The Political Constitution of Federalism in Antebellum America: The Nullification Debate as an Illustration of Informal Mechanisms of Constitutional Change

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The requirements of the U.S. Constitution are often assumed to be either clear or defined by the judiciary through interpretation, or both. Examination of the nullification crisis of 1833 indicates that this view of the U.S. Constitution is misleading. The nullification crisis provoked three competing visions of the appropriate understanding of federalism in the context of textual ambiguity and judicial activity. The subsequent development of federalism was determined by that political conflict and compromise. The nullification controversy provides an important example of the openness of constitutional norms, the significance of political debate in the shaping of constitutional meaning, and the complexity of antebellum political thought.

Federalism and its constitutional nature have been complex problems throughout American history. Federalism is best thought of not as a specified intermediate position between confederation and nation, but rather as a continuing tension contained within, and created by, the founding document.[1] Partly because of that ambiguity, the resolution of that tension is a political, and not merely a legal task that has fallen on subsequent generations since the founding.

By locating the U.S. Constitution in a specific text, the founders placed some legal limits on government action, but they also left some constitutional questions open for future deliberation and development. Consideration of the constitutional nature of federalism points to the deliberative and constructive nature of political action to constitutional meaning. Recognizing the potentially constitutive nature of politics provides an entry point for moving beyond a sharp dichotomy between constitutional

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[1]Although there are other sources and purposes for its writing, Donald S. Lutz has justifiably argued that "federalism lies at the heart of the United States Constitution," Donald S. Lutz, *The Origins of American Constitutionalism* (Baton Rogue, LA: Louisiana State University Press, 1988), p. 153.

legalism and technocratic or interest-driven government administration. Politics can open a space both between and beyond these alternatives, in which political principles are established to guide future government deliberation and action and in which government institutions are structured so as to shape and constrain future policy decisions. Although the courts are important in defining and enforcing the limits of federalism, exclusive focus on judicial pronouncements as the source of understanding constitutional meaning is misguided.[2]

In the context of federalism in particular, constitutional interpretation can help provide the distant limits of permissible government action, but the core ambiguity of federalism cannot be dispelled through traditional legal analysis.[3] Although the foundations for the ultimate structure are taken as given, political actors must bring external values and interests to bear in order to add specificity to an inherently indeterminate text and change received understandings of its implications. Such political efforts do not merely reshuffle the administration of intergovernmental relations, but construct the principled configuration of federalism within which such political debates can then take place.

In this article, I reconstruct the constitutional arguments and positions that emerged during the nullification crisis that sought to define the nature of federal-state relations in the decades prior to the Civil War.[4] Examination of these events serves several goals. First, it sheds further light on the constitutional nature of a historical event often analyzed in other contexts. Second, in contrast to the overwhelmingly court-centered approach that has dominated constitutional theory for the past century, the dynamics of the nullification controversy provide evidence of how constitutional issues are discussed and resolved in a political context. Third, the nullification crisis focuses specifically on the issue of federalism and highlights arguments

[2]Some postwar commentators have essentially urged that federalism be transformed from a judicial and constitutional issue of government power to a political and administrative issue of intergovernmental relations. See for example, Herbert Wechsler, "The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government," *Columbia Law Review* 54 (1954): 543; Jesse H. Choper, *Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court* (Chicago, IL: University of Chicago Press, 1980). For a critique, see John C. Pittenger, "*Garcia* and the Political Safeguards of Federalism: Is There a Better Solution to the Conundrum of the Tenth Amendment?" *Publius: The Journal of Federalism* 22 (Winter 1992): 1-19. Some recent commentators have responded to an abortive effort by the Court to limit the powers of the general government in the name of federalism by describing the Court's role as essentially "educative" in highlighting political rather than legal principles in enforcing boundaries of government authority. See, for example, Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* (New York: Oxford University Press, 1982), pp. 190-195; Robert F. Nagel, *Constitutional Cultures: The Mentality and Consequences of Judicial Review* (Berkeley: University of California Press, 1989), pp. 60-83.

[3]From a legal perspective, this approach suggests an expansion and modification of the political questions doctrine. The judiciary should recognize constitutional areas that are not only completely beyond judicial competence, but also those in which the judicial role is limited and supplemented by political action. *Luther v. Borden*, 48 US (7 How.) 1 (1849); *Coleman v. Miller*, 307 US 433 (1939); *Baker v. Carr*, 369 US 186 (1962).

[4]In this context, the specifics of the device of nullification are far less important than the different understandings of federalism more broadly, including the dynamics of constitutional development, at play in the conflict.

as to how and why a reshaping of political understandings is essential to reasserting the power of the states *vis-à-vis* the national government.[5] In other words, the nullification debate hinged on arguments that federalism is a matter of constitutional politics, and not just constitutional law. Understanding the constitutive nature of political action is central not only to analyzing the historical development of the U.S. Constitution, but also to grasping the nature and significance of current and future political moments.

NULLIFICATION AND THE STATES' RIGHTS TRADITION

The nullifiers stood at one extreme of the federalism spectrum, but nonetheless operated within a viable tradition of less centralized constitutionalism. Their failure to establish nullification as a regular mechanism of constitutional settlement was by no means foreordained. Their ability to capture the political mechanisms of a state and to provoke serious deliberation on the issue by mainstream political actors is testimony to the fact that their suggestions were not yet "beyond the pale" of American politics.[6] Although the ratification of the U.S. Constitution clearly closed off some political options, at least without constitutional amendment, it left many issues unresolved and available for future debate.[7]

Subsequent to the ratification of the U.S. Constitution, one of the first significant attempts to resist political consolidation was the Virginia and

[5]Although there were several intertwined, constitutional issues involved in the nullification crisis, this study is limited to the arguments over federalism. Useful general histories of the crisis include William W. Freehling, *Prelude to Civil War: The Nullification Controversy in South Carolina, 1816-1836* (New York: Harper & Row, 1966); David Franklin Houston, *A Critical Study of Nullification in South Carolina* (1896; reprint, Gloucester, MA: Peter Smith, 1968); Chauncy Samuel Boucher, *The Nullification Controversy in South Carolina* (Chicago: University of Chicago Press, 1916). On political moves to resolve the controversy, see Merrill D. Peterson, *Olive Branch and the Sword—The Compromise of 1833* (Baton Rouge: Louisiana State University Press, 1982); Richard E. Ellis, *The Union at Risk: Jacksonian Democracy, States' Rights and the Nullification Crisis* (New York: Oxford University Press, 1987).

