirit” or “principles” of a constitution to describe a constitutional principle that they believed implicit in or imperfectly expressed by the text. President Edmund Pendleton of the

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84. Hamilton, *supra* note 40, at 100.

85. *Kemper v. Hawkins*, 3 Va. (1 Va. Cas.) 20, 59 (1793) (Tyler, J.).

86. *Turpin v. Lockett*, 10 Va. (6 Call) 113, 152 (1804) (Tucker, J.).

87. *Id.*

88. *Id.* The first section of the 1776 Virginia Declaration of Rights ascribed to “all men” “certain inherent rights . . . namely, the enjoyment of life and liberty, with the means of acquiring and possessing property.” VA. DECLARATION OF RIGHTS art. I (1776).

89. *Jones v. Crittenden*, 4 N.C. (Car. L. Rep.) 55, 57 (1814).

90. *Id.* at 56.

91. *Id.* at 63-64.

92. *Id.* at 56.

Virginia Court of Appeals explained an early constitutional decision of his court as one that “preserved the Spirit of the Constitution and was the best Interpretation which the Inaccurate words of the Constitution would admit of.”<sup>93</sup> In *Marbury*, Chief Justice Marshall stated as a general proposition of apparently fundamental nature that “[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.”<sup>94</sup> Marshall’s affirmative assertion that the plaintiff before him possessed such a right, however, rested on the text of Article III defining “the judicial Power of the United States.”<sup>95</sup> Marshall stated, “This power is expressly extended to all cases arising under the laws of the United States; and consequently, in some form, may be exercised over the present case; because the right claimed is given by a law of the United States.”<sup>96</sup>

Perhaps the most interesting set of extratextual arguments is that which, arguably, indicated a judicial willingness to invalidate legislative acts directly on the basis of extratextual principle.<sup>97</sup> Unfortunately for those scholars seeking to find founding-era examples of “noninterpretivist” constitutional argument, most seemingly clear examples of judicial review on extratextual grounds turn out on closer examination to be ambiguous. The *locus classicus* is Justice Samuel Chase’s opinion in *Calder v. Bull*.<sup>98</sup> Chase rather flamboyantly announced that

[t]here were certain *vital* principles in our *free Republican governments*, which will determine and over-rule an *apparent and flagrant* abuse of legislative power; as to authorize *manifest injustice by positive law* . . . [t]he *genius*, the *nature*, and the *spirit* of our State Governments, amount to a prohibition of *such acts of legislation*; and the *general principles of law and reason* forbid them.<sup>99</sup>

Chase’s language at first seems unequivocally to endorse direct judicial use of these principles regardless of their embodiment in a constitutional

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93. Letter from Edmund Pendleton to James Madison (Nov. 8, 1782), in 2 LETTERS AND PAPERS OF EDMUND PENDLETON 428 (David J. Mays ed., 1967).

94. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

95. U.S. CONST. art. III, § 1, cl. 1.

96. *Marbury*, 5 U.S. (1 Cranch) at 173-74.

97. On occasion, somewhat similar themes can be found in legislative contexts. For example, Vice President Aaron Burr privately expressed concerns in 1802 about the eventually successful attempt to abolish the circuit judgeships created by the 1801 “Midnight Judges Act.” Although he believed it clear that Congress possessed the “Constitutional right [and] power” to do so, he questioned “whether it would be constitutionally Moral.” Letter from Aaron Burr to Barnabus Bidwell (Feb. 1, 1802), in 2 POLITICAL CORRESPONDENCE AND PUBLIC PAPERS OF AARON BURR 659-60 (Mary-Jo Kline & Joanne Wood Ryan eds., 1983).

98. 3 U.S. (3 Dall.) 386, 395 (1798).

99. *Id.* at 388.

text: "To maintain that our Federal, or State, Legislature possesses *such powers*, if they had not been *expressly* restrained; would, in my opinion, be a *political heresy*, altogether inadmissible in our *free republican governments*."<sup>100</sup> Chase's actual behaviour, however, sets this interpretation of his meaning in question. He resolved the case on the basis of a strictly textual argument and, later in his opinion, apparently denied the Federal Supreme Court's power to invalidate a state statute except "in a very clear case" of conflict with the United States Constitution.<sup>101</sup> Chase probably meant to assert nothing more than the existence of principles of political morality that bind legislators' consciences and that, to the extent they are incorporated into a constitutional text, are enforceable by courts.

Other well-known instances of extratextual judicial review present similar ambiguities. Justice Joseph Story's opinion for a unanimous Supreme Court in *Terrett v. Taylor*<sup>102</sup> arguably rested on the general principle of vested rights in holding a state statute invalid. Story, however, summarized the Court's rationale in a sentence that yoked the textual and extratextual: "[W]e think ourselves standing upon the principles of natural justice, upon the fundamental laws of every free government, upon the spirit and letter of the constitution of the United States, and upon the decisions of the most respectable judicial tribunals."<sup>103</sup> Story, to be sure, did not explain on *which* part of the "letter of the constitution" he had found his footing. In *Fletcher v. Peck*,<sup>104</sup> Marshall followed Hamilton's much earlier example<sup>105</sup> of combining textual and extratextual bases in order to invalidate Georgia's statutory revocation of land grants: "[T]he state of Georgia was restrained, either by general principles which are common to our free institutions, or by the particular provisions of the constitution of the United States."<sup>106</sup> Only Justice William Johnson, in a concurring opinion, relied unequivocally and exclusively on what he termed "a general principle, on the reason and nature of things."<sup>107</sup>

Argument—even ambiguous argument—from extratextual sources of authority sometimes provoked criticism. Justice James Iredell re-

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100. *Id.* at 388-89.

101. *Id.* at 393.

102. 13 U.S. (9 Cranch) 43, 53 (1815).

103. *Id.* at 52.

104. 10 U.S. (6 Cranch) 87, 125 (1810).

105. Alexander Hamilton, Opinion of Counsel (Mar. 25, 1796), in 4 THE LAW PRACTICE OF ALEXANDER HAMILTON 430-31 (Julius Goebel, Jr. & Joseph H. Smith eds., 1980).

106. *Fletcher*, 10 U.S. (6 Cranch) at 139.

107. *Id.* at 143 (Johnson, J., concurring).

sponded to Chase's opinion in *Calder* by denying that the Supreme Court possessed any power to invalidate a statute "merely" because it was, in the Court's opinion, "contrary to the principles of natural justice."<sup>108</sup> Iredell sharply distinguished the "ideas of natural justice [which] are regulated by no fixed standard [and upon which] the ablest and the purest men have differed" from the "fundamental law" established by written constitutions that "define[s] with precision the objects of the legislative power, and . . . restrain[s] its exercise within marked and settled boundaries."<sup>109</sup> Only the latter, in Iredell's view, could provide a legitimate basis for judicial review. Judges less dubious than Iredell about the possibility of identifying the "dictates of moral justice"<sup>110</sup> nevertheless shared his unwillingness to rest the power of judicial review on that basis: Justice Tucker wrote in *Turpin v. Locket* that "a court of justice can only pronounce the act [of the legislature] void so far as it contains any thing, which the constitution of the commonwealth prohibits."<sup>111</sup> The political grammar of the founding era recognized the existence and importance of broad principles of justice and free government; Americans, for the most part, did not think that those principles were legally obligatory in the same fashion as the textual commands of a constitutional instrument.

#### D. *The Authority of Precedent in Constitutional Argument*

The proper role of legislative and judicial precedent in constitutional argument was ambiguous during this period. Americans often contrasted their written fundamental laws with the English "constitution," comprised of what Representative Peter B. Porter in 1811 called "immemorial usage or prescription."<sup>112</sup> The latter was, in its essence, nothing but a collection of precedents: "Whatever the government, or any branch of it had *once done*, it was inferred they had a *right* to do *again*."<sup>113</sup> The very point of a "printed Constitution" thus might seem the rejection of reliance on precedent, and such arguments were made on a number of important occasions. When the national bank act came up for renewal in 1811, its supporters relied in part on the argument that the "Constitutional question" of its legitimacy "must be considered as settled, adjudicated, and at rest."<sup>114</sup> The First Congress had debated fully the act's constitutionality, and President Washington had approved it af-

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108. *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 399 (1798) (Iredell, J.).

109. *Id.*

110. *Turpin v. Locket*, 10 Va. (6 Call) 113, 150 (1804) (Tucker, J.).

111. *Id.* at 156.

112. 22 ANNALS OF CONG. 643 (1811).

113. *Kemper v. Hawkins*, 3 Va. (1 Va. Cas.) 20, 78 (1793) (Tucker, J.).

114. 22 ANNALS OF CONG. 642 (1811) (Rep. Porter's summary of his opponents' views).

ter careful consideration of the issue; later Congresses, Presidents, and the federal courts had assumed and acted upon the assumption that the act was valid. Representative Porter attacked this argument as a “doctrine of prescriptive Constitutional rights,” and explained subsequent acquiescence in the original bank act as based on respect for the private rights created by the act.<sup>115</sup> Senator Henry Clay denounced reliance on legislative precedent as

fraught with the most mischievous consequences. . . . [O]nce substitute *practice* for principle—the expositions of the constitution for the text of the constitution, and in vain shall we look for the instrument in the instrument itself! It will be as diffused and intangible as the pretended constitution of England. And it must be sought for in the statute book, in the fugitive journals of Congress, and in reports of the Secretary of the Treasury<sup>116</sup>

As members of Congress, Porter told the House, he and his colleagues were “solemnly bound, by our oaths, to obey” the Constitution’s “injunctions . . . as we, in our best judgments shall understand them and not as they shall be interpreted to us by others.”<sup>117</sup>

Despite the theoretical cogency of Porter’s and Clay’s position, most Americans of the period rejected it in favor of recognizing as legitimate the role of legislative and judicial precedent in deciding constitutional questions. Founding-era legal thought generally accepted a “traditional” concept of precedent: The decisions of courts and other law-declaring institutions “claim[ed] authority not in virtue of having been decided or settled, but in virtue of having a place within a recognized . . . process of reflective judgment exercised within this body of experience, which is itself authoritative because of its historical links to a shared sense of identity in the community.”<sup>118</sup> Thus William W. Hening, an important early reporter and legal writer, explained that “[a]ll judicial determinations, to be regarded as authority, must be brought to the standard of justice and common sense.” The law could be considered settled only by the concur-

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115. *Id.* at 643.

116. Henry Clay, Speech on the Bill to Recharter the Bank of the United States (Feb. 15, 1811), in 1 CLAY PAPERS, *supra* note 52, at 537. Clay’s remark about “reports of the Secretary of the Treasury” was a reference to Hamilton’s 1790 *Second Report on the Further Provision Necessary for Establishing Public Credit*, which recommended the creation of a national bank. See McDONALD, *supra* note 31, at 192-97 (describing the *Second Report*).

117. 22 ANNALS OF CONG. 643 (1811).

118. Gerald J. Postema, *Some Roots of our Notion of Precedent*, in PRECEDENT IN LAW 22 (Laurence Goldstein ed., 1987); see also GERALD J. POSTEMA, BENTHAM AND THE COMMON LAW TRADITION 10 (1986) (noting that in classical common law, judges were always free “to test the formulation of the rule [in a past precedent] against the practice of the (legal) community”).

rence of "good and enlightened men."<sup>119</sup> Similarly, those who accepted the power of legislative precedent or "practice" to fix constitutional meaning did not believe that any and every legislative action, by itself and immediately, became "part of the [constitutional] instrument."<sup>120</sup> Arguments based on legislative precedent almost invariably relied on the existence of "a course of practice" approved deliberately and repeatedly over time by the responsible organs of government<sup>121</sup> and approved by "the uniform acquiescence of the nation."<sup>122</sup> Madison's explanation of his 1816 approval of the second bank bill and his 1817 veto of an internal improvements bill was that the former was supported by twenty-five years of acceptance of the legitimacy of national banks<sup>123</sup> which the latter did not enjoy. Argument from practice could not, in other words, be based on "insufficient precedents,"<sup>124</sup> ones ill-thought-through, short-lived, or intermittent.<sup>125</sup>

The defenders of legislative precedent as a source of constitutional argument rejected critics' allegations that they were ignoring the textual nature of American constitutions. Justifying an 1818 internal improvements bill on the basis of earlier exercises of Congress' spending power, Representative John C. Calhoun (at this point in his career a strong supporter of federal power) denied that his reliance on a "uniform course of legislation" replaced a Constitution of "positive and written principles"

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119. WILLIAM W. HENING, *THE NEW VIRGINIA JUSTICE* iv (3d ed. 1820).

120. *Turpin v. Lockett*, 10 Va. (6 Call) 113, 185 (1804) (Lyons, P., & Carrington, JJ.).

121. Letter from James Madison to Charles Jared Ingersoll (June 25, 1831) [hereinafter Letter from Madison to Ingersoll], in *THE MIND OF THE FOUNDER* 389, 391-92 (Marvin Meyers ed., 1981).

122. 32 *ANNALS OF CONG.* 1325 (1818) (speech of Henry St. G. Tucker).