[6]To belittle the nullifiers as arguing as if the Anti-Federalists "had written the Constitution" and to dismiss their "reading of the ratification debate" as "odd," as one recent commentator has done, is to accept the written Constitution as far less open-ended than it is and to mischaracterize the nature of constitutional development. David F. Ericson, *The Shaping of American Liberalism: The Debates over Ratification, Nullification and Slavery* (Chicago: University of Chicago Press, 1993), p. 75. Similarly, Charles Sellers characterizes nullification principles as an "absurdity"; Sellers, *The Market Revolution: Jacksonian America, 1815-1846* (New York: Oxford University Press, 1991), pp. 305-306. In contrast, Lutz has argued, "Although details of the federal form remained incomplete in the Constitution, that does not detract from the importance of federalism. Details of almost every important aspect of the Constitution were left to future generations. The struggle over states' rights, judicial interpretation of the Bill of Rights as it applies to the states, and even the decline of state power versus national power operate within a framework defined by federalism," Lutz, *American Constitutionalism*, p. 153. See also, Harry V. Jaffa, "Partly Federal, Partly National," *The Conditions of Freedom: Essays in Political Philosophy*, ed. Harry V. Jaffa (Baltimore, MD: Johns Hopkins University Press, 1975), pp. 161-183.

[7]However, to reduce the debates surrounding the nullification crisis to a mere "reaction to the attack on the very essence of national sovereignty" and incapable of constituting "any kind of development beyond what Jefferson would have done" obscures the alternative conceptions of federalism that were at play during the crisis, as well as the ambiguity of the Jeffersonian inheritance on the subject. Theodore J. Lowi, "Foreword," *The Dynamics of American Politics: Approaches and Interpretations*, eds. Lawrence C. Dodd and Calvin Jillson (Boulder, CO: Westview Press, 1994), p. xiv.

Kentucky resolutions of 1798. Responding to the centralizing tendencies of the Federalist administrations, the resolutions were secretly drafted by James Madison and Thomas Jefferson and passed by the Virginia and Kentucky legislatures.[8] Building from the premise that the Constitution's Tenth Amendment specified that the general government is one of limited powers, the resolutions declared the sense of the legislatures that the Alien and Sedition Acts of 1798 were unconstitutional and requested that the other states similarly condemn the acts and "require" their repeal. A number of states responded by denying the authority of states to judge the constitutionality of federal actions. These critics often pointed to the judiciary as the proper forum for such interpretative efforts.[9] Virginia and Kentucky responded in a second set of resolutions adopted in 1799, and in a report drafted by Madison in 1800.[10]

Although there are interesting differences between the Virginia and Kentucky resolutions, they both begin from the same assumption: that the federal Constitution is a "compact" among the states and that as the parties to that compact, the states have a right and duty to interpret and enforce its terms.[11] Further, the federal government could not be understood to be "the exclusive or final judge of the extent of the powers delegated to itself," for that would undermine the very notion of a limited government. Instead, drawing from John Locke and the English common law, Jefferson contended that "as in all other cases of compact among powers having no common judge, each party has an equal right to judge for itself, as well of infractions as of the mode and measure of redress."[12]

In what became known as the "sentinel" role of the states, the state governments were to serve as guardians against the general government, "jealous" of liberty and unwilling to show any "confidence" in national

[8]The Kentucky resolutions, including Jefferson's original drafts, may be found in Thomas Jefferson, *The Writings of Thomas Jefferson*, ed. Paul Leicester Ford, vol. 7 (New York: G. P. Putnam's Sons, 1896), pp. 289-309; for the Virginia resolutions, see James Madison, *The Writings of James Madison*, ed. Gaillard Hunt, vol. 6 (New York: G. P. Putnam's Sons, 1906), pp. 326-331. For a history of their writing, see Adrienne Koch and Harry Ammon, "The Virginia and Kentucky Resolutions: An Episode in Jefferson's and Madison's Defense of Civil Liberties," *William and Mary Quarterly* 3rd Series, 5 (April 1948): 145-76.

[9]The replies from Delaware, Rhode Island, Massachusetts, Pennsylvania, New York, Connecticut, New Hampshire and Vermont are in *State Documents on Federal Relations: The States and the United States*, ed. Herman V. Ames (1906; reprint, New York: Da Capo Press, 1970), pp. 16-25. Notably, there were no condemnations from the southern states, though no states joined Virginia and Kentucky in their official denunciation of the Alien and Sedition Acts. Massachusetts, Connecticut, New Hampshire, and Pennsylvania endorsed those acts in their replies.

[10]For the Virginia resolutions of 1799 and Madison's report, see Madison, *Writings*, 1: 331-406.

[11]One notable distinction is that the Kentucky resolutions relied on the Tenth Amendment and the federal relationship it confirmed to strike at the constitutionality of the Alien and Sedition Acts, whereas the Virginia resolutions referred specifically to the First Amendment to challenge the Congress's power over seditious speech, though Jefferson's own draft of the Kentucky resolutions also made use of the First Amendment. Jefferson, *Writings*, 7: 293-295; Madison, *Writings*, 6: 328-329.

[12]Jefferson, *Writings*, 7: 292. Compare, John Locke, "Second Treatise," *Two Treatises of Government*, ed. Peter Laslett (New York: Cambridge University Press, 1988), § 13, 19.

officeholders.[13] The state governments contended for the need for a disinterested judge to protect the parchment barriers of the constitutional text from aggressive actions by the U.S. Congress or the president.[14] To these arguments for limited government, proponents of states' rights added particular historical considerations that favored the states as constitutional creators and emphasized the close political relationship between state officials and their constituents.[15] The resolutions carried an implicit threat of the use of state political power to "interpose" the state government between a citizen and the federal government that had "marked him as its prey" in order to prevent the operation of acts that are "unauthoritative, void, and of no force."[16] Jefferson's draft resolution specifically supplemented the suffrage with the "natural right" of each state "to nullify on their own authority all assumptions of power by others within their limits."[17]

Jefferson's election to the presidency in 1800 put an effective end to that immediate controversy. Nonetheless, the less centralized understandings of federal-state relations persisted and spread beyond both the South and the strongholds of the Republican party. Numerous states, North and South, used legislative resolutions to reaffirm the compact nature of the union, to express interpretations of the federal Constitution, and often to direct the states' U.S. senators to take designated actions to prevent or end unconstitutional federal actions.[18] The strongest expression of states' rights sentiments was not in the South but in New England, where the Hartford Convention met in opposition to the War of 1812 and recommended that states resist any federal laws providing for conscription and also proposed mechanisms for allowing the states to conduct the war separately.[19]

[13]Jefferson, *Writings*, 7: 304. The "sentinel" label was given by John Taylor, who sponsored the Virginia resolutions. Taylor, *An Inquiry into the Principles and Policy of the Government of the United States* (New Haven: Yale University Press, 1950), p. 557. For similar imagery, see also James Madison, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution*, ed. Jonathan Elliot, vol. 3 (New York: Burt Franklin, 1964), p. 35.

[14]Similarly, John Marshall built his case for judicial review on the simple argument that the written Constitution set limits on legislative action, but if the legislature determined those limits for itself, then it would in practice exercise unlimited powers. Thus, Marshall concluded that a disinterested party, such as the Court, must determine the legal limits of legislative authority. *Marbury v. Madison*, 5 US (1 Cranch) 137, 176-177 (1803).

[15]Madison, *Writings*, 6: 329.

[16]Jefferson confided that he would prefer "for the present" simply to make a public declaration and "reserve ourselves to shape our future measures or no measures, by the events which may happen," Jefferson, *Writings*, 7: 289-290, 288-289. The Virginia Resolutions called for the states "to interpose for arresting the progress of the evil, and for maintaining within their respective limits the authorities, rights, and liberties appertaining to them," Madison, *Writings*, 6: 326.

[17]Jefferson, *Writings*, 7: 301. It was in part to this threat that the other states responded. Rhode Island, for example, thought the Virginia legislature had inappropriately blended "together legislative and judicial powers," and was threatening the use of "the strength of its own arm," Ames, *State Documents*, p. 17.

[18]In protesting the embargo in 1809 for example, Rhode Island, which had opposed the 1798 resolutions, converted to states' rights principles and declared itself "one of the parties to the Federal compact" with a "right to express their sense of any violation of its provisions" and "to interpose for the purpose of protecting" citizens from "usurped and unconstitutional power," Ames, *State Documents*, pp. 43-44.

[19]Ames, *State Documents*, pp. 54-87. For a general history, see James M. Banner, Jr., *To the Hartford Convention* (New York, NY: Knopf, 1970).

Such noncentralizing tendencies fed into an increasing southern sectionalism and accelerated after the Panic of 1819, a series of nationalist decisions by the Marshall Court, and the Missouri crisis in 1820. The southern disenchantment with growing federal power made itself felt in a number of areas, but two such episodes are of particular interest.[20] In 1815, the Virginia high court refused to act in accord with mandates issued by the U.S. Supreme Court, sparking a strongly worded rebuke by the Madison-appointed Justice Joseph Story.[21] Three years later, the chief judge of the Virginia Court of Appeals, Spencer Roane, took to the newspapers to rally the people of the state against the consolidating tendencies expressed in John Marshall's opinion in *McCulloch v. Maryland.*[22] Roane emphasized that the Constitution was incomplete and neither addressed every possible political contingency nor provided the most satisfactory remedies for future political problems.[23] In the absence of clearly known constitutional meaning and in the face of the federal government's interest in expanding its powers, disputed powers had to be arbitrated by the states through political settlements. In the end, however, Roane put his faith in the federal government bowing to an aroused public opinion.[24]

During the late 1820s, the state of Georgia engaged in an extended dispute with the federal government over the state's right to extend its criminal laws and civil jurisdiction over the lands of Indian tribes residing within its territory.[25] Governor George Troup explicitly denied the jurisdiction of the U.S. Supreme Court over a dispute "involving rights of sovereignty between the States and the United States," and refused to send state attorneys to argue the issue before the Court. Such issues of sovereignty were a "matter for negotiation between the States and the United States," that is, political discussion and compromise, not legal resolution. Nonetheless, the constitutional requirement that would govern the outcome of such discussions was clear to Georgia. Denial of judicial or legal jurisdiction over the dispute was not equivalent to a denial of authoritative constitutional

[20]The growth of southern particularism is documented in Charles S. Sydnor, *The Development of Southern Sectionalism, 1819-1848* (Baton Rouge: Louisiana State University Press, 1948); Jesse T. Carpenter, *The South as a Conscious Minority, 1789-1861: A Study in Political Thought* (1930; reprint, Columbia: University of South Carolina Press, 1990).

[21]*Fairfax's Devisee v. Hunter's Lessee,* 11 US (7 Cranch) 603 (1813); *Hunter v. Martin,* 4 Munford 1 (Va. 1814); *Martin v. Hunter's Lessee,* 14 US (1 Wheat.) 304 (1816).

[22]*McCulloch v. Maryland,* 17 US (4 Wheat.) 316 (1819).

[23]The Hampden essays, along with a series of exchanges on the *McCulloch* decision, are collected in *John Marshall's Defense of McCulloch v. Maryland,* ed. Gerald Gunther (Stanford, CT: Stanford University Press, 1969), pp. 106-154. On the imperfection of the Constitution, see Gunther, *John Marshall's Defense,* pp. 130, 146-147. Roane also made use of his own *Hunter* opinion and a similar decision by Pennsylvania's high court, Gunther, *John Marshall's Defense,* p. 149.

[24]Gunther, *John Marshall's Defense,* 153-154. On such states' rights principles, Virginia and Kentucky entered a series of official legislative protests to the intervention of the federal judiciary in state land dealings, Ames, *State Documents,* pp. 103-113.