123. Letter from Madison to Ingersoll, *supra* note 121, at 393. Madison dismissed the defeat of the first bank's renewal in 1811, which came about by Vice President George Clinton's tie-breaking Senate vote against the bill on constitutional grounds, as irrelevant. *See id.* The Senate was evenly divided on the renewal bill as a result of "a junction of those who admitted the power [of Congress to establish a bank], but disapproved the plan, with those who denied the power. On a simple question of constitutionality, there was a decided majority in favour of it." *Id.*

124. Madison, *supra* note 29, at 388.

125. The importance of public acceptance in the maturation of legislative action into precedent encouraged the opponents of controversial statutes to seek prominent means of memorializing their views. The Kentucky Resolutions of 1799, for example, announced the state's intention not to resist the Alien and Sedition Acts, but immediately stated that "in order that no pretext or arguments may be drawn from a supposed acquiescence on the part of this commonwealth in the constitutionality of these laws, and be thereby used as precedents for similar violations of the federal compact, this commonwealth does now enter against them its solemn protest." Kentucky Resolutions of 1799, *supra* note 76, at 107. Years later Henry St. George Tucker remarked that "[i]t would be absurd to speak of the alien and sedition laws as precedents. It would be absurd to attribute the sanctity of national acquiescence, to measures which were received with the deep toned murmurs of national disapprobation." 32 *ANNALS OF CONG.* 1326 (1818).

with one “founded on precedents”: “[H]e introduced the uniform sense of Congress and the country (for they had not been objected to) as to our powers; and surely, said he, they furnished better evidence of the true interpretation of the Constitution than the most refined and subtle arguments.”<sup>126</sup> Madison defended the apparent inconsistency in his attitude toward a national bank—constitutional opposition in 1791 followed by presidential approval in 1816—as a simple consequence of his acceptance of “the respect due to deliberate and reiterated precedents.”<sup>127</sup> For Madison it was “a constitutional rule of interpreting a Constitution” that “abstract and individual opinions” of the text’s meaning had to yield to “a course of precedents amounting to the requisite evidence of the national judgment and intention.”<sup>128</sup>

Unless “practice” and “uniform acquiescence” could “serve as landmarks for subsequent legislatures,” Henry St. George Tucker argued to the House of Representatives in 1818,<sup>129</sup> debatable constitutional issues could never be settled.

Do gentlemen suppose that if, which Heaven permit! this confederation of States shall last for a century, we shall, throughout that period, be continually mooting Constitutional points; holding nothing as decided; admitting no construction to have been agreed upon; and, instead of going on with the business of the nation, continually occupied with fighting, over and over again, battles a thousand times won?<sup>130</sup>

Discussing legislative interpretations of the Virginia Declaration of Rights, Judges Peter Lyons and Paul Carrington summarized this widely-held view: “[w]ritten constitutions are, like other instruments, subject to construction; and, when expounded, the exposition, after long acquiescence, becomes, as it were, part of the instrument; and can, no more, be departed from, than that.”<sup>131</sup>

Some constitutionalists questioned the precedential value of particular legislative acts. Judge Spencer Roane refused to recognize Virginia legislation on the subject of church lands as an authoritative interpretation of the religious-freedom provision of the state bill of rights because of the legislation’s “errors and inconsistency.”<sup>132</sup> One statute, he wrote,

126. John C. Calhoun, Speech on Internal Improvements (Feb. 4, 1817), in 1 THE PAPERS OF JOHN C. CALHOUN 398, 404 (Robert L. Meriwether ed., 1959).

127. Letter from Madison to Ingersoll, *supra* note 121, at 393.

128. *Id.* at 392-93.

129. 32 ANNALS OF CONG. 1325 (1818).

130. *Id.* at 1325-26.

131. *Turpin v. Locket*, 10 Va. (6 Call) 113, 185 (1804) (Lyons, P., & Carrington, JJ.).

132. *Id.* at 173 (Roane, J.).

not only was “in direct hostility . . . with the spirit of the bill of rights,” but even contradicted its own preamble.<sup>133</sup> Roane’s insistence that “an act . . . marked with a want of knowledge of our constitution”<sup>134</sup> is not a precedent was echoed later by Henry St. George Tucker’s observation that legislation “against the clear meaning of the Constitution” was of no authority,<sup>135</sup> and Marshall’s suggestion in *McCulloch v. Maryland*<sup>136</sup> that even long acquiescence could not sanctify “a bold and daring usurpation” or an act infringing “the great principles of liberty.”<sup>137</sup>

Even the critics of invoking legislative practice in constitutional argument tended to treat judicial precedent with more respect.<sup>138</sup> While denouncing any attempt to bind the Eleventh Congress to the constitutional judgments of its predecessors, Senator Clay freely conceded “the utility of uniformity of decision” in “courts of justice” as a check on judicial waywardness,<sup>139</sup> while his ally, Representative Porter, admitted the authority of the courts “to explain . . . the practical operation of each particular law,” including the immediate question of its constitutionality.<sup>140</sup> Porter denied only the power of judicial precedent to restrict subsequent legislative choice: “[T]he commentaries of courts are not to furnish the principles upon which I am afterwards to legislate.”<sup>141</sup> Others do not seem to have admitted even this restriction. In his *Report of 1800*—no paean to judicial power—Madison seems to have agreed with his opponents that “in all questions submitted to it by the forms of the constitution,” the federal judiciary was the constitutional interpreter “in the last resort . . . in relation to the authorities of the other departments of the government.”<sup>142</sup> Unlike state legislative resolutions, a judicial decision on “the constitutionality of measures of the federal government” is an authoritative legal declaration: it “enforces the gen-

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133. *Id.* at 171 (Roane, J.).

134. *Id.* at 172 (Roane, J.).

135. 32 ANNALS OF CONG. 1325 (1818).

136. 17 U.S. (4 Wheat.) 316 (1819).

137. *Id.* at 401.

138. There were, of course, critics of judicial adherence to precedent. See, e.g., Anonymous, *Rudiments of Law and Government Deduced from the Law of Nature* (Charleston 1783), in 1 AMERICAN POLITICAL WRITING, *supra* note 1, at 590 (“Law from precedent should be altogether exploded.”).

139. Clay, *supra* note 52, at 536.

140. 22 ANNALS OF CONG. 644 (1811).

141. *Id.*

142. Report of 1800, *supra* note 71, at 311. Madison insisted, of course, that the judiciary’s interpretations were *not* final as against the views of “the parties to the constitutional compact.” *Id.* But the Report as a whole made clear that those “parties” were not the state governments but rather the “states” acting in their sovereign capacities as the loci of the popular will. *Id.*



eral will, whilst that will and that opinion continues unchanged.”<sup>143</sup>

Courts in this period regularly followed both formal and informal constitutional precedents. When the repeal of the “Midnight Judges Act” of 1801 once again compelled the Justices of the Federal Supreme Court to ride circuit, the renewed imposition of that duty was challenged as unconstitutional.<sup>144</sup> Although several of the Justices privately believed that the challenge was valid as an original matter, Justice Paterson for the Court rejected it as coming too late: The Court’s acceptance of the requirement “for a period of several years, commencing with the organization of the judicial system . . . has indeed fixed the construction.”<sup>145</sup> Writing about the Virginia Constitution, Judge Tucker explained that “the duty of expounding [the law, including the constitution] must be exclusively vested in the judiciary”<sup>146</sup> and that as a consequence “the decisions of the supreme court of appeals in this commonwealth, upon any question [concerning] the operation or construction . . . of the constitution of this commonwealth, are to be resorted to by all other courts, as expounding, in their truest sense, the laws of the land.”<sup>147</sup> The preface to the reports of John Marshall’s opinions on circuit stated that it fell to Marshall to “develope, define, and establish, the true and fundamental powers and character of our incomparable government.” The principles Marshall’s decisions applied to the Constitution “thus bec[ame] part of itself, and necessary to its healthful, durable and consistent action.”<sup>148</sup>

As with legislative precedents, the authority of judicial precedent was not without its limits. Few constitutionalists would have disagreed with Roane’s general comment in 1815 that a precedent that “has never received the solemn and deliberate discussion and decision” of a court

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143. *Id.* at 402-03.

144. Following the Republican victories in the 1800 election, the lame duck Federalist majority in Congress enacted a sweeping reform of the federal judicial system. The Judiciary Act of 1801 replaced the cumbersome system of circuit courts made up of district judges and Supreme Court Justices on circuit with six new courts staffed primarily by sixteen resident circuit judges; the Act also granted these courts general federal question jurisdiction. Judiciary Act of 1801, ch. 4, 2 Stat. 89, 90-92 (repealed 1802). From a modern perspective, the Act’s provisions appear sensible—indeed, the Act’s remodelling of the judiciary substantially paralleled the modern system, but at the time most Republicans were enraged, particularly because outgoing President John Adams attempted to fill the new judgeships with Federalist appointees (the so-called midnight judges). The new Republican congressional majority therefore repealed most of the 1801 Act’s reforms. Act of March 8, 1802, ch. 8, 2 Stat. 132; Act of April 29, 1802, ch. 31, 2 Stat. 156.

145. *Stuart v. Laird*, 5 U.S. (1 Cranch) 299, 309 (1803).

146. *Kemper v. Hawkins*, 3 Va. (Va. Cas.) 20, 79 (1793) (Tucker, J.).

147. *Id.* at 93.

148. Joseph Hopkinson, *Memoir of John Marshall*, in 1 BROCKENBROUGH’S REPORTS xiii (1837).

would be of little independent value.<sup>149</sup> Reviewing and rejecting Roane's conclusion, Justice Story was careful to rest his judgment "upon a foundation of authority" consisting not only of "judicial decisions of the Supreme Court through so long a period," but also of the "contemporaneous exposition" of the First Congress that vested the jurisdiction in the Court and of the "acquiescence of enlightened state courts."<sup>150</sup> Perhaps because of the relatively small volume of court decisions on constitutional matters in this period, criticism of the authority of judicial precedent tended to be focused not on its validity in arguments before courts, but on attempts to impose judicial interpretations on other constitutional actors. Thus the question of the sources of constitutional argument blended into a second important theme, that of the authority of the interpreter.

## II. THE LOCUS OF INTERPRETIVE AUTHORITY

During his struggle to impose a royalist vision of the English legal order on the common-law courts, King James I angrily rejected the claim of the courts to exclusive authority to "interpret" the laws of the realm. "If the Judges interpret the lawes themselves and suffer none else to interpret," the King remarked, "then they may easily make of the laws shipmens hose."<sup>151</sup> King James's remark reflected his awareness of a characteristic not only of early Stuart England but of all Western legal orders: interpretive authority is a potent source of political power, and the final or exclusive possession of that authority identifies a major center of power in the legal order. Americans of the founding era were well aware of King James's insight, and a major theme in early constitutional debate concerned rival claims of interpretive authority. Various people during the period claimed major roles in constitutional interpretation for Congress, the President, the federal courts, the state legislatures, the state courts, and state conventions; the two primary disputes were over the finality of judicial interpretation, and the identity of ultimate interpretive authority in the federal Union.

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149. *Hunter v. Martin*, 18 Va. (4 Munf.) 1, 51 (1815) (Roane, J.); see also Professor Postema's important work on the "traditionary" understanding of precedent, *supra* note 118, at 1-29 (discussing the role of precedent in common-law-based legal systems).

150. *Martin*, 14 U.S. (1 Wheat.) at 352. Roane and Story held identical views of the authority of precedent, and described that common view in their opinions in the *Martin* litigation in almost identical language: Then as now, agreement on the importance of *stare decisis* did not guarantee agreement on its application.

151. HOWARD NENNES, *BY COLOUR OF LAW* 72 (1977).

*A. Legislatures as Constitutional Interpreters*

Americans generally agreed that both federal and state legislatures enjoyed the power, and were subject to the obligation, to interpret the constitutions under which they were acting. Occasionally, particularly in the First Congress, legislators expressed doubts about their ability or authority to interpret constitutional language. During the 1789 debate over whether to grant the President sole authority to remove officers appointed with the advice and consent of the Senate, Representative Alexander White observed that "it seems a difficult point to determine whether he has or has not this power by the Constitution."<sup>152</sup> Under such circumstances White preferred "to leave the construction to [the President] . . . I will venture to say, the occasion for the exercise of it will be a better comment on the Constitution than any we can give."<sup>153</sup>

Other Congressmen insisted that interpretation was an exclusively judicial task. As Madison paraphrased this position, it was the claim "that the legislature itself has no right to expound the Constitution; that wherever its meaning is doubtful, you must leave it to take its course until the Judiciary is called upon to declare its meaning."<sup>154</sup> Madison himself was not hostile to the courts' interpretive authority: "I acknowledge, in the ordinary course of Government, that the exposition of the laws and Constitution devolves upon the Judiciary."<sup>155</sup> But, Madison insisted, the courts' ordinary or primary role in interpretation was not an exclusive one. "It is incontrovertibly of as much importance to this branch of [g]overnment as to any other," he reminded the House, "that the Constitution should be preserved entire."<sup>156</sup> He saw no reason, in principle or in constitutional text, why "it will be less safe, that the exposition should issue from the Legislative authority than any other."<sup>157</sup> In any event, as Fisher Ames told the House of Representatives in 1791, legislative interpretation was unavoidable because the formulation of legislation under a constitution defining legislative power almost always involved decisions as to the constitution's meaning: "[W]e have scarcely made a law in which we have not exercised our discretion with regard to the true intent of the Constitution."<sup>158</sup> State legislatures, most of which were not expressly limited to a set of enumerated powers, found occasion to construe the procedural provisions of their constitutions as well as

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152. 1 ANNALS OF CONG. 516 (Joseph Gales ed., 1789).

153. *Id.*

154. *Id.* at 500, 501.

155. *Id.*

156. *Id.*

157. *Id.*

158. Ames, *supra* note 37, at 853-54.

their state bills of rights.<sup>159</sup>

For Congress at least, the legislative role in proposing constitutional amendments often was seen as a special subset of the general legislative duty to interpret the Constitution. James Madison, for example, regularly insisted that the Federal Bill of Rights consisted of “explanatory amendments”<sup>160</sup> meant only to declare authoritatively the meaning of the 1787 Constitution.<sup>161</sup> Thomas M’Kean similarly referred to the Eleventh Amendment as a “legislative declaration of the meaning of the constitution.”<sup>162</sup> Jefferson welcomed both the passage of an 1817 improvements bill and Madison’s veto of it because he believed (mistakenly) that those events would lead to a constitutional amendment granting Congress the requisite power and “sett[ing] forever the meaning” of the words “provide for the common Defence and General welfare” in Article I, section 8.<sup>163</sup> Henry St. George Tucker, on the other hand, rejected the call for an internal improvements amendment precisely because he understood the “general welfare” language differently from Jefferson and thus believed Congress already possessed the power to fund internal improvements. Such an “unnecessary” amendment, Tucker insisted, “only serves to narrow and circumscribe the construction of the instrument, and, whilst it gives one power, furnishes a weapon by which ten more may be wrested from us.”<sup>164</sup>

### B. *The President and Constitutional Interpretation*

Since the Constitution’s ratification the Presidents also regarded themselves as obliged and entitled to interpret it. George Washington, for example, withdrew his original nomination of William Paterson to be a justice of the Supreme Court when it was pointed out to Washington that Paterson’s uncompleted term in office as a United States Senator encompassed the period in which Congress had created the position of associate justice. Since Article One, section 6 forbids the appointment of any member of Congress “during the Time for which he was elected . . . to any civil Office under the Authority of the United States, which shall have been created . . . during such time,” Washington withdrew the nom-

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159. The statute that the Virginia Court of Appeals upheld in *Turpin v. Lockett*, 10 Va. (6 Call) 113 (1904), and that the United States Supreme Court held void in *Terrett v. Taylor*, 13 U.S. (9 Cranch) 43 (1815), was itself the Virginia legislature’s express exercise of the authority to interpret the Virginia Declaration of Rights.