[25]The legislature relied on a theory of state sovereignty to claim full authority over Indian lands and to denounce the threat of federal military force, Ames, *State Documents,* 119-121.

principle.[26] Despite protests by New England, Andrew Jackson's election to the presidency proved beneficial for Georgia. The administration acted swiftly during the nullification crisis to satisfy Georgia's concerns and to ensure her neutrality in the conflict with South Carolina.[27]

Georgia's example soon inspired those in South Carolina who viewed the protective tariff to be an unconstitutional and intolerable burden on the state. The particular arguments against the tariff are not discussed here, but both the criticism of the tariff and its particular vehicle of protest employed a specific vision of the union and the constitutional relation between the general government and the states.[28] The process began with a series of essays published in 1827 by Robert Turnbull. Turnbull connected complaints against the tariff with fear of political centralization and undertook to define a more limited role for the general government. South Carolina, he asserted, "knew the general government, not by the kindness which it practises towards us, but by the taxes and the tribute money that it incessantly demands of us," and he placed this within the context of a federal principle that "we are an united people it is true—but we are a family united only for external objects."[29]

Turnbull emphasized that there were principled, and restrictive, limits to federal power but that the proper balance was a political issue. One effect of this mix was that the judiciary could not adequately determine the constitutional meaning of federalism. Not only was the Court an interested party in any conflict between the general government and the states, but it also could not reduce the relevant constitutional principles to legal precision. Without a neutral judge to arbitrate the conflict, it was up to the states to adopt "such measures to enforce such compacts as in their wisdom they shall judge fit." Given that the U.S. Constitution was a compact among the sovereign states, its meaning had to be understood as consistent with states' sovereignty, doubts about its meaning had to be resolved in favor of

[26]Federal actions relative to the Creek Indians were "an invasion of our vested rights, offensive in its manner, and not warranted by any principle of justice, meriting that hearty defiance which belongs to a people peculiar for their submission to constitutional authority, but equally remarkable for their opposition in every shape to tyranny and usurpation," Ames, *State Documents*, 122-123. Relative to the Cherokees, the legislature contended that "the lands in question *belong* to Georgia—she *must* and she *will* have them," Ibid., 125 (emphasis in original).

[27]Ellis, *Union at Risk*, pp. 102-122; Edwin A. Miles, "After John Marshall's Decision: *Worcester v. Georgia* and the Nullification Debate," *Journal of Southern History* 34 (November 1973): 519-544.

[28]South Carolina was relatively slow among southern states to reject the Federalist party and nationalism more generally. As late as December 1824, the South Carolina legislature passed resolutions denying the authority of a state to "impugn the Acts of the Federal Government or the decisions of the Supreme Court of the United States," which was the "proper tribunal" for determining constitutional meaning. George McDuffie, later a leading nullifier, denied in 1824 in the U.S. House of Representatives that the states were "sentinels" or "watch-towers of freedom," Ames, *State Documents*, pp. 137-139; Houston, *Critical Study*, p. 30. On the state's nationalist tradition, see Houston, *Critical Study*, pp. 16-32. On the failure of principled localism to shape national politics during the Jeffersonian era, see Norman K. Risjord, *The Old Republicans: Southern Conservatism in the Age of Jefferson* (New York: Columbia University Press, 1965). Thus, opposition to the tariff led South Carolina to reject nationalism and embrace a previously existing localist tradition, but then subsequently to develop that tradition in new directions.

[29]Brutus, *The Crisis: or, Essays on the Usurpations of the Federal Government* (Charleston, SC: A. E. Miller, 1827), pp. 12-13.

the states, and its terms ultimately had to be given meaning by the states. When faced with a violation of the limits of federal constitutional power, the states must resist, with arms if necessary.[30]

While Turnbull detailed numerous particular powers delegated to the general government under the U.S. Constitution, he also strove to define the principles that governed those delegations. This essential guiding principle was that the general government only had the power to act in those instances in which "the want of a common head" would "involve the whole in distress and ruin," principally foreign affairs. Turnbull emphatically rejected any possibility that the general welfare could "mean such interests, as a majority of the States might possess." Federal interests were those held in common by all. More abstractly, Turnbull was concerned that the state governments not be reduced to "petty corporations," little more than "repairers of parish roads and bridges." Ultimately, the federal balance was a question of political influence, which required proactive efforts by the states to bolster their own authority and exercise essential government functions.[31]

The most sophisticated expressions of what may be called this position of "radical federalism" during the crisis were made by John C. Calhoun. A late convert to the states' rights cause, Calhoun, while serving as vice president, secretly wrote the "Exposition and Protest," which was printed by the South Carolina legislature at the end of 1828. Under his own name, Calhoun later elaborated his theory of nullification in several public statements and on the floor of the United States Senate. Nullification sparked two alternative constructions of federalism. Daniel Webster led the development of a fully nationalist position, which defined the centralist end of the political spectrum. Andrew Jackson, with the aid notably of his secretary of state, Edward Livingston, carved out a third position, which can be labelled "centrist federalism."[32] The conflict between these three views of federalism peaked during the winter of 1832 to 1833, when the nullifiers proved only partially successful in establishing their vision while managing to defer part of the issue.

Calhoun not only faced more nationalist sentiment from the North and West, but also more extreme disunionist sentiment from the South. Moreover, even radical federalists questioned the constitutionality of nullification as a particular expression of the states' rights view. Nevertheless, Calhoun's arguments offer the best representation of the extreme states' rights position, embodying the most politically sustainable and fully articulated localist position during the controversy.

Calhoun's exposition of the argument emerged almost fully formed, and immediately incorporated Turnbull's escalation, while reaffirming a

[30]Ibid., 25, 97, 104, 109-110, 152-166.

[31]Ibid., 47, 23, 82, 139.

[32]For a somewhat different analysis of these divisions, see Major L. Wilson, "'Liberty and Union': An Analysis of Three Concepts Involved in the Nullification Controversy," *Journal of Southern History* 33 (August 1967): 331-355.

commitment to the union and thereby isolating the secessionists.[33] Nullification was both a specification of and a means to achieving his broader conception of radical federalism. Repeatedly invoking the memory of Jefferson and the "spirit of 1798," Calhoun portrayed nullification as the logical extension of the state interposition that lay at the base of Republican politics. Despite the appeal to precedent, nullification was clearly a step beyond the 1798 resolutions and their offspring, both making explicit a state's right to prevent the enforcement of federal laws and adopting local measures to that end. Moreover, Calhoun added an innovation by requiring that a popular convention issue the nullification ordinance rather than a state legislature.[34] These developments not only required a new theoretical foundation to support them, but also provided firmer support for the political movement.