160. Madison, *supra* note 33, at 375.

161. Report of 1800, *supra* note 71, at 340.

162. *Respublica v. Cobbett*, 3 Dall. 467, 474 (Pa. 1798).

163. Letter from Thomas Jefferson to Albert Gallatin (June 16, 1817), in 15 JEFFERSON WRITINGS, *supra* note 36, at 131, 133.

164. 31 ANNALS OF CONG. 1120 (1818).

ination, informing the Senate that "I think it my duty, therefore, to declare that I deem the nomination to have been null by the Constitution."<sup>165</sup> Washington also explained one of his two vetoes on constitutional grounds.<sup>166</sup> Most famous, of course, was Washington's concern over whether to sign the national bank bill, a concern that led him to request written opinions as to the bill's constitutionality from three members of his cabinet. In responding, all three assumed that the President legitimately might employ the veto to give effect to his constitutional views, and Jefferson described the very purpose of the veto power as "the shield provided by the Constitution to protect against the invasions of the legislature" into the rights of the executive, the judiciary, and the states,<sup>167</sup> a view shared by James Kent.<sup>168</sup> Neither John Adams nor Jefferson exercised the veto, but Madison's seven vetoes included several based on constitutional objections to legislation.<sup>169</sup>

During this period, the most dramatic confrontation between the Congress and the President over claims to interpretive authority occurred in 1796, when Washington requested that the Congress implement the Jay Treaty with Britain by appropriate legislation.<sup>170</sup> When the House of Representatives requested Washington to transmit to it certain secret documentation concerning the treaty so as to fulfill its constitutional duty of deliberation with regard to the proposed legislation, Washington refused. The President justified his refusal to acquiesce in the House's constitutionally based demand as a matter of "[a] just regard to the Constitution," which he interpreted differently from the House.<sup>171</sup> In turn the House majority restated its own views of the constitutional issue, although no further attempt was made to secure the documents.

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165. Message from George Washington to the Senate (Feb. 28, 1793), in 1 MESSAGES AND PAPERS, *supra* note 29, at 137, 137.

166. George Washington, Veto Message (Apr. 5, 1792), in 1 MESSAGES AND PAPERS, *supra* note 29, at 124, 124.

167. Bank Opinion, *supra* note 35, at 420-21.

168. Kent, *supra* note 27, at 941-43.

169. See, e.g., James Madison, Veto Messages (Feb. 21, 1811 & Feb. 28, 1811), in 1 MESSAGES AND PAPERS, *supra* note 29, at 489-90 (vetoing two bills on first amendment grounds).

170. In 1794, Washington appointed Chief Justice John Jay to negotiate an end to British attacks on American shipping and British withdrawal from posts they were holding in the Northwest Territory. The treaty Jay ultimately negotiated and signed, 8 Stat. 116 (1795), obtained those goals but made various concessions to the British that proved highly unpopular. A hostile majority in the House of Representatives attempted to block implementation of the treaty by threatening a refusal to appropriate funds to implement it. See JERALD A. COMBS, THE JAY TREATY 159-88 (1970) (discussing the debate over ratification and implementation of the treaty).

171. George Washington, Message to the U.S. House of Representatives (Mar. 30, 1796), in 35 THE WRITINGS OF GEORGE WASHINGTON 2-5 (John C. Fitzpatrick ed., 1940).

The dispute highlighted the consequences of having no final interpreter—Washington's views prevailed in the practical sense that the House found no way to compel him to adopt its opinion and release the documents, and ultimately felt obliged to implement the Jay Treaty. But the interpretive questions themselves were not resolved.

The potential problem of legislative-executive conflict over the United States Constitution's meaning was raised by the Jay Treaty affair, but for the most part such conflict was not a major element of the constitutional history of the period. Although the spectre of governmental paralysis in the case of severe and unresolved constitutional disagreement occasionally was raised,<sup>172</sup> it did not in fact occur. In contrast, the questions of who possessed interpretive authority in the federal system and of the relationship between federal power and state autonomy were among the most widely canvassed issues of the era.

### C. *The Debate Over Federal and State Interpretive Authority*

Nationalists consistently maintained that both reason and text supported their ascription to the federal government, and specifically to the federal courts, of final interpretive authority on questions of federalism. In 1799, the Massachusetts Senate observed that federal powers were "entrusted" to the national authorities "by the people" and that state interference with federal legislation—what the Senate described as a state opposing "her force and will to those of the nation"—would reduce the Constitution itself "to a mere cypher, to the form and pageantry of authority, without the energy of power."<sup>173</sup> Legal questions involving the proper construction of the Constitution, the Senate stated, "are exclusively vested by the people in the judicial courts of the United States."<sup>174</sup> As Justice Story asserted in 1815, nationalists viewed the supremacy of the Constitution as inextricably linked to the "the paramount authority of the United States" as a government.<sup>175</sup> To make the former a reality, the latter had to be granted as well. "[S]tates as States," Clay told the United States Senate in 1818, "have no right to oppose the execution of the powers which the general government asserts";<sup>176</sup> the institution with

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172. 5 ANNALS OF CONG. 699-700 (1796) (speech of William Vans Murray).

173. Massachusetts Resolutions in Reply to Virginia (adopted on Feb. 13, 1799), *reprinted in STATE DOCUMENTS ON FEDERAL RELATIONS* 18, 19 (Herman V. Ames ed., 1970) [hereinafter *STATE DOCUMENTS*].

174. *Id.* at 18.

175. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 344 (1816).

176. Henry Clay, Speech on Internal Improvements (Mar. 13, 1818), *in* 2 CLAY PAPERS, *supra* note 52, at 467, 472.

legitimate interpretive authority to judge and limit the assertion of these powers was itself "general"—the federal judiciary.

The exercise of federal power during the late 1790s in accord with a nationalist interpretation of the Constitution provoked in its turn a vigorous assertion of the states' role in constitutional interpretation. Pennsylvania Chief Justice Thomas M'Kean in his 1798 opinion, *Respublica v. Cobbett*, denied that there was any final interpretive authority on disputed issues of federalism and national power short of the people: "If a state should differ with the United States about the construction of [the Constitution], there is no common umpire but the people, who should adjust the affair by making amendments in the constitutional way, or suffer from the defect."<sup>177</sup> The Kentucky and Virginia Resolutions of 1798 arguably appeared to reject both the nationalist view and M'Kean's "no-umpire" theory by locating final interpretive authority in "each party [state]"<sup>178</sup> or in "the states."<sup>179</sup> The nullifiers of the late 1820s and 1830s were to seize upon this language as locating ultimate constitutional authority in the individual state convention (subject to Article V's amendment process),<sup>180</sup> but the original meaning of the two sets of Resolutions was in fact much more ambiguous.

In Jefferson's original draft of the 1798 Kentucky Resolutions, he wrote that each state had "a natural right in cases not within the compact (*casus non foederis*) to nullify of their own authority, all assumptions of power by others within their limits,"<sup>181</sup> an assertion that the legislature omitted before adopting the Resolutions. As Madison repeatedly pointed out during the nullification crisis, however, Jefferson's careful use of the phrases "natural right" and "cases not within the compact" seemed to point not to a legal power to interpret the Constitution but to the ultimate remedy of revolution "against insupportable oppression."<sup>182</sup>

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177. *Respublica v. Cobbett*, 3 Dall. 467, 473 (Pa. 1798).

178. Kentucky Resolutions of 1798, in *THE POLITICAL WRITINGS OF THOMAS JEFFERSON* 157 (Edward Dumbauld ed., 1955).

179. James Madison, Virginia Resolutions of 1798 [hereinafter Virginia Resolutions], in 17 *MADISON PAPERS*, *supra* note 22, at 189.

180. Debate over the legitimacy of protective tariffs culminated in the Nullification Crisis of 1828-1833, during which the state of South Carolina purported to "nullify" federal legislation, and President Andrew Jackson threatened to enforce federal law by force. The proponents of an individual state's authority to nullify national legislation it considered unconstitutional claimed that they were only carrying out the logic of the "principles of '98," a claim Madison and others hotly disputed. See RICHARD E. ELLIS, *THE UNION AT RISK* 1-12 (1987) (discussing the intellectual origins of the nullification crisis).

181. Thomas Jefferson, Draft of the Kentucky Resolutions, in 7 *JEFFERSON WRITINGS*, *supra* note 36, at 298, 301.

182. James Madison, Notes on Nullification (1835-36), in *THE MIND OF THE FOUNDER*, *supra* note 121, at 428-29 n.3. On Madison's criticism of the nullifiers' invocation of Jefferson,

Although the anonymously drafted Kentucky Resolutions of 1799 did use the term "nullification," the legislature avoided any implication that the Resolutions themselves had legal force by speaking of state action in the plural, by stating that "this commonwealth, as a party to the federal compact, will bow to the laws of the Union," and by implying that "its solemn protest" was the opposition "in a constitutional manner" which it stated it was carrying out.<sup>183</sup>

In the *Report of 1800* Madison so downplayed the Virginia Resolutions' assertion of state interpretive authority that nationalist critic Alexander Addison regarded the *Report's* theoretical position in the matter as indistinguishable from the nationalist view.<sup>184</sup> The "states" that possess final interpretive power, the *Report* explained, were "the people composing those political societies, in their highest sovereign capacity" rather than the state governments or even the states as societies "organized into those particular governments."<sup>185</sup> The power of "interposition" Madison mentioned in the *Report* was, it seems, simply a restatement of "the fundamental principle on which our independence itself was declared," that "the people" are sovereign "over constitutions,"<sup>186</sup> a position no nationalist would have denied. Nationalist James Bayard, for example, asked rhetorically in Congress in 1802 "if the power to decide upon the validity of our laws resides with the people? Gentlemen cannot deny this right to the people. I admit that they possess it."<sup>187</sup>

The exercise of interpretive authority by state legislatures during this era was confined to two closely related modes: the enunciation of respectable opinion intended to sway the views of others, and the attempt to deny precedential status to disputed federal actions. Madison described the Virginia Resolutions as "expressions of opinion, unaccompanied with any other effect than what they may produce on opinion, by exciting reflection" and producing "a change in [Congress' or the judiciary's] expression of the general will."<sup>188</sup> The 1799 Kentucky legislature

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see ADRIENNE KOCH, *JEFFERSON AND MADISON: THE GREAT COLLABORATION* 287-88 (1950).

183. Kentucky Resolutions of 1799, *supra* note 76, at 107.

184. Alexander Addison, Analysis of the Report of the Committee of the Virginia Assembly (Philadelphia 1800), in 2 *AMERICAN POLITICAL WRITING*, *supra* note 1, at 1055, 1057-60. Addison's complaint at this point with the *Report* was that the Resolutions it purported to justify had asserted "a right of the Legislative of Virginia to judge of the violation of the compact," when by the *Report's* own reasoning the Resolutions were nothing more than the "opinion as individuals" of the state legislators. *Id.* at 1058, 1059.

185. Report of 1800, *supra* note 71, at 309.

186. *Id.* at 311-12.

187. 11 *ANNALS OF CONG.* 646 (1802).

188. Report of 1800, *supra* note 71, at 348.



described its “solemn protest” as intended to prevent future interpreters from drawing any conclusions from “a supposed acquiescence on the part of this commonwealth in the constitutionality” of the Alien and Sedition Acts.<sup>189</sup> Similarly, the Pennsylvania Resolutions of 1811 against a renewal of the national bank bill were directed to the state’s delegation in Congress, instructing its senators and representatives “to use every exertion in their power” to defeat renewal.<sup>190</sup> Despite the sometimes heated rhetoric found in state legislative discussions of federal behavior, those discussions seldom if ever went beyond the expression of opinion or a call for amendments to the Constitution.

The primary function of asserting state interpretive authority in the founding era was negative, the denial of finality to federal interpretations. This was perhaps clearest in *Hunter v. Martin*, where the Virginia Court of Appeals relied on its own interpretation of the United States Constitution in denying the Federal Supreme Court’s jurisdiction to review state judgments. Judge William Cabell described the state court’s position as nothing more than a refusal to equate obedience to the Constitution with “a subjection to the Federal Courts.”<sup>191</sup> Neither Cabell nor any of his colleagues claimed that the federal judges were bound to accept the state court’s constructions of the Constitution; they simply asserted their own independent judgment in constitutional interpretation, while leaving to “the impartial investigation” of the people the final decision as to “the constitutionality of Federal adjudications.”<sup>192</sup>

*D. The Judicial Power “to expound what the law is”*<sup>193</sup>

Alongside the wide-spread respect accorded legislative interpretations and the peculiarly nationalist and states-rights predilections for, respectively, presidential and “state” constructions of the Federal Constitution, there was general agreement, over a broad range of political and constitutional opinion, about the special responsibility of the judiciary in constitutional interpretation. Upholding the power of judicial review, the great state sovereignty judge Spencer Roane stated that it was “the province of the judiciary to expound the laws” and in doing so to expound “that law which is of the highest authority of any.”<sup>194</sup> The great nationalist judge and scholar James Kent, writing almost simulta-

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189. Kentucky Resolutions of 1799, *supra* note 76, at 107.

190. Pennsylvania General Assembly, Resolutions Against the Bank (Jan. 11, 1811), *in* STATE DOCUMENTS, *supra* note 173, at 52, 53.

191. *Hunter v. Martin*, 18 Va. (4 Munf.) 1, 11 (1815).

192. *Id.* at 23 (Brooke, J.).

193. *Kemper v. Hawkins*, 3 Va. (1 Va. Cas.) 20, 78 (1793) (Tucker, J.).

194. *Id.* at 38 (Roane, J.).

neously, agreed: "[T]he interpretation or construction of the Constitution is as much a JUDICIAL act, and requires the exercise of the same LEGAL DISCRETION, as the interpretation or construction of a Law."<sup>195</sup> "I consider the Courts of Justice," Kent concluded, "as the proper and intended Guardians of our limited Constitutions, against the factions and encroachments of the Legislative Body."<sup>196</sup>

Respect for the interpretive authority of the courts was often put in the strongest terms. St. George Tucker asserted that the task of "expound[ing] *what the law is*" was "the duty and office of the judiciary" and that "the duty of expounding must be exclusively vested in the judiciary."<sup>197</sup> Writing more generally of the judicial power to interpret all laws, Justice William Johnson stated that "[o]f these laws the courts are the constitutional expositors; and every department of government must submit to their exposition; for laws have no legal meaning but what is given them by the courts to whose exposition they are submitted."<sup>198</sup> The same was true, Justice John Marshall wrote, of the great unwritten constitutional principle of respect for vested rights: "The question whether a right has vested or not, is, in its nature, judicial, and must be tried by the judicial authority."<sup>199</sup> The "decision of all cases" involving the construction of the Federal Constitution and laws, the Massachusetts Senate stated in 1799, was "exclusively vested by the people in the courts of the United States."<sup>200</sup> The United States Supreme Court's "exposition of the constitution, laws, [and] treaties of the United States," Chief Justice Marshall wrote, is that "which must ultimately prevail."<sup>201</sup>

The authoritativeness of judicial interpretation was sometimes based on the intrinsic "nature" of such questions, as suggested by Kent and Marshall's statements. At other times the courts' interpretive powers derived from the need to give practical meaning to the American constitutions' attempt to limit governmental power. "If you mean to have a constitution," Congressman Bayard told his colleagues, "you must discover a power to which the acknowledged right is attached of pronouncing the invalidity of the acts of the legislature which contravene the instrument."<sup>202</sup> "To maintain, therefore, the Constitution, the judges are

195. Kent, *supra* note 27, at 942.

196. *Id.* at 944.

197. *Kemper*, 3 Va. (1 Va. Cas.) at 78-79 (Tucker, J.).

198. William Johnson, Public Statement of August 26, 1808, in 1 THE GROWTH OF PRESIDENTIAL POWER 563-72 (William M. Goldsmith ed., 1974).

199. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 167 (1803).

200. STATE DOCUMENTS, *supra* note 173, at 18.

201. Letter from John Marshall to Dudley Chase (Feb. 2, 1817), in JOHN E. OSTER, THE POLITICAL AND ECONOMIC DOCTRINES OF JOHN MARSHALL 80, 81 (1914).

202. 11 ANNALS OF CONG. 645 (1802).

a check upon the legislature.”<sup>203</sup> The Federalist Bayard agreed with the Republican Roane that, in the latter’s words, the judiciary is “not only the proper, but a perfectly disinterested tribunal” whenever a claim is raised that the constitution has been violated.<sup>204</sup> As Kent explained, “the efficacy” of constitutional limitations “would be totally lost . . . if the Legislature was left the ultimate Judge of the nature and extent of the [constitutional] barriers.”<sup>205</sup> The dangers of factional struggle and of “considerations of temporary expediency” rendered the legislature incapable of policing its own constitutional limitations. “The Courts of Justice which are organized with peculiar advantages to exempt them from the baneful influence of Faction” were, in Kent’s view, “the most proper power in the Government . . . to maintain the Authority of the Constitution.”<sup>206</sup> Roane made a similar point in the language of separation of powers rather than that of checks and balances: “[E]very legislative exposition,” he wrote, “contravenes that principle requiring a separation of the legislative and judicial departments” by uniting “the powers of passing and executing laws in the same persons [which is] no contemptible definition of despotism.”<sup>207</sup> As a consequence, “a legislative construction of the law and constitution . . . however respectable . . . must yield to that of the judiciary.”<sup>208</sup> Similarly, Justice Story wrote that “[w]hatever weight” a legislative interpretation “might properly have as the opinion of wise and learned men, as a declaration of what the law has been or is, it can have no decisive authority.”<sup>209</sup>

James Madison’s view of the authority of judicial interpretation is particularly instructive, because Madison firmly believed in an active interpretive role for both the executive and the legislative branches, as well as (in the federal context) some final, if ambiguous, place for “state” interpretation. When the Massachusetts Senate accused the Virginia legislature of usurping the interpretive authority of the federal courts, Madison’s *Report of 1800* responded first by pointing out that not all “instances of usurped power” could eventuate in justiciable cases, and then by defining the Virginia legislature’s assertion of “state” interpretive power as concerned with “those great and extraordinary cases in which all the forms of the Constitution may prove ineffectual against infrac-

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203. *Id.*

204. *Kemper v. Hawkins*, 3 Va. (1 Va. Cas.) 20, 39 (Gen. Ct. 1793) (Roane, J.).

205. Kent, *supra* note 27, at 942.

206. *Id.*

207. *Turpin v. Lockett*, 10 Va. (6 Call.) 113, 176 (1804).

208. *Id.* at 172-73.

209. *Terrett v. Taylor*, 13 U.S. (9 Cranch) 43, 51 (1815).

tions."<sup>210</sup> Somewhat equivocally, Madison continued by stating that the finality of federal judicial interpretation "must necessarily be deemed the last in relation to the authorities of the other departments of the [federal] 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."<sup>211</sup> Much later in the *Report*, however, Madison returned to the subject. There he carefully differentiated as "expressions of opinions" the "declarations" of citizens or legislatures from the enforceable "expositions of the judiciary": The latter, he stated, "enforce[ ] the general will" in accordance with the judiciary's opinion of that will as embodied in the Constitution.<sup>212</sup> As President, Madison took a similar position. In response to the Pennsylvania Governor's call for assistance in resisting what both the Governor and the state legislature viewed as an unconstitutional invasion of state autonomy by the Supreme Court, Madison refused even to discuss the merits of the constitutional question. Instead, Madison stressed his duty as President "to carry into effect any such decree" and strongly implied the existence of a duty on the state's part to accept the Court's decision.<sup>213</sup>

The widely held view that judicial interpretation was, short of direct action by the people, the primary or even final authority on constitutional questions was not without its critics. The 1802 struggle in Congress over the bill to repeal the Midnight Judges Act provoked a direct denial by a few Republicans of the power of judicial review, and consequently of judicial interpretive power.<sup>214</sup> The Republican political leadership, in contrast, accepted the legitimacy of some form of judicial review while disliking the contemporary Federalist judiciary.<sup>215</sup> As Jefferson wrote to Abigail Adams two years later, he did not question the

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210. Report of 1800, *supra* note 71, at 311.

211. *Id.* On the separate question of the relative authority of the interpretations of federal and state institutions, Madison's consistent position was that state governmental actors were bound by the constitutional decisions of the federal judiciary. See ROBERT A. BURT, *THE CONSTITUTION IN CONFLICT* 71-72 (1992).

212. Report of 1800, *supra* note 71, at 348.

213. Letter from James Madison to Simon Snyder (Apr. 13, 1809), in 1 *THE PAPERS OF JAMES MADISON (PRESIDENTIAL SERIES)* 114 (Robert A. Rutland et al. eds., 1984).

214. Charles Warren showed that this attack on the legitimacy of judicial review was the product not of constitutional principle but of specific regional concerns over the effect of federal court decisions on land title disputes in Virginia and Kentucky. See 1 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 219-22 (rev. ed. 1928).

215. The Republican press, for example, did not criticize the Supreme Court's assertion of the power of judicial review in *Marbury*. *Id.* at 248-52. Warren concluded that "practically the only published attack on [the judicial review] portion of Marshall's opinion" was a series of letters printed by a Federalist newspaper that prefaced them with the remark that in the editor's opinion, the legitimacy of judicial review was "almost too clear for controversy." *Id.* at 252.

courts' "right to decide what laws are constitutional and what not," but only the claim that they could do so "not only for themselves in their own sphere of action but for the legislature and executive also in their own spheres."<sup>216</sup> Jefferson's view was that every branch was "equally independent in the sphere of action assigned to them"; as a consequence he accepted as legitimate, for example, both the judiciary's enforcement of the Sedition Act, because it believed it constitutional, and his own pardon of those convicted under the Act, because he thought it unconstitutional.<sup>217</sup> Jefferson's theory of co-ordinate interpretive authorities was echoed on later occasions,<sup>218</sup> but most of Jefferson's fellow Republicans seem to have accepted Madison's less conflict-ridden vision of interpretive authority, one in which legislative and executive opinion played appropriate roles without challenging the primacy of judicial construction in "the ordinary course of Government."

### III. THE IDENTITY OF THE SOVEREIGN

When Alexander Hamilton ridiculed the notion that the United States might "furnish the singular spectacle of a *political society* without *sovereignty*,"<sup>219</sup> he was expressing a widely held sense that "sovereignty" was an unavoidable concept in political thought. And yet, when Justice James Wilson asked, "Who, or what, is a sovereignty? What is his or its sovereignty? On this subject, the errors and the mazes are endless and inexplicable,"<sup>220</sup> he, too, captured a central feature of the era's talk about "sovereignty." While not all of Wilson's contemporaries shared his dislike for the terms, few of them can have doubted that "sovereign" and "sovereignty" were concepts as contested and confusing as they were common in American political debate. The language itself was inherited from the British colonial past. In the English Tory tradition, "the sovereign" primarily referred to the "supreme lord" (according to Dr. Johnson's definition),<sup>221</sup> that is, in the British context, to the King. The term

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216. Letter from Thomas Jefferson to Abigail Adams (Sept. 11, 1804), in *THE WRITINGS OF THOMAS JEFFERSON* 49-53 (Andrew A. Lipscomb & Albert E. Bergh eds., Memorial ed. 1904).

217. *Id.*

218. For example, in 1811, Peter Porter conceded that he accepted the de facto power of the judiciary to interpret the Constitution through its role in administering "the practical operation of each particular law," but rejected "the commentaries of courts" as a guide for future legislation. 22 *ANNALS OF CONG.* 644 (1811).

219. Hamilton, *supra* note 40, at 98.

220. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 456 (1793) (Wilson, J.).

221. SAMUEL JOHNSON, *A DICTIONARY OF THE ENGLISH LANGUAGE* s.v. "sovereign" (1755).

“sovereignty” denoted the King’s “attribute of . . . pre-eminence.”<sup>222</sup> From the monarch’s personal sovereignty English lawyers derived such characteristics as his immunity from compulsive suit and the legal impossibility of ascribing to him any wrong.<sup>223</sup> Using the term in a broader sense, Blackstone and many others defined “sovereign power” as “the making of laws,” possession of which obliges “all others [to] conform to, and be directed by it.”<sup>224</sup> In this sense of ultimate legislative power, “the sovereignty of the British constitution,” post-1688 lawyers agreed, was “lodged” in the composite body of Parliament consisting of King, Lords, and Commons.<sup>225</sup>

English “Country” thinkers and pre-Revolutionary American Whigs<sup>226</sup> tended to use the language of sovereignty in a different manner, to designate the ultimate location of political authority in the people rather than in their royal or parliamentary agents. James Otis’ 1764 pamphlet, *The Rights of British Colonies Asserted and Proved*, for example, conceded the necessity of sovereign power in every polity: “[A]n original supreme Sovereign, absolute and uncontrollable, *earthly* power *must* exist in and preside over every society.” But for Otis, sovereignty in this proper sense could only rest “*originally* and *ultimately* in the people” who for convenience’s sake then delegate their authority, in trust, to the actual executive and legislative powers of the state.<sup>227</sup>

American political discussion after independence was influenced both by the legal definitions of sovereignty and by Whig notions about the popular foundations of legitimate government. A central issue in this early period was identifying what role these various ideas should play in the new American constitutional order. People across the range of political opinion shared Whig language about “the people”: Ultra-nationalist John Jay wrote that “[the people] are truly the sovereign of the coun-

222. 1 WILLIAM BLACKSTONE, COMMENTARIES \*234.

223. *Id.* at \*236-37.

224. *Id.* at \*49.

225. *Id.* at \*51.

226. During the early 1700s, a school of political thought arose in England that was opposed to the politicians of “the Court,” who dominated English political life for most of the century. This “Country” school or ideology seems to have influenced heavily the views of the late-colonial Whigs (or Patriots) in America who eventually led the Revolution. “Country” themes can also be traced in Anti-federalist rhetoric during the ratification period and in the thought of the Republicans in the 1790s. *See generally* LANCE BANNING, *THE JEFFERSONIAN PERSUASION: EVOLUTION OF A PARTY IDEOLOGY* (1978) (discussing links between the “Country” ideology, ratification-era Antifederalism, and the Republican party of the 1790s).