Nullification was presented as a necessary complement to the power of judicial review. Although the federal courts serve as impartial arbiters in disputes between individuals or states, they are necessarily partial in any conflict between the general and state governments. Ultimately, the federal courts are influenced by the same factors as other federal institutions, and they are incompetent to address many of the key issues in federal-state relations. The judiciary's power is coextensive with the powers of the general government, but does not extend farther. For the nullifiers, federal-state relations required political, not legal, settlements. The judiciary has no distinctive claim in an intrinsically political dispute. Consequently, inviting judicial intervention would be tantamount to inviting any other form of federal political control over the states. Moreover, as a political conflict, the successful resolution of federal-state disputes necessitated, from the states' perspective, that the states have effective political influence. Federalism requires that each state be able to look to its own interests and not rely on other agents and institutions to represent and respect those interests.[35] By providing each state with a provisional veto over federal actions, nullification would elevate the state's power to interpret and enforce the limits of federal power delegated under the U.S. Constitution to a role similar to that already exercised by the courts and the president.[36]

[33]In the Summer of 1827, Thomas Cooper had called on the South "to calculate the value of our Union," and insisted that the alternatives were "submission or separation." Similarly, there were those in the 1832 convention who favored immediate secession, but not only were they unsuccessful in pushing for secession in November but were largely routed by March. Houston, *Critical Study*, pp. 138-140; Peterson, *Olive Branch*, pp. 87-88. For nullification's commitment to states' rights within union, see John C. Calhoun, *The Papers of John C. Calhoun*, ed. Clyde N. Wilson, vol. 11 (Columbia: University of South Carolina Press, 1978), p. 276.

[34]For Calhoun's appeals to the "spirit of 1798," see John C. Calhoun, *Union and Liberty*, ed. Ross M. Lence (Indianapolis, IN: Liberty Press, 1992), pp. 370-371, 380; Calhoun, *Papers*, 11: 447, 453, 464, 466, 564. Calhoun's innovation relative to state conventions was not immediately recognized. See for example, U.S. Congress, Senate, *Congressional Debates*, 21st Cong., 1st sess., 1830, pp. 31-50, 58-83.

[35]Calhoun, *Union and Liberty*, pp. 345-346, 380-381; Ibid., *Papers*, 11: 281.

[36]The veto was only provisional because three-fourths of the states could authoritatively interpret or add to the U.S. Constitution via amendment or convention. Calhoun, *Union and Liberty*, p. 356; Ibid., *Papers*, 11: 278, 634-636.

The particular mechanism of nullification was a corollary to a larger understanding of federalism. Nullification was asserted to be a direct result of President Jackson's betrayal of southern interests on the tariff issue and the tardy response of other southern states to the need for action.[37] Constitutional meaning, both in terms of the eventual tilt of federal relations and of the suggestion of the device of nullification, developed through and from political need. In explaining how such a procedure could be found in the U.S. Constitution, South Carolina minimized the distinction between the task faced by the founders and by their heirs.[38] It is the permanent hostility of the different sections and interests in the union that made a constitution necessary. If a check on the majority interests was the basis of the U.S. Constitution, then such an effective mechanism as nullification for achieving that goal must be a part of that document as well. The states' check on the general government flowed from the federal Constitution and its theory of government in the same fashion as the judiciary's, as a natural and necessary consequence implicit in the text.[39]

The permanent diversity of interests within the union grounded the construction of radical federalism. As Turnbull argued, the states represented a variety of local interests. In some instances, these same interests may exist within all the states, but in others, the interests may be unique to particular states and in opposition to the dominant interests of other states. South Carolina's concern with free trade was one such interest that would consistently be in opposition to the manufacturing interests of other states. For the nullifiers, political action rested on shared, not divergent, interests, and thus the federal role was limited to those activities that touched upon common interests. Those powers delegated to the general government were supposed to operate uniformly on all the states, providing for each without unduly burdening the rest.[40] The exercise of contested federal powers became a struggle between those favoring power and those favoring liberty, and the necessity of resorting to force against a state in order to carry out federal policy was an indication that the federal system was out of balance and treating some states unequally.[41]

The character of the federal union was not only shaped by the present diversity of interests, however. It was also shaped by its origins. The history of the various states as independent colonies, member states in a loose confederation, separate ratifiers of the U.S. Constitution, and conservators of the undefined reserved powers, all served to establish the case for radical

[37]Calhoun, *Union and Liberty*, pp. 419, 426.

[38]Cf., Paul W. Kahn, *Legitimacy and History: Self-Government in American Constitutional Theory* (New Haven, CT: Yale University Press, 1992), pp. 35, 42-45. For Kahn, Calhoun, and others of his generation saw their constitutional task as purely interpretative of the original intent, or maintenance of the founders' U.S. Constitution. This ignores the dynamic, constructive quality that maintenance entailed, at least for Calhoun.

[39]Calhoun, *Papers*, 11: 271-273, 492-493; Ibid., *Union and Liberty*, pp. 352, 356-359, 384-385, 407-408.

[40]Calhoun, *Union and Liberty*, pp. 342-343, 373.

[41]Ibid., 371, 374, 390, 433, 436, 460.

federalism. The rights and powers held by the states were not concessions granted by the U.S. Constitution, but the document's central core, delimiting the general government's delegated powers. As Calhoun put it, "the truth is that the very idea of an American people, as constituting a single community is a mere chimera. Such a community never, for a moment, existed, neither before, nor since the dec[laratio]n of Independence."[42] By appealing to the people of the states, Calhoun not only sought to strengthen the theoretical appeal of nullification, but also to undercut the political power of the general government. The sovereign people constituted the basis of both constitutional authority and political power. Indeed, the great threat of a consolidated government was not merely in the formal violation of constitutional divisions, but in the sapping of the popular influence of state governments. As the nationalists recognized, and the nullifiers feared, a more active federal government, even within its own sphere, necessarily threatened the ties between the citizenry and their state governments. The political threat was the constitutional threat. Therefore, the radical federalists were forced to challenge not only attempts to exercise undelegated power but also the "abuse" of delegated powers.[43] At a more formal level, the states must defend their special status as the sovereign creators of the original compact. As such, it was their sovereign right to interpret and fix the Constitution's terms and to restrain its agents. Allowing this power to fall into disuse threatened the theoretical understanding of the U.S. Constitution itself, and thereby fostered greater federal abuses as both the mechanism of restraint and the belief in restraints were abandoned by political actors.[44]

DANIEL WEBSTER AND THE NATIONALIST ALTERNATIVE

The strongest response to this representation of the federal Constitution was Daniel Webster's. Webster was uniquely positioned to build the nationalist construction, for he stood as the premier representative of the traditional center of nationalist sentiment, an architect of the economic system the nullifiers hoped to destroy, and the attorney instrumental in establishing several nationalistic Court decisions. Thus, it was Webster who first attacked nullification in the national legislature and ushered the Force Bill through the U.S. Congress three years later. Webster rejected every aspect of the radical federalist position. While each participant in the struggle claimed to be developing constitutional meaning, Webster was the most assertive in positioning himself as the defender of the status quo. Thus,

[42]Calhoun, *Papers*, 11: 495.

[43]Calhoun, *Liberty and Union*, pp. 359, 433; Calhoun, *Papers*, 11: 615, 645; Thomas Cooper, *Consolidation, An Account of Parties in the United States, from the Convention of 1787 to the Present Period*, 2d ed. (Columbia, SC: Times and Gazette, 1830).

[44]Calhoun, *Papers*, 11: 619, 625; Ibid., *Union and Liberty*, pp. 340, 343-344, 348, 378.

Webster insisted to a New York audience that "this is the *actual* U.S. Constitution, this is the law of the land."[45] Webster continually emphasized that the nullifiers were attempting to replace the U.S. Constitution and not simply interpret it.

> I shall not consent, Sir, to make any new constitution, or to establish another form of government. I will not undertake to say what a constitution for these United States ought to be. That question the people have decided for themselves; and I shall take the instrument as they have established it, and shall endeavor to maintain it, in its plain sense and meaning, against opinions and notions which, in my judgment, threaten its subversion.[46]

If the nullifiers succeeded, then the text "should not be denominated a constitution;" instead, it should be called "a collection of topics, for everlasting controversy." Continued controversy over constitutional meaning, in Webster's view, could "not be a government." The people's role in forming the U.S. Constitution was over. Now "the thing is done," and the time to worry about continuing agreement to its terms or operation "is at an end."[47] Consistent with this vision of settled constitutional meaning, Webster referred all interpretative questions to the courts. For him, the choice was between "law" and "force," and the existence of a settled constitution required the resort to the judicial elaboration of Constitutional law.[48]

While hoping to turn constitutional disputes over to the Marshall Court, Webster nonetheless was willing to offer his own vision of the "actual" Constitution. When dealing with the delegated powers of the general government, "if the law be within the fair meaning of the words in the grant of the power, its authority must be admitted until it is repealed." The courts should be highly deferential toward the U.S. Congress; yet, the understanding of the courts is the only available measure of constitutionality. In instances that cannot be formulated as a judicial question, as the nullifiers contended the protective tariff and issues of state sovereignty could not be, then the Congress's own judgment as to its powers must remain unquestioned.[49] The U.S. Constitution cannot be understood as a jealous grant of power to the general government, but rather should be regarded as a full and generous trust. If the general government stands on the same authority as do the state governments, that is, on the sovereign people, then there should be

[45]Daniel Webster, *Writings and Speeches of Daniel Webster*, vol. 2 (Boston: Little, Brown and Company, 1903), p. 59 (emphasis added).

[46]Ibid., 6: 184. In fact, nullification was nothing more than treason. U.S. Congress, Senate, *Congressional Debates*, 21st Cong., 1st sess., 1830, p. 79.

[47]U.S. Congress, Senate, *Congressional Debates*, 21st Cong., 1st sess., 1830, p. 78; Webster, *Writings*, 6: 201; Ibid., 2: 57.

[48]U.S. Congress, Senate, *Congressional Debates*, 21st Cong., 1st sess., 1830, pp. 76-77; Webster, *Writings*, 2: 60. Of course, the reliance on constitutional law made the selection of judges a critical political issue. Ibid., 2: 62.

[49]Webster, *Writings*, 6: 229, 197-198, 215.

no reason to be more cautious of the one than of the other. If anything, the general government may be even more trustworthy than the states. The general government was formed to address the failures of the confederation-era state governments. Moreover, the general government alone represented the whole people. As such, the general government did not require close judicial supervision to prevent abuses of its power. Citizen suffrage and the regular election of federal officials were sufficient checks against unwarranted federal action.[50]

The general government was not simply to preside over the union's foreign affairs, but also to be active in forging a nation. To do so, there must be a national government capable of operating in its own right, with full taxation and enforcement power. Further, in order for the government to possess sufficient energy, "the judgment of the majority must stand as the judgment of the whole." The only alternative, in Webster's view, was anarchy, and then the union would be nothing but "a rope of sand."[51] If the United States were understood to be a seamless whole, a true nation, rather than a confederated union, there would be little question as to whether unchecked majority rule was appropriate. Thus, against the nullifiers' vision of a contingent union, Webster contended that the states were not "strangers" to one another, but that a "bond of union" had existed between them long before the present U.S. Constitution. Far from being a compact among separate states, the U.S. Constitution was ordained and established by the whole people of the nation.[52] Within the union, "we should look upon the States as one," and federal powers should be exercised for the "general benefit" of that single unit.[53] The general government should actively bind the union together and bring the interests of the states in line with the interests of the whole. The national debt, the federal revenue, and the national roads and canals all served to secure the advantage of general government, and Webster was quick to remind his northern allies that every blow against his vision of the union "strikes at the tenderest nerve of [their] interest and [their] happiness," which would bring their "own future prosperity into debate also," which was "but another mode of speaking of commercial ruin."[54] Constitutional meaning was not simply a function of abstract speculation or historical investigation, but also of current economic interest, which was itself a constitutional end.

[50]U.S. Congress, Senate, *Congressional Debates*, 21st Cong., 1st sess., 1830, pp. 74, 77; Webster, *Writings*, 6: 219, 222.

[51]Webster, *Writings*, 6: 219; U.S. Congress, Senate, *Congressional Debates*, 21st Cong., 1st sess., 1830, p. 74.