227. James Otis, *The Right of the British Colonies Asserted and Proved*, in *POLITICAL WRITINGS*, reprinted in 1 *THE FOUNDERS’ CONSTITUTION* 52-53 (Philip B. Kurland & Ralph Lerner eds., 1987).

try"<sup>228</sup> at almost the same time Anti-federalist Spencer Roane defined "the people of this country" as "the only sovereign power."<sup>229</sup> Americans of disparate views also shared the Blackstonian use of "sovereign(ty)" in connection with the organs of government.<sup>230</sup> Federalist John Marshall, for example, could refer to the legislature of Georgia as "the supreme sovereign power of a state,"<sup>231</sup> as easily as states rights jurist Robert White would speak of "the rights, Sovereignty, and Independence of the respective State Governments."<sup>232</sup> But rhetorical similarities masked and sometimes confused profound constitutional disagreement. By "the people," a nationalist like Jay meant Americans as a whole, while Roane was referring to Virginians as a distinct political community. Marshall's ascription of "sovereignty" to a state legislature merely echoed Blackstone's near-equation of "sovereign" and "legislative," but White meant to invoke strong notions of the states' judicial and legislative autonomy from federal interference. There was, in fact, no agreed-upon definition of "sovereignty" and no uncontroversial identification of its location in the American constitutional order. The term was both central to the founding era's political grammar and essentially ambiguous.<sup>233</sup>

#### A. *The Political System of "Divided Sovereignty"*

The varying meanings of "sovereignty" in this period may be grouped into four categories. The earliest, and most persistent, was the language of divided sovereignty. Despite the view, widespread during 1787 and 1788, that sovereignty was necessarily indivisible and thus that either the states *or* the nation had to be sovereign, soon after 1789 it became common to assert, as Hamilton wrote in 1791, that "the powers of sovereignty are in this country divided between the National and State Governments."<sup>234</sup> Constitutional arguments often referred in parallel fashion to "the sovereignty of the nation" and the "residuary sovereignty of each State,"<sup>235</sup> or to "the divided sovereignty"<sup>236</sup> of the Union.

The language of divided sovereignty often seems simply to have been

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228. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 471 (1793) (Jay, C.J.).

229. *Kemper v. Hawkins*, 3 Va. (1 Va. Cas.) 20, 36 (Gen. Ct. 1793) (Roane, J.).

230. *See supra* note 224 and accompanying text.

231. *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 130 (1810).

232. *Jackson v. Rose*, 4 Va. (2 Va. Cas.) 34, 35 (1815).

233. Confusion and disagreement over the use of sovereignty language also pervaded the debates about the creation and ratification of the federal Constitution. *See* H. Jefferson Powell, *The Modern Misunderstanding of Original Intent*, 54 U. CHI. L. REV. 1513, 1524-29 (1987).

234. Hamilton, *supra* note 40, at 98.

235. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 471 (1793) (Jay, C.J.).

236. *Hunter v. Martin*, 18 Va. (4 Munf.) 1, 8 (1815) (Cabell, J.).

a means of recognizing verbally the existence of separate and complete governmental structures with deliberative and legislative powers both in the several states and on the federal level: When Henry Clay described the United States as a combination of "twenty local sovereignties" with parochial and "municipal" concerns and "one great sovereignty" entrusted with external and commercial responsibilities,<sup>237</sup> the use of "sovereignty" rather than "government" or "legislature" was little more than a rhetorical flourish. In the 1805 case of *Hepburn v. Ellzey*,<sup>238</sup> E. J. Lee's argument for the plaintiff involved a denial that the states were radically distinct legally from other subnatural polities such as the District of Columbia, while Charles Lee's opposing position insisted on the unique constitutional role of the states. The former therefore stressed that the states lacked "certain rights of sovereignty,"<sup>239</sup> while the latter stressed the states' "peculiar" role in the Union. For neither attorney, however, was some concrete concept of "sovereignty" crucial to his argument, and both probably would have subscribed to Charles Lee's remark that "[t]he states are not absolutely sovereigns, but (if I may use the expression) they are *demi-sovereigns*."<sup>240</sup>

The use of divided sovereignty talk was not always this protean in application; at times it served to designate the existence of decisional autonomy and discretion, what E. J. Lee described in 1805 as "the free exercise of all the rights of sovereignty uncontrolled by any other power."<sup>241</sup> Hamilton's 1791 bank opinion<sup>242</sup> accepted the sovereignty of both state and federal governments as to their respective spheres of activity in order to claim for Congress the power to exercise discretion in its choice of means to pursue its constitutional ends.<sup>243</sup> Congress' decisions about legislative means thus shared in the supremacy of the Constitution's designation of legitimate legislative ends.<sup>244</sup> Judge Cabell's rejection of Federal Supreme Court jurisdiction over state court decisions used similar logic to reach a politically contrary result. Given the "residual sovereignty of the states," neither Congress nor the Supreme Court could compel state courts to conform their interpretations of the United States Constitution to the Court's. To admit such a power would be to deny the state judges' inherent obligation and ability to apply law "ac-

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237. Clay, *supra* note 52, at 449.

238. 6 U.S. (2 Cranch) 445 (1804).

239. *Id.* at 446 (argument of counsel).

240. *Id.* at 449 (argument of counsel).

241. *Id.* at 446 (argument of counsel).

242. See *supra* notes 39-42 and accompanying text.

243. Hamilton, *supra* note 40, at 98.

244. *Id.* at 107.



ording to their own judgments.”<sup>245</sup> Lower courts within a single sovereignty, Cabell admitted, were required to follow the decisions of the sovereignty’s highest court; the very point of calling the states sovereign was to deny that state and federal courts were instruments of the same sovereignty.<sup>246</sup> Cabell’s fellow states-rights Virginian Robert White used divided sovereignty language in an effort to demonstrate that Congress could not confer jurisdiction over a federal offense on a state court: Congress’ attempt to do so was unconstitutional both because it invaded the state’s sovereign autonomy and because it improperly derogated from the Union’s own sovereignty, “an important part” of which was “a right to expound its Laws” in its own courts.<sup>247</sup> “Sovereignty” as Hamilton, Cabell, White, and others sometimes used it, thus was a concept intimately connected with the question of discretion, which will be discussed below.

### B. *The Sovereignty of the Nation*

The best-known use of the language of sovereignty had to do with identifying the fundamental nature of the political and constitutional order. On at least two important occasions in the 1790s, attempts were made to capture the language of sovereignty as a means of expressing a particular vision of the United States Constitution. The United States Supreme Court’s first great case, *Chisholm v. Georgia*,<sup>248</sup> involved a private party’s claim that a state could be subjected to national judicial power without its consent.<sup>249</sup> The case thus unavoidably posed for the Court the question of the identity of the sovereign in the federal constitutional order. Georgia’s justification for its refusal to recognize the Court’s jurisdiction—a justification articulated only after the fact since the state declined even to argue the point before the Court<sup>250</sup>—rested on the legal rule found in Blackstone and elsewhere that the sovereign could not be sued without his (or its) consent. The rule’s viability in a federal court system had been discussed during the ratification campaign of 1787-88, and Hamilton, among other supporters of the Constitution, had intimated that the states would retain, “as one of the attributes of sover-

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245. *Hunter v. Martin*, 18 Va. (4 Munf.) 1, 11 (1815) (Cabell, J.).

246. *Id.* at 8-9.

247. *Jackson v. Rose*, 4 Va. (2 Va. Cas.) 34, 35 (1815).

248. 2 U.S. (2 Dall.) 419 (1793).

249. *Id.* at 453 (Wilson, J.).

250. Governor Edward Telfair, Message to the Georgia Legislature (Nov. 4, 1793), in *STATE DOCUMENTS*, *supra* note 173, at 8-9; An Act Declaratory of Certain Parts of the Retained Sovereignty of the State of Georgia (passed by the State House of Representatives, Nov. 21, 1793), in *STATE DOCUMENTS*, *supra* note 173, at 9-11.

eignty," their immunity from suit under the proposed Constitution.<sup>251</sup> Georgia's implied position thus enjoyed significant support from the history of the Constitution's origins.

Attorney General Randolph, the plaintiff's counsel in *Chisholm*, argued to the Court that a variety of considerations supported the claim that an unconsenting state was subject to compulsory federal jurisdiction. Randolph's primary argument was strictly textual: Article III extended federal jurisdiction to controversies "between a state and citizens of another state." No one would doubt, Randolph observed, that under such language Georgia constitutionally could sue Chisholm (a South Carolinian) in federal court; both logic and the grammar of the clauses in Article III strongly suggested that the reverse was true as well.<sup>252</sup> Randolph insisted that the states' sovereign status, which he conceded,<sup>253</sup> did not contradict this textual argument. Precisely as sovereigns, "with the free will, arising from absolute independence,"<sup>254</sup> the states had formed a federal union that limited their powers and independence both by the delegation of authority to the federal government and by implicit prohibitions on state action. Such undeniable "diminutions of sovereignty" proved, in Randolph's opinion, that "there is nothing in the nature of sovereignties, combined as those of America are, to prevent the words of the constitution [apparently subjecting states to suit] . . . from receiving an easy and usual construction."<sup>255</sup>

Randolph's argument attempted to combine a common nationalist rhetorical strategy, one that identified the states as (partially) sovereign while insisting that on the issue at hand, state sovereignty had been abridged by the states' own action in adopting the Constitution.<sup>256</sup> Two members of the Supreme Court majority that upheld *Chisholm*'s right to sue Georgia adopted a different approach, one that recast the entire discussion of sovereignty in a strongly nationalist direction. Justice James Wilson launched a frontal assault on the very use of sovereignty language

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251. THE FEDERALIST No. 81, at 548-49 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

252. *Chisholm*, 2 U.S. (2 Dall.) at 419 (argument of counsel).

253. *Id.* at 423 (argument of counsel).

254. *Id.* (argument of counsel).

255. *Id.* (argument of counsel).

256. As Justice James Iredell intimated in his dissent, this strategy was not without its problems. Randolph had no clear answer to the assertion that the words of Article III could only be read properly against the background of legal history and political assumptions shared by Americans in 1787-88. By recognizing a state's right to sue as *plaintiff* in federal court, Justice Iredell insisted, "every word in the Constitution" could be given effect without offending the widespread assumption during the ratification process that the states would retain their sovereign immunity from compulsory suit. *Id.* at 429, 449-50 (Iredell, J.).

at all in American political discussion. No intellectual or rhetorical confusion had done "mischief so extensive or so practically pernicious . . . in politics and jurisprudence," in Justice Wilson's view, as the words "states" and "sovereigns."<sup>257</sup> Justice Wilson pointed out that the terminology of "sovereignty" was wholly absent from the Constitution's text, and not surprisingly so, since only the people of the nation as a whole could properly assume the title of "sovereign" in a government of freedom and equal rights.<sup>258</sup> Talk of a "sovereign" was simply inapposite and misleading in America where there were no "subjects." In particular, a state such as Georgia had no claim to be called or treated as "sovereign." It was not "sovereign" in the sense of the law of nations because it was bound by the Constitution and thus did not govern itself "without any dependence on another power";<sup>259</sup> nor was it "sovereign" in terms of republican theory, for the "citizens of Georgia, as a part of the 'People of the United States'" had not surrendered "the supreme or sovereign power to that state; but, as to the purposes of the union, retained it to themselves."<sup>260</sup> Having disposed of the entire notion of state sovereignty, Justice Wilson had no need to deal with the argument that the Constitution presumed or preserved state sovereign immunity.

Chief Justice John Jay reached Justice Wilson's (and Randolph's) conclusion by yet another, and in Chief Justice Jay's case, historical route. During the colonial period, Chief Justice Jay wrote, the crown was the sovereign, and the American colonists were fellow-subjects of one another and of the inhabitants of Great Britain. When the colonies as a united group declared themselves independent, "the sovereignty of the country passed to the people of it," the American people as a whole.<sup>261</sup> The vicissitudes of war and political confusion, along with "local convenience and considerations," misled Americans into reconceiving the nation as a "confederation" of "thirteen sovereignties."<sup>262</sup> The failure of the Articles of Confederation, however, reawakened the American people to "their collective and national capacity," and in that capacity the people "executed their own rights, and their own proper sovereignty" to establish the Constitution.<sup>263</sup> Thus the language of state sovereignty was an historical error,<sup>264</sup> subsequently corrected, and compulsory fed-

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257. *Id.* at 453, 454 (Wilson, J.).

258. *Id.* (Wilson, J.).

259. *Id.* at 457 (Wilson, J.).

260. *Id.* (Wilson, J.).

261. *Id.* at 469 (Jay, C.J.).

262. *Id.* at 470 (Jay, C.J.).

263. *Id.* at 471 (Jay, C.J.).

264. Chief Justice Jay did refer to the state's "residuary sovereignty," but the context sug-

eral jurisdiction over state-defendants “brings into action, and enforces this great and glorious principle, that the people are the sovereign of this country.”<sup>265</sup>

On a political level, the attempts of Justice Wilson and Chief Justice Jay to claim “sovereignty” for the nation, or to banish the term altogether, ran afoul of the clamor aroused by the possibility of federal judgments being enforced against debt-ridden states such as Georgia. The Eleventh Amendment swiftly overturned the specific holding of *Chisholm v. Georgia*, and the “Revolution of 1800”<sup>266</sup> rendered ultranationalist views politically unacceptable. On the other hand, Wilson and Jay had identified correctly the importance of debate over sovereignty, and over the proper recounting of constitutional history in American constitutional argument. Their outright rejection of state sovereignty and Jay’s historical picture of a national “people” which preceded the post-independence state polities were minority views (especially after 1800), but in more subtle forms their positions influenced the jurisprudence of the Marshall Court and the Republican nationalism of the late 1810s.<sup>267</sup>

### C. *The States as Sovereign Parties to the Constitution*

The states’ status as sovereigns, contested by Wilson and Jay but generally admitted rhetorically by both nationalists and their opponents in the 1790s, became a central constitutional concept in the theory (or theories) propounded by Republican leaders during the 1798-1800 crisis.<sup>268</sup> In a series of widely publicized public papers—Pennsylvania Chief Justice M’Kean’s opinion in *Respublica v. Cobbett*,<sup>269</sup> the Kentucky Resolutions of 1798 and 1799, the Virginia Resolutions of 1798, and the Virginia Report of 1800<sup>270</sup>—the Republicans sketched an anti-nationalist constitutional vision that regarded state sovereignty as the fundamental political datum in the constitutional order. The electoral “Revolution of 1800,” which permanently ousted the Federalists from national political

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gests that he was referring to “sovereignty” in the old sense of sovereignty as “the right to govern.” *Id.* at 470 (Jay, C.J.).