[52]Hence, the union was indissoluble; individuals could only be free from the Constitution's authority upon its destruction. Webster, *Writings*, 6: 185, 187, 192.

[53]U.S. Congress, Senate, *Congressional Debates*, 21st Cong., 1st sess., 1830, p. 64; see also, John Quincy Adams, "Society and Civilization," *American Review* 2 (July 1845): 87-88, and his report on manufactures in U.S. Congress, House, *Congressional Debates*, 22nd Cong., 1st sess., appendix, 1832, pp. 81, 88-89.

[54]Webster, *Writings*, 2: 57-58, 47.

ANDREW JACKSON AND CENTRIST FEDERALISM

A middle position was carved out by Andrew Jackson, among others. This construction of centrist federalism sought to strike a balance between an appropriate concern for states' rights and a desire to preserve a permanent and supreme national government. The Jacksonian center pursued a Madisonian line, and encountered many of the same difficulties. On the one hand, the Jacksonians reasserted Madison's claim as Publius that the U.S. Constitution is partly national and partly federal, thus denying the absolutist positions advanced by Calhoun and Webster.[55] On the other hand, Jackson, like Madison, wavered between nationalist and particularist statements, which could not be easily reconciled with one another but could be used to build a political coalition.

Like Webster's nationalism, the centrist position developed first and most fully during the 1830 debates over the Foot Resolution.[56] Edward Livingston of Louisiana, like Jackson from the new Southwest, admired the necessary recurrence to "first principles" but dissented from both those who argued that the general government was "popular or consolidated" and those who argued that it was "federative." In fact, he insisted, "we find traces of both these features."[57] Contrary to the nationalists, Livingston thought that the former colonies had existed independently of one another until bound together through the constitutional compacts. The nationalist difficulty, in his view, was that they rested their case on a shaky historical foundation and the preamble's reference to the people. As a result, Livingston sought to shift the foundation of federalism from the social basis disputed between Webster and Calhoun to a purely political basis. The centrist vision was grounded in government institutions, or the autonomous power of the nation-state, not the people or the nation that supposedly stood behind them. Instead of emphasizing the unity of the people in a single nation, Livingston thought it was sufficient to emphasize the general government's power of enforcement, including the constitutional recognition of treason

[55]Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers*, ed. Clinton Rossiter (New York: Mentor, 1961), No. 39, pp. 240-246.

[56]Connecticut's Senator Samuel Foot's proposal would suspend land surveys, given a current surplus of several million acres of already surveyed land. Cheap land was an important benefit to western interests, both enriching western constituents and encouraging western development. Land sales also figured into fiscal policy. High tariff rates were quickly amortizing federal debt. A budget surplus, however, would create pressure to reduce the protectionist tariffs, threatening eastern interests. Thus, eastern representatives were advocating the distribution of the surplus to the states for use in internal improvements, creating a new interest in maintaining or even increasing federal revenues from tariffs and land sales. Missouri's Thomas Hart Benton attacked the resolution as an effort to raise acreage price by restricting the supply of saleable land, which in turn threatened western development. Benton's charge threatened the American System's North-West coalition, potentially aligning the West with the South in order to maintain cheap land in exchange for a reduction in protection. South Carolina's Robert Hayne seized the opportunity to make just such an offer. In order to cut off further exploration of that possibility, Daniel Webster changed the subject by taking the floor to attack South Carolina's nullification doctrines and invoke nationalist sentiment against the South and shore up the protectionist coalition.

[57]U.S. Congress, Senate, *Congressional Debates*, 21st Cong., 1st sess., 1830, pp. 248, 264, 265.

as a federal crime. The president was obliged to enforce the laws of the general government, and if any form of resistance to those laws was a reserved power of the state, then there should be a correlative federal duty to respect those rights laid out in the Constitution. Instead, the federal enforcement power was absolute. Sovereignty was not reserved to the states, but divided between the two governments.[58]

Even though the general government possessed a full right and duty to enforce its laws against the states, it nonetheless should respect those co-sovereign governments. Repeating his early arguments for a stronger national government, the mostly retired Madison contended that nullification would disrupt the workings of the efficient administration of government, subject the nation to delays, inconveniences, and expenses, and weaken the "salutory veneration for a system requiring frequent interpositions."[59] Thus, the mechanisms for checking the activities of the federal government must be internal, including a careful regard by federal officials for the limits of their authority. Jackson pledged in his first inaugural address to be "animated by a proper respect for those sovereign members of our Union," and Livingston emphasized that there could not be a single national majority capable of overturning the place of the states in the federal system.[60] This concern for the states expressed itself partly through attempts to reclaim the authority of the Virginia and Kentucky Resolutions for centrist federalism. Livingston was careful to assure his opponents that his views "coincide in the sentiments of those resolutions," and Madison engaged in an extensive effort to deny the nullifiers the authority of the resolutions.[61] More concretely, the centrists leaned toward resolving the dispute through concessions. Livingston pleaded with the nationalists that "how can we hope for ready obedience to our laws, if the people are taught to believe in a permanent hostility of one part of the Union towards another." Even if the government should occasionally be active to make its territory productive, it nonetheless should not impose burdens on some states in order to benefit the remainder.[62]

[58]Ibid., 265-267.

[59]Madison, *Writings*, 9: 391-392.

[60]Andrew Jackson, in *Presidential Messages and State Papers*, ed. Julius W. Muller, vol. 3 (New York: Review of Reviews, 1917), p. 893; U.S. Congress, Senate, *Congressional Debates*, 21st Cong., 1st sess., 1830, pp. 268-269. See also, Madison, *Writings*, 9: 355.

[61]U.S. Congress, Senate, *Congressional Debates*, 21st Cong., 1st sess., 1830, p. 267; Madison, *Writings*, 9: 341-357, 382-403, 479-482, 489-492; Ibid., *Letters and Other Writings of James Madison*, vol. 4 (Philadelphia: J. B. Lippincott & Co., 1865), pp. 334-337. See also, Agricola, *Virginia Doctrines not Nullification* (Richmond: S. Shepherd & Co., 1832). This was not simply an effort at face-saving by Madison, for the resolutions lay at the base of the Republican understanding of the U.S. Constitution. Madison's research led to some concessions to the nullifiers on Jefferson's views; Madison, *Writings*, 9: 395-396. Prominent Virginian editor Thomas Ritchie concluded that "the South Carolinians were right as to Mr. Jefferson's opinions." Quoted in Merrill Peterson, *The Jefferson Image in the American Mind* (New York: Oxford University Press, 1960), p. 56. See also, Abel Parker Upshur, *An Exposition of the Virginia Resolutions of 1798* (Philadelphia, Alexander's General Printing Office, 1833), and the South Carolina pamphlets cited in Peterson, *Jefferson Image*, p. 466.