265. *Id.* at 479 (Jay, C.J.).

266. On the Republican understanding of their victory in the federal elections of 1800 as a true “revolution,” see DANIEL SISSON, *THE AMERICAN REVOLUTION OF 1800* (1974).

267. The great nationalist Republican jurist of the next generation, Joseph Story, relied extensively on Jay’s historical argument in his identification of the nation as the true sovereign under the Constitution. See H. Jefferson Powell, *Joseph Story’s Commentaries on the Constitution: A Belated Review*, 94 *YALE L.J.* 1285, 1303-04 (1985).

268. See *supra* notes 69 & 72.

269. 3 *Dall.* 467, 475 (Pa. 1798); see *supra* note 177 and accompanying text.

270. See *supra* notes 71-76, and 177-79, and accompanying text.

power, and the dissemination of the “principles of ’98” through such influential channels as St. George Tucker’s 1803 edition of Blackstone, insured that federal constitutional argument after 1800 would have, as explicit subject or implicit backdrop, a complex of concepts and questions surrounding the notion of the states as sovereigns.<sup>271</sup>

The second and third articles of the Articles of Confederation defined the fundamental nature of the confederacy that the Articles were establishing, and enunciated a fundamental interpretive principle flowing from that nature. The second article stated that “[e]ach state retains its sovereignty, freedom and independence,”<sup>272</sup> and the third that the “states hereby severally enter into a firm league of friendship.”<sup>273</sup> The second article concluded that as a consequence each state retained “every Power, Jurisdiction and Right, which is not by this confederation expressly delegated to the United States, in Congress assembled.”<sup>274</sup> The heart of the “principles of ’98” was the claim that these concepts—the states as original sovereigns; the Union as a league or compact created by a written, quasi-contractual agreement; the interpretive obligation of reading the compact’s delegation of authority to the federal government narrowly, in strict accord with the compact’s text and the states’ intent—were applicable as well to the 1787 Constitution and should govern its interpretation. As Pennsylvania Supreme Court Chief Justice M’Kean wrote, before the Constitution’s adoption, “the several states had absolute and unlimited sovereignty within their respective boundaries.”<sup>275</sup> When these sovereigns replaced the Articles’ “league of friendship,” Jefferson wrote, they did so “by compact,” “constitut[ing] a general government for special purposes, delegat[ing] to that government certain definite powers, reserving, each state to itself, the residuary mass of right to their own self-government.”<sup>276</sup> As a consequence, Madison asserted,

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271. There are, of course, other interpretations of the “principles of ’98” and their role in constitutional history. In his superb lectures on *Constitutions and Constitutionalism in the Slaveholding South*, Don E. Fehrenbacher, while agreeing with the states-rights interpretation put forward here, disputes their long-term importance. According to Professor Fehrenbacher, “[s]ubsequent use of the Resolutions in the sectional conflict has inflated and distorted their contemporary significance.” Don E. Fehrenbacher, *CONSTITUTIONS AND CONSTITUTIONALISM IN THE SLAVEHOLDING SOUTH* 42 (1989). In a famous article, Adrienne Koch and Henry Amman accepted the historical importance of the Kentucky and Virginia Resolutions while interpreting them as primarily concerned with the Federalist threat to individual constitutional rights and especially to freedom of speech and press. Adrienne Koch & Henry Amman, *The Virginia and Kentucky Resolutions: An Episode in Jefferson’s and Madison’s Defense of Civil Liberties*, 5 *WM & MARY Q.* (3d ser.) 145 (1948).

272. ARTICLES OF CONFEDERATION art. II (1781).

273. *Id.* art. III.

274. *Id.* art. II.

275. *Respublica v. Cobbett*, 3 *Dall.* 467, 473 (Pa. 1798).

276. *Kentucky Resolutions of 1798*, *supra* note 178, at 540.

the federal government's powers "result[ed] from the compact" and were "limited by the plain sense and intention of the instrument constituting that compact . . . no further valid than they are authorized by the grants enumerated in that compact."<sup>277</sup>

Jefferson and Madison were not wholly in agreement, and their disagreement exemplified a deep uncertainty running through state sovereignty constitutionalism. Jefferson's 1798 Kentucky Resolutions conceived of the constitutional compact as an agreement between "each state . . . as a state and . . . an integral party, its co-states forming as to itself, the other party."<sup>278</sup> The resulting image of a series of two-party compacts is conceptually confusing, but yielded a conclusion Jefferson apparently welcomed, that each individual state had "an equal right to judge for itself, as well of infractions as of the mode and measure of redress."<sup>279</sup> Madison, in contrast, consistently referred to "the states" in the plural as the "sovereign parties to their constitutional compact"<sup>280</sup> and seems to have seen the states' check on the federal government as essentially political in character. Madison's understanding of the compact theory thus did not differ greatly from the nationalist position in practical terms.<sup>281</sup> *The Report of 1800* expressly defined the "states" that are constitutional parties and sovereigns as "the people composing those political societies, in their highest sovereign capacity," rather than as any ordinary state organ.<sup>282</sup>

This vision of the Constitution as a compact among sovereigns—the Pennsylvania legislature in 1811 described it as "to all intents and purposes a treaty between sovereign states"<sup>283</sup>—played an important and ultimately tragic role in future constitutional history as the justification for state defiance of federal authority, for state interference with federal activity, and for secession and civil war. In the founding era, its primary function was to provide a conceptual basis on which to rest a narrow construction of the Constitution's grants of power to the federal government. As a matter of political and international law, St. George Tucker wrote in 1803, "[S]everal sovereign and independent states may unite

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277. Report of 1800, *supra* note 71, at 308.

278. Kentucky Resolutions of 1798, *supra* note 178, at 540.

279. *Id.*

280. Report of 1800, *supra* note 71, at 308-10, 348.

281. Few Americans of any political persuasion would have disagreed with Roger Sherman's 1787 observation that federal statutes could not "be enforced contrary to the Sense of a majority of the States." Letter to Unknown Addressee (Dec. 8, 1787), in 14 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 387 (John P. Kaminski & Gaspare J. Saldino eds., 1983) [hereinafter DOCUMENTARY HISTORY].

282. Report of 1800, *supra* note 71, at 309.

283. Pennsylvania Resolutions of 1811, in STATE DOCUMENTS, *supra* note 173, at 53.

themselves together by a perpetual confederacy, without each ceasing to be a perfect state";<sup>284</sup> such "a federal compact, or alliance between . . . states," customarily was reduced to writing,<sup>285</sup> which in turn was "to be construed strictly, in all cases where the antecedent rights of *states* may be drawn in question."<sup>286</sup>

The state compact and strict construction themes of the "principles of '98" were a constant feature of constitutional discourse after 1800. They provided the language for constitutional opposition, invoked by New England Federalists against President Jefferson's embargo and President Madison's war, as well as by Pennsylvania Republicans against the bank bill renewal and by Virginia Republicans against Supreme Court jurisdiction. But these concepts were not without influence on those supporting expansive readings of federal power. After 1800 the latter almost invariably couched their constitutional views in terms of close textual exegesis rather than of grand pronouncements about the federal government's undefined "resulting powers" or sovereignty of choice. Justice Story's opinion in *Martin v. Hunter's Lessee*,<sup>287</sup> for example, squarely rejected the 1798 "principle" that the states as sovereignties established the Constitution and adopted instead an ultra-nationalist ascription of the Constitution's creation to "the people of the United States."<sup>288</sup> Story upheld a statutory grant of jurisdiction to the Supreme Court, however, by a rigorous parsing of Article III's text entirely in the 1798 textualist tradition.

The Republican nationalist justifications of their expansive federal legislative program of the post-War of 1812 period were similar blends of '98 principle and Hamiltonian substance. In 1817, for example, Calhoun accepted "the position" that "our Constitution was founded on positive and written principles,"<sup>289</sup> and he defended an internal improvements bill by a careful examination of the language of Article I, section 8. Clay began an 1818 speech with the statement that "he had imbibed his constitutional opinions which had influenced his political course" from the *Report of 1800* and other documents "of analogous principles";<sup>290</sup> Clay

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284. Tucker, *supra* note 49, at 141.

285. *Id.* at 153.

286. While founding-era Americans usually employed the language of compact and strict construction in addressing federalism issues, Republican constitutionalists occasionally used the concepts to support a more general libertarian presumption against the existence of governmental power on any level. See Kentucky Resolutions of 1798, *supra* note 178, at 161-62 (expressing Republican "attachment to limited government, whether general or particular").

287. 14 U.S. (1 Wheat.) 304, 323-82 (1816).

288. *Id.* at 324.

289. Calhoun, *supra* note 126, at 404.

290. Clay, *supra* note 52, at 448.

went on to assert the legitimacy “in all that relates essentially to the preservation of this Union” of giving federal powers “a liberal construction.”<sup>291</sup> Jefferson sadly acknowledged to Albert Gallatin in 1817 that “almost the only landmark which now divides the federalists [among whom Jefferson classed many Republican nationalists] from the republicans” was the debate over how to read—indeed almost over how to punctuate—the beginning of Article I, section 8.<sup>292</sup> The great 1790s debate over the locus of sovereignty had as its most immediate result the reenforcement of textual argument as the primary vehicle of constitutional discourse.

#### IV. THE PROBLEM OF DISCRETION

In his great *Dictionary*, published in 1755, Dr. Samuel Johnson identified two distinct sets of meanings for the word “discretion.” For the first definition of “discretion,” he listed “Prudence; knowledge to govern or direct one’s self; skill; wise management.” Among the examples Johnson gave were two that linked “wisdom and discretion,” and one, a quotation from Pope’s *Essay on Criticism*, that used “discretion” to refer to care or skill in the writing of poetry. Johnson’s second set of definitions was unaccompanied by examples from literature, as he himself provided one: “Liberty of acting at pleasure; uncontrolled, and unconditional power; as, he surrenders at discretion; that is without stipulation.”<sup>293</sup>

“Discretion” was an important and extremely controversial concept in early American constitutional discourse; much of the trouble stemmed from the fact that for Americans of the late eighteenth and early nineteenth centuries, the word retained both complexes of meaning Dr. Johnson had recognized. Many, perhaps most, of the major constitutional disputes of the period involved a claim by someone to the legitimate exercise of discretion in the sense of wisdom, skill, or knowledge, and a rejoinder by others that this was in fact a claim to the unconstitutional and oppressive possession of discretion in the form of uncontrolled power. Debate over the role and legitimacy of “discretion” in the American constitutional order played a significant part in discussions of the extent of congressional power, the scope of judicial review, the relationship between the executive and the judiciary, and the sanctity of vested rights; all three branches of government under the American constitutions de-

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291. *Id.* at 449.

292. Letter from Thomas Jefferson to Albert Gallatin, *supra* note 163, at 133.

293. For a modern reader, Johnson’s example may obscure as much as it clarifies. To “stipulate” meant in Johnson’s time “to bargain” or “to settle terms.” Thus, where Johnson wrote “he surrenders at discretion,” we might say something like “he surrenders without negotiating any terms and thus is at the mercy of his enemy’s will.”



fined themselves in part on the basis of what form of discretion they legitimately could exercise.<sup>294</sup>

The underlying political grammar of early American constitutionalism was structured around the search for a means of empowering government and the opposite need to control government in the interests of the people's welfare and liberty. Without some means of control, Americans would be no safer from their own governments than they had been from the King and Parliament. An excess of control, on the other hand, would "paralyze the powers of the Constitution"<sup>295</sup> and thus render the American experiment in republican government self-defeating. Everyone agreed with Hamilton that "no government has a right to do *merely what it pleases*,"<sup>296</sup> but in one way or another almost everyone also agreed with his cynical observation that "in politics, power, and right are equivalent,"<sup>297</sup> at least as a statement of the tendency of power to claim legitimacy. The very point of written constitutions was to deny the automatic equation of power with right and thereby to put a check on power's tendency toward oppression. "[I]t is jealousy, and not confidence, which prescribes limited constitutions to bind down those whom we are obliged to trust with power," Jefferson wrote in 1798, adding that "our Constitution has accordingly fixed the limits to which, and no further, our confidence [in our governors] may go."<sup>298</sup> Hamilton himself wrote that to recognize "unlimited discretion" in Congress would be to "destroy the very idea of a Constitution limiting its discretion. The Constitution would at once vanish!"<sup>299</sup> Boundless executive discretion was, if possible, even less acceptable: As Justice Johnson wrote, "The officers of our government, from the highest to the lowest, are equally subjected to legal restraint."<sup>300</sup>

#### A. *The Discretion of the Legislature*

The most important and controversial questions about "discretion" concerned its exercise by legislatures and, especially, by Congress. The activity of legislation clearly involved "discretion" in Dr. Johnson's first

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294. Professor G. Edward White's magisterial study of the later Marshall Court is the essential starting point for anyone interested in early nineteenth century notions of "discretion." See WHITE, *supra* note 7, at 195-200.

295. 8 ANNALS OF CONG. 1222 (1798) (speech of James A. Bayard).

296. Hamilton, *supra* note 40, at 103.

297. *Id.* at 123.

298. Kentucky Resolutions of 1798, *supra* note 178, at 161.

299. Letter from Alexander Hamilton to William Loughton Smith (Mar. 10, 1796), in 20 HAMILTON PAPERS, *supra* note 40, at 72-73.

300. *Gilchrist v. Collector of Charleston*, 10 F. Cas. 355, 356 (C.C.D.S.C. 1808) (No. 5,420).

sense of “prudence” or “wise management.”<sup>301</sup> The Constitution gave powers to Congress, Madison told the House of Representatives in 1796, on the presumption that “the legislature would exercise its authority with discretion, allowing due weight” to considerations of policy, expediency, and circumstance;<sup>302</sup> the power to engage in a degree of “deliberation and discretion” was “essential to the nature of legislative power.”<sup>303</sup> The “political discretion” of Congress, Judge John Davis wrote in 1808, “embraces, combines and considers, all circumstances, events and projects, foreign or domestick, that can affect the national interests.”<sup>304</sup>

Legislators engaged in making choices about the exercise of “the authority delegated to them,” according to Justice Iredell, “exercise the discretion vested in them by the people.”<sup>305</sup> Republicans such as Madison usually differed with Federalists, like Hamilton, Davis, and Iredell, over the relationship of congressional discretion to the interpretation of the Constitution. The generality—and thus the ambiguity—of the Constitution’s language was frequently discussed during the ratification process. A newspaper in late 1787 expressed the standard argument of the Constitution’s supporters: The proposed Constitution defined federal powers “as minutely as may be, in their principle; and any detail of them which may become necessary, is committed to the wisdom of Congress.”<sup>306</sup> It was precisely this implicit reliance on congressional discretion that disturbed opponents of the Constitution: “There is some ambiguity in several important parts of it, which arises principally from ye too general terms in which it is expressed. Too much perhaps is left for ye future Congress to supply, which when supplied will be no part of ye Constitution.”<sup>307</sup>

After ratification, nationalists usually stressed the need for Congress to exercise wise judgment both in interpreting the Constitution and in selecting the most appropriate means to carry out its constitutional responsibilities. As Ames reminded the House in 1791, few pieces of legislation literally tracked the language of Article I which grants Congress power; as a consequence, in virtually all its law-making Congress was obliged to exercise “our discretion with regard to the true intent of the

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301. See *supra* note 293 and accompanying text.

302. 5 ANNALS OF CONG. 493 (1796).

303. *Id.*

304. *United States v. The William*, 28 F. Cas. 614, 620 (D. Mass. 1808) (No. 16,700).

305. *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 399 (1798) (Iredell, J., concurring).

306. A Citizen of Philadelphia, *The Weakness of Brutus Exposed* (Nov. 8, 1787), in 14 DOCUMENTARY HISTORY, *supra* note 281, at 66.

307. Letter from William Symmes, Jr. to Peter Osgood, Jr. (Nov. 15, 1787), in 14 DOCUMENTARY HISTORY, *supra* note 281, at 116.

Constitution.”<sup>308</sup> He explained that “[t]he Constitution contains the principles which are to govern in making laws,” but that in applying these constitutional principles to specific legislative concerns, the Congress was “to exercise our judgments, and on every occasion to decide according to an honest conviction of its true meaning.”<sup>309</sup> “The boundaries of the Constitution cannot be laid down with mathematical precision, by the square and compass,” Henry St. George Tucker argued in 1818, “[t]hey must be ascertained by the principles of sound reason and common sense, and by the exercise of a just discretion.”<sup>310</sup> The Constitution thus was to be regarded as “a rule of conduct for the legislative body” rather than a list of exactly what Congress could and could not do.<sup>311</sup> The needs of the nation “are of such infinite variety, extent and complexity,” Hamilton wrote, that Congress must enjoy “of necessity . . . great latitude of discretion in the selection and application of [the] means” of meeting those needs.<sup>312</sup> He admitted the possibility of “controversy and difference of opinion” over the constitutionality of Congress’ choices, but contended that “a reasonable latitude and judgment” on the constitutional question “must be allowed” to Congress.<sup>313</sup>

According Congress discretion in the interpretation and application of the Constitution, nationalists argued, did not entail permitting it to “govern by its own *arbitrary* discretion”;<sup>314</sup> the discretion they were endorsing was Dr. Johnson’s “prudence” (“wisdom applied to practice”) rather than his “uncontrolled power.” Congress itself was capable of determining what means of carrying out its tasks were appropriately related to the Constitution’s ends and appropriately respectful of the rights of individuals and states. The nationalists admitted that “there must always be great difference of opinion, as to the ‘direct relationship’, and ‘real necessity’ of the accessory powers” selected,<sup>315</sup> but insisted that this fact did not mean that Congress’ choices were arbitrary. “No, sir,” Tucker told his congressional colleagues, “it is not a mathematical, it is a moral certainty, that we are to expect in these great questions of political right . . . . Constitutional powers, which admit not of precise definition,” were, he added, “to be referred to practical good sense and sound discre-

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308. Ames, *supra* note 37, at 854.

309. *Id.*

310. 31 ANNALS OF CONG. 633 (1818).

311. 31 ANNALS OF CONG. 459 (1818).

312. Hamilton, *supra* note 40, at 105.

313. *Id.* at 107.

314. *Id.* at 153.

315. 32 ANNALS OF CONG. 1325 (1818).

tion."<sup>316</sup> Nationalists stressed this "internal" check of rational argument on congressional arbitrariness; they also invoked "representative responsibility"<sup>317</sup> and judicial review<sup>318</sup> as "external" checks on legislative waywardness.

The early opponents of expansive readings of federal power are often viewed as motivated primarily by a general fear of centralized power. Although that concern undeniably fueled the development of opposition thought and its crystallization in the "principles of '98," the fear of discretion was at least as important a factor. Opposition constitutionalists of the 1790s by and large doubted that the activity of prudential reasoning could be distinguished from the exercise of arbitrary choice; as a consequence they did not believe that an "internal" check on Congress' powers could exist once the legislature abandoned a strict observance of its "chartered authorities."<sup>319</sup> "To take a single step beyond the boundaries thus specially drawn around the powers of Congress is to take possession of a boundless field of power, no longer susceptible of any definition."<sup>320</sup>

The nationalists' claim that according to their interpretation of its powers Congress was constrained by its obligation to pursue the Constitution's designated ends, and especially "the general welfare" named in Article I, section 8, was, Jefferson wrote, empty.<sup>321</sup> It amounted to a reduction of "the whole instrument to a single phrase, that of instituting a Congress with power to do whatever would be for the good of the United States; and, as they would be the sole judges of the good or evil, it would be also a power to do whatever evil they please."<sup>322</sup> "[T]he Constitution of the United States is not . . . a mere general designation of the ends or objects for which the Federal Government was established," Peter Porter told the House of Representatives in 1811, "leaving to Congress a discretion as to the means or powers by which those ends shall be brought about."<sup>323</sup> The Constitution was equally "a specification of the powers or means themselves" by which its ends were to be achieved.<sup>324</sup> "The powers of the Constitution, carried into execution according to the strict terms and import of them, are the appropriate means, and the only

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316. *Id.*

317. 31 ANNALS OF CONG. 459 (1817) (House committee report on Internal Improvements).

318. 11 ANNALS OF CONG. 36, 38 (1802) (speech of Gouverneur Morris, Jan. 8, 1802).

319. Madison, *supra* note 33, at 416.

320. Bank Opinion, *supra* note 35, at 416.

321. *Id.*

322. *Id.* at 418.

323. 22 ANNALS OF CONG. 636 (1811).

324. *Id.*

means within the reach of this Government, for the attainment of its ends.”<sup>325</sup> Opponents of expansive federal power, such as Madison, who accepted the unavailability of legislative interpretation hoped to resolve debatable questions of construction through careful exegesis of the text and then to control Congress by demanding adherence to precedent.<sup>326</sup>

The intellectual struggle between advocates and opponents of congressional discretion in applying the Constitution was waged in large part over the proper reading of two clauses of Article I, section 8: the ambiguous language about the “general welfare” at the beginning of the section,<sup>327</sup> and the Necessary and Proper Clause at its conclusion. The “general welfare” language was susceptible to at least three different interpretations. The most nationalist and least widespread view construed the clause to grant Congress three separate and distinct powers—the power to collect taxes, to pay debts, and to “provide for the common defense and general welfare of the United States.”<sup>328</sup> Alexander Addison’s critique of the *Report of 1800* adopted this position. The Constitution, according to Addison, “gives to Congress power over the means, and imposes the duty of providing for the general welfare in all cases whatever, to which in its discretion the means ought to be applied.”<sup>329</sup> Critics of this view, such as Jefferson, regarded this as a claim of “universal power” based on a mere grammatical quibble,<sup>330</sup> and most nationalists also rejected it as inconsistent with section eight’s evident attempt to enumerate Congress’ powers.<sup>331</sup>

Most nationalists, and all of their opponents, agreed that the phrase “provide for the common defense and general welfare” modified Congress’ power to raise money and spend it. The debate then became one over whether Congress could spend the revenues it raised on any object that seemed to it to benefit the nation’s defense or welfare, or rather was restricted to expenditures connected with the powers subsequently enu-

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325. *Id.*

326. Madison noted early in the First Congress that “[a]mong other difficulties, the exposition of the Constitution is frequently a copious source, and must continue so until its meaning on all great points shall have been settled by precedents.” Letter from James Madison to Samuel Johnson (June 21, 1789), in 12 MADISON PAPERS, *supra* note 22, at 250; *see also* Letter from Madison to Ingersoll, *supra* note 121, at 390-93 (discussing the “necessity of regarding a course of practice” as fixing the meaning of the Constitution).

327. “The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States.” U.S. CONST. art. I, § 8.

328. *Id.*

329. Addison, *supra* note 184, at 1066.

330. Bank Opinion, *supra* note 35, at 418-19.

331. *See, e.g.*, Calhoun’s famous speech defending the constitutionality of the 1817 internal improvements bill that Madison subsequently vetoed. Calhoun, *supra* note 126, at 398-409.

merated in the section. Hamiltonian Federalists in the 1790s and many Republican nationalists of the period following the War of 1812 maintained the former position. As Calhoun explained in 1817, "First-the power is given to lay taxes; next, the objects are enumerated to which the money accruing from the exercise of this power may be applied-to pay the debts, provide for the common defence, and promote the general welfare."<sup>332</sup> He rejected a limitation of the spending power to the other powers listed in the section as inconsistent with the constitutional text: "If the framers had intended to limit the use of the money to the powers afterwards enumerated and defined, nothing could be more easy than to have expressed it plainly."<sup>333</sup> The scope of Congress' spending power thus involved not a question of constitutional interpretation but of political policy. So long as Congress did not attempt to appropriate money for a "purpose merely or purely local," Hamilton wrote, the question of "how far it will really promote or not the welfare of the union, must be a matter of conscientious discretion" and not of "constitutional right."<sup>334</sup>

Critics of the usual nationalist interpretation position argued that its pragmatic effect would be identical to that of the ultra-nationalist claim that there was a substantive "general welfare" power. The latter gave Congress "a general power of legislation instead of the defined and limited one hitherto understood to belong to them," Madison wrote in 1817.<sup>335</sup> "A restriction of the power 'to provide for the common defense and general welfare' to cases which are to be provided for by the expenditure of money" was no better; it "would still leave within the legislative power of Congress all the great and most important measures of Government, money being the ordinary and necessary means of carrying them into execution."<sup>336</sup> Madison and those who shared his view of the "general welfare" phrase rejected such a result as textually unacceptable, since it would "rende[r] the special and careful enumeration of powers which follow the clause nugatory and improper."<sup>337</sup> Equally unacceptable was the vast expansion of federal governmental discretion that would result. A Congress empowered to spend money in all matters involving the general welfare, Madison argued in his *Report of 1800*, would be too busy to give careful attention to all "the objects of legislative care," as well as unable to adapt its legislation properly to "the diversity

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332. *Id.* at 403.

333. *Id.*

334. Hamilton, *supra* note 40, at 129.

335. 8 THE WRITINGS OF JAMES MADISON 387 (Gaillard Hunt ed., 1908).

336. *Id.* at 387.

337. *Id.* at 87.

of particular situations.”<sup>338</sup> “One consequence must be, to enlarge the sphere of discretion allowed to the executive magistrate,” thus raising the spectre of a president wielding quasi-royal “prerogative and patronage.”<sup>339</sup> Madison’s message vetoing the 1817 Bonus Bill<sup>340</sup> added to this an argument concerning judicial review, which he asserted would be unavailable to restrain congressional misuses of a “general welfare” power or an enlarged spending power “inasmuch as questions relating to the general welfare, being questions of policy and expediency, are unsusceptible of judicial cognizance and decision.”<sup>341</sup> To avoid such unacceptable results, Alexander Smythe told the House the following year, the phrase had to be construed to limit Congress to “expending the money raised in the execution of the other powers expressly granted.”<sup>342</sup>

In their attack on the original bank bill,<sup>343</sup> Madison and Jefferson crafted what became the standard non-nationalist interpretation of the Necessary and Proper Clause. The clause authorized Congress to exercise a power not expressly given, according to Madison, only if it was “evidently and necessarily involved in an express power.”<sup>344</sup> Any other argument would construe the clause to give Congress “an unlimited discretion,” a conclusion that would undercut “the essential characteristic of the government”—its limited nature.<sup>345</sup> Jefferson was even more emphatic, writing that the Constitution legitimized only “those means without which the grant of power would be nugatory.”<sup>346</sup> This stringent reading of the clause reappeared in the 1811 bank renewal debate.<sup>347</sup> Representative Porter, for example, insisted that the clause “gives no latitude of discretion on the selection of means or powers.”<sup>348</sup> “If you undertake to justify a law” as necessary and proper to the execution of an enumerated power, Porter maintained, “you must show the incidentality and applicability of the law to the power itself, and not merely its relation to any supposed end which is to be accomplished by its exercise[;] . . . the plain, direct, ostensible, primary object and tendency of your law [must be] to execute the [enumerated] power.”<sup>349</sup>

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338. Report of 1800, *supra* note 71, at 316.

339. *Id.*

340. *See supra* note 29 and accompanying text.

341. Madison, *supra* note 29, at 585.

342. 31 ANNALS OF CONG. 1146 (1818).

343. *See supra* notes 32-36 and accompanying text.

344. Madison, *supra* note 33, at 378.

345. *Id.* at 376.

346. Bank Opinion, *supra* note 35, at 41.

347. *See supra* note 33 and accompanying text.

348. 22 ANNALS OF CONG. 636 (1811).

349. *Id.*

Nationalists attacked this strict reading of the Necessary and Proper Clause as implausible. According to Hamilton, “neither the grammatical, nor popular sense of the term requires that construction. According to both, *necessary* often means no more than *needful, requisite, incidental, useful, or conducive to*.”<sup>350</sup> The “whole turn of the clause”—with its references to “*all laws,*” “*all other powers,*” “*any department or officer,*” and so on—indicated, Hamilton argued, that “it was the intent of the convention, by that clause to give a liberal latitude to the exercise of the specified powers.”<sup>351</sup> The Necessary and Proper Clause in fact was an explicit authorization of Congress’ “great latitude of discretion in the selection and application of those means.”<sup>352</sup> Later nationalists reiterated Hamilton’s analysis. Marshall’s 1805 opinion in *United States v. Fisher*,<sup>353</sup> for example, rejected a Jeffersonian strict necessity construction as an interpretive nightmare, since it would always be possible to argue that any given means could be replaced by a different one.<sup>354</sup> Instead, “Congress must possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the constitution.”<sup>355</sup>

### B. Presidential Discretion and the Rule of Law

The problem of discretion was not confined to the legislative sphere. Indeed, the most persistent constitutional issue during Jefferson’s presidency probably was the struggle between the administration and the federal courts over the nature and limits of executive discretion. Even though a central Republican theme in the 1790s was opposition to the Federalist ideal of a strong executive, after the Republican electoral victory of 1800, Republican President Jefferson was a staunch defender of presidential discretion to interpret the Constitution and to act on his interpretation,<sup>356</sup> to govern the executive’s conduct by its own view of the law notwithstanding contrary judicial opinion,<sup>357</sup> to make independent judgments about issues of special executive concern such as foreign affairs and national security,<sup>358</sup> and to resist judicial attempts to “direct the

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350. Hamilton, *supra* note 40, at 102.

351. *Id.* at 102-03 (emphasis added).

352. *Id.* at 105.

353. 6 U.S. (2 Cranch) 358 (1805).

354. *Id.* at 396.

355. *Id.*

356. Letter from Thomas Jefferson to John B. Colvin, *supra* note 36, at 279.

357. Letter from Thomas Jefferson to George Hay (June 12, 1807), in 9 JEFFERSON WRITINGS, *supra* note 36, at 53-54.

358. *Id.* at 56.



use to be made" of executive power.<sup>359</sup>

The response of the federal courts was to recognize the existence of the President's "political powers, in the exercise of which he is to use his own discretion," but to insist that the courts, not the President, were the final judges of the limits of those powers. Marshall's opinion in *Marbury* conceded that "in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable."<sup>360</sup> But where the law assigned a duty to the executive, or there was a question of constitutional right, the President's actions were subject to judicial examination. The President "cannot, at his discretion sport away the vested rights of others," Marshall wrote, adding that a claim of vested right "must be tried by the judicial authority."<sup>361</sup> Presidential invasion of such a right would entitle the injured party to a remedy even if that entailed subjecting a high executive officer to a peremptory judicial writ. Nor did the President enjoy discretion about whether to enforce the laws. "If he could," Justice Paterson observed, "it would render the execution of the laws dependent on his will and pleasure; which is a doctrine that has not been set up, and will not meet with any supporters in our government."<sup>362</sup>

Jefferson's claim to independent interpretive authority was flatly denied by both Federalist and Republican judges. Marshall's famous statement that "[i]t is emphatically the province and duty of the judicial department to say what the law is"<sup>363</sup> was directed against the pretensions of the legislature, but he and his colleagues were equally ready to apply it to the executive. Justice Johnson forcefully stated their position in his newspaper defense of his decision in *Gilchrist v. Collector of Charleston*:<sup>364</sup> "Of these laws [the 'laws of the United States'] the courts are the constitutional expositors; and every department of government must submit to their exposition; for laws have no legal meaning but what is given them by the courts to whose exposition they are submitted."<sup>365</sup>

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359. Letter from Caesar Rodney to Thomas Jefferson (July 15, 1808), in 1 *THE GROWTH OF PRESIDENTIAL POWER*, *supra* note 198, at 558-61. The letter, addressed to the President by his attorney general and "leaked" to the press, was obviously a statement of the official views of the Jefferson administration.

360. 5 U.S. (1 Cranch) 137, 166 (1803).

361. *Id.* at 167.

362. *United States v. Smith*, 27 F. Cas. 1192, 1230 (C.C.D.N.Y. 1806) (No. 16,342).

363. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

364. 10 F. Cas. 355 (C.C.D.S.C. 1808) (No. 5,420). In *Gilchrist*, Justice Johnson held for the circuit court that presidential instructions interpreting and applying a federal embargo act were unwarranted under the statute and if intended to be mandatory were an inadvertent but "unsanctioned encroachment upon individual liberty." *Id.* at 356. He therefore issued a writ of mandamus ordering the collector of the port of Charleston to disregard the instructions.

365. Johnson, *supra* note 198, at 568-69.

The replacement of Jefferson by Madison as President eased relations between the executive and the judiciary, in large part because Madison quickly receded from Jefferson's more militant positions. While Madison did not hesitate on a number of occasions to veto a bill because he disagreed with Congress about its constitutionality, from early on in his administration he denied that any "legal discretion lies with the Executive of the U[nited] States" to interfere with judicial decisions or interpretations of law.<sup>366</sup>

### C. *The Legal Discretion of the Courts*

Americans of the founding era frequently stated that courts, too, exercised discretion, but in those cases the usage usually belonged in Dr. Johnson's first set of definitions which referred to prudence, skill, and knowledge.<sup>367</sup> In exercising its proper form of discretion, a court was not to choose arbitrarily but in accordance with the rules of law. When United States District Attorney George Hay argued to the circuit court during the treason prosecution of Aaron Burr that the court could *choose* not to grant Burr's motion for a subpoena *duces tecum* to the President, Chief Justice Marshall replied that Hay misunderstood judicial discretion: "This is said to be a motion to the discretion of the court. This is true. But a motion to its discretion is a motion, not to its inclination, but to its judgment; and its judgment is to be guided by sound legal principles."<sup>368</sup> The court's discretion was to be exercised in determining the legal relevance of the documents sought by the subpoena, and the legal cogency of any claim by the executive that the national interests required the document's exclusion from evidence, but "the court has no right to refuse its aid to motions for papers to which the accused may be entitled" by legal principle.<sup>369</sup>

"Discretion" in the judicial context thus had little to do with choice; it was, rather, the court's skillful exercise of judgment in discerning and applying correctly the rules of law. "Courts are the mere instruments of the law, and can will nothing," Marshall wrote in 1824. "When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law."<sup>370</sup> Legal discretion, the process of determining the correct application of given princi-

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366. Letter from James Madison to Simon Snyder (Apr. 13, 1809), *supra* note 213, at 114.

367. See *supra* note 293 and accompanying text.

368. *United States v. Burr*, 25 F. Cas. 30, 35 (C.C.D. Va. 1807) (No. 14,692d). In the motion, Burr sought to compel President Jefferson to produce various documents relating to the military's efforts to arrest him.

369. *Id.*

370. *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 866 (1824).

ples to specific cases, thus had little in common with the political discretion of a legislature or an executive magistrate, even when the term was ascribed to either in a positive sense. As Judge Davis explained, "Legal discretion is limited. It is thus defined by [L]ord Coke, 'Discretion is to discern, by means of law, what is just.' Political discretion has a far wider range. It embraces, combines and considers, all circumstances, events and projects, foreign or domestick, that can affect the national interests."<sup>371</sup> Judicial discretion could only play a role in questions where the applicable principles of decision permitted "precision and certainty,"<sup>372</sup> but it is of the very essence of political discretion that it is exercised in conditions of uncertainty and with regard to considerations of expediency and necessity.

Despite the obvious fact that not all judicial decisions, and particularly those involving constitutional matters, were uncontroversial, legal discretion and politics were usually differentiated sharply. The Constitution, Marshall insisted in 1800, "had never been understood, to confer on [the judiciary] any political power whatever," but only the authority to resolve specific questions that could take "a legal form" and thus be decided by legal rules.<sup>373</sup> Judicial discretion thus involved "the exercise of a rational Judgment," in Kent's words, rather than "arbitrary will."<sup>374</sup> Judicial interpretation of a constitution, with all its political ramifications, was no less "legal" in nature than statutory construction or common-law reasoning. Constitutional interpretation, like all legal interpretation, rested on demonstrable principles, which St. George Tucker asserted "can be ascertained from the living letter, not from obscure reasoning or deductions only."<sup>375</sup> While there certainly were critics of specific constitutional decisions throughout this period, their complaint seldom if ever was directed against the assertion that courts must wield (legal) discretion in determining and applying the law. The intense warfare waged against the Federalist judges in the first years of Jefferson's presidency did not involve, for the most part, any rejection of judicial power, only of its unworthy possessors. There was no paradox in the fact that the most prominent Jeffersonian jurist of the 1810s, Spencer Roane, held a very high view of judicial authority. When he attacked the Federal Supreme Court's claim of jurisdiction to review state court deci-

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371. *United States v. The William*, 28 F. Cas. 614, 620 (D. Mass. 1808) (No. 16,700) (translation of Coke's Latin supplied).

372. *Id.*

373. John Marshall, Speech in the U.S. House of Representatives (March 7, 1800), in 4 *THE PAPERS OF JOHN MARSHALL* 82, 95-96 (Charles T. Cullen ed., 1984).

374. Kent, *supra* note 27, at 943.

375. *Kamper v. Hawkins*, 3 Va. (1 Va. Cas.) 20, 78 (Gen. Ct. 1793) (Tucker, J.).

sions, his criticism was that the Court had abused its discretion by applying the wrong legal principles, not that judicial discretion was itself illegitimate or indistinguishable from political choice.

#### V. CONSTITUTIONALISM AS A POLITICAL GRAMMAR

Viewed from the perspective of specific political issues, the founding era appears to have been a time of remarkably widespread constitutional dissension. The Philadelphia convention itself was far from harmonious, and the struggle over ratification revealed deep disagreements over political structure, civic virtue, and the proper relationship of power to liberty. Before the First Congress adjourned, the victorious Federalists (supporters of ratification) had split irreversibly into two political alliances, bitterly divided over constitutional issues. Beginning with the 1791 bank debate, federal constitutional discussion operated within a framework of systemic disagreement.<sup>376</sup> State constitutionalism was also the locus of serious conflict.<sup>377</sup>

The founding era's very real battles over substantive constitutional questions, however, were articulated—indeed, were made possible—by the emergence of a common set of ideas, problems, and structures of argument. Contemporary American constitutional debate is shaped more by our continued use of that “political grammar” (greatly modified over the years, of course) than by continuity with the particular moral and political concerns of the founding era. Much heated debate in contemporary constitutional theory stems from the fact that the modern theorists are operating, sometimes unwittingly, within the eighteenth-century dichotomy between discretion as power and discretion as the disciplined application of reason.<sup>378</sup> The failure to recognize that American constitutionalism is a linguistic tradition of political debate rather than a determinate set of political outcomes fuels the continuous search for the right constitutional theory, the theory that provides the correct resolutions of constitutional disputes and thus will confer legitimacy on constitutional decisions.

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376. To be sure, the substantive positions of various individuals and groups sometimes changed or even switched: The localist, state-sovereignty themes of the Republicans of 1798 were popular among the Federalists of 1815, and conversely mainstream Republican thought was by the latter date quite close to 1790s Federalism in its approval of a vigorous federal government.

377. *See, e.g.*, A.G. ROEBER, FAITHFUL MAGISTRATES AND REPUBLICAN LAWYERS 203-61 (1981) (discussing debate over distribution of political power in Virginia legal system between 1790 and 1810).

378. “It is part of normal experience to find our thought conditioned by assumptions and paradigms so deep-seated that we did not know they were there until something brought them to the surface.” POCOCK, *supra* note 8, at 32.

American constitutionalism, however, has never been a determinate set of outcomes. The structures and basic concepts of constitutionalism push in certain directions, toward an individualistic view of society, for example, without dictating the answers to many questions likely to be viewed as debatable in American society.<sup>379</sup> Sanford Levinson has written that “[t]here is nothing that is unsayable in the language of the Constitution, even if some things will sound strange and ‘off-the-wall.’”<sup>380</sup> Even if as a pragmatic matter this is overstated, Professor Levinson’s main point about the indeterminacy of the constitutional tradition within which we in fact live—as opposed to the determinate constitutionalisms of the theorists—is surely correct. Our political grammar has been and can be employed to say and do both evil and good.

Viewed in this way, American constitutionalism does not answer the questions of political morality and social justice that are the ultimate subject of its vocabulary and rhetorical structures; the grammar book does not tell you what to say. In that respect, however, we are in no different position from that of the Americans of the founding era. In arguing that the Virginia constitution did not permit the legislature to recognize the privileged property rights of the colonial established church, the great Virginia jurist Spencer Roane discussed his understanding of the social and political “effect of the revolution.” Roane acknowledged “the danger of different inferences being drawn, from this source, owing to the different media through which they pass.”<sup>381</sup> To speak of the meaning of “the reign of equal justice” that the Revolution “established in America” takes one far afield from technical legal argument; each individual’s answer, Roane suggested, depends finally on ethical beliefs and commitments, the depth of one’s “sensibility in the cause of equal rights.”<sup>382</sup> The constitutional question could not properly be posed, for Roane, if those beliefs, commitments, and sensibilities were excluded. Like Roane and his contemporaries, we too must go beyond the grammar of constitutional debate in order to determine what meaning the Constitution is to have.

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379. At any given time, of course, many issues will not be seen as seriously contestable. The unconstitutionality of de jure segregation is an example of such an issue today. Forty years ago, in contrast, the question was eminently debatable.

380. LEVINSON, *supra* note 6, at 191-92.

381. *Turpin v. Lockett*, 10 Va. (6 Call) 113, 165-66 (1804) (Roane, J.).

382. *Id.* at 166.