[62]U.S. Congress, Senate, *Congressional Debates*, 21st Cong., 1st sess., 1830, pp. 249-250, 271. See also, Madison, *Writings*, 9: 479-480; Andrew Jackson, *The Statesmanship of Andrew Jackson*, Francis N. Thorpe, ed. (New York: Tandy-Thomas Co., 1909), p. 27; Jackson, *Presidential Messages*, 3: 1067.

More than the competing alternatives, centrist federalism vacillated in its commitments. Although such logical tensions are not intrinsically debilitating, the particular centrist emphasis on the general government's power of enforcement fractured the construction in the face of active nullification. As Livingston, now in the administration, and Jackson were driven by their institutional position to focus on the threat to the enforcement of federal laws, other centrists outside the executive branch grew concerned about the threatened expansion of national power inherent in the use of force against a state. Having built the centrist position on the government's power of enforcement itself, the administration was in no position to be sensitive to such concerns. If the president flinched from his institutional authority to enforce the law, then the entire centrist edifice of divided government sovereignty would collapse. Jackson could remain passive in the face of Georgia's recalcitrance to court orders because it challenged neither presidential authority nor Jackson's own Indian policy. South Carolina, however, threatened to disrupt the revenue collection for which the president was directly responsible, and did so by explicitly challenging federal political authority and marshalling troops.[63] It is not surprising that Jackson regarded "the act of raising troops [as] positive treason." Additionally, a state challenge to political, as opposed to mere legal, authority called into question the existence of the general government as a sovereign entity, legitimated by the democratic voice of the majority of the people. Moreover, having no strong interest in tariff reduction, Jackson easily believed that "nullification is an effort of disappointed ambition, originating with unprincipled men who would rather rule in hell, than be subordinate in heaven" and a personally threatening "monster."[64] In the midst of the crisis, Livingston, through the voice of the president, could only strengthen his earlier assertions that the president had no discretion in these matters and was obliged by oath and office to put down nullification. Thus, when the foundations of the centrist construction were challenged, its proponents retreated into the institutional and formal powers of the general government.[65]

This increasing concern with putting down what was taken to be a treasonable course of action so overshadowed all other options that Jackson's special proclamation against nullification not only denounced it in the strongest terms, but also rebuilt his constitutional theory along more nationalist lines. Nullification was "subversive of [the] Constitution" and had "for its object the destruction of the Union"; it was a pure "invention,"

[63]Miles, "After John Marshall's Decision"; Richard B. Latner, "The Nullification Crisis and Republican Subversion," *Journal of Southern History* 43 (February 1977): 19-38.

[64]Jackson, *Statesmanship*, p. 20; Andrew Jackson *The Correspondence of Andrew Jackson*, ed., John Spencer Bassett, vol. 4 (New York: Carnegie Institute, 1929), pp. 241, 462-463; Jackson, *Statesmanship*, p. 22 (emphasis in original).

[65]U.S. Congress, Senate, *Congressional Debates*, 21st Cong., 1st sess., 1830, p. 267; Jackson, *Presidential Messages*, 3: 1034-1036, 1043, 1050, 1068.

inconsistent with the Constitution's "every principle." From their earliest days, the colonies were "connected by common interest," and jointly constituted a nation at the outset of the Revolution. The general government was now the "safest depository of this discretionary power in the last resort," for it represents "*one people.*" Now Jackson did not emphasize the care to be taken in protecting states' rights, but rather in preventing the states from improperly interfering with the powers vested in the nation. Indeed, the states did not merely share sovereignty, but in fact were "no longer sovereign."[66] Such retrenchment could only be the expected result of a challenge to the centerpiece of the centrist theory, effective government authority. The proclamation divided the centrists in the states. The governor of Virginia, for example, asserted his willingness to use force to prevent Jackson from marching on South Carolina, even if he was unwilling to embrace nullification.[67] Many others accepted increasing portions of radical federalism, admitting that the states contained distinct and hostile interests and that the union could exist only so long as the general government acted on interests that imposed no unequal burdens.[68]

CONSTRUCTING "JACKSONIAN" FEDERALISM

Along with the Compromise tariff, the Force Bill came to a vote in the Congress at the end of February 1833. During the 1830 debates on the Foot Resolution, when Robert Hayne first raised the nullification issue in the Senate, a number of members expressed their support, including the chairman of the judiciary committee.[69] By the end of the crisis, only John Tyler of Virginia was willing to vote against the Force Bill. In order to secure the Compromise, however, fourteen senators from southern and border states, including Calhoun, abstained from the vote. In the House, forty members voted against the Force Bill, including several pro-administration southerners.[70] In March, the South Carolina convention reconvened, rescinded its earlier ordinance, and nullified the Force Bill. Although Virginia state judge and eventually United States Secretary of State Abel Upshur produced perhaps the most elaborate defense of nullification seven

[66]Jackson, *Presidential Messages*, 3: 1052, 1054, 1056, 1055, 1059, 1060, 1062 (emphasis in original). Jackson's strong nationalism was somewhat balanced by his conciliatory fourth annual message delivered days before. Alternating between the carrot and the stick in dealing with the nullifiers was characteristic of the centrist position.

[67]Ellis, *Union at Risk*, pp. 83-91, 111-112, 129-132, 147-149. Martin Van Buren likewise questioned the nationalism of the proclamation, but in this Jackson explicitly went against Van Buren and other states' rights critics. Sellers, *Market Revolution*, p. 328; Jackson, *Correspondence*, 5: 2-4, 11-12.

[68]See for example, George Troup, *Letter from George M. Troup to a Gentlemen in Georgia* (Milledgeville, GA: Prince & Bagland, 1834); Littleton Waller Tazewell, *A Review of the Proclamation of President Jackson of the 10th of December, 1832* (Norfolk, VA: J. D. Ghiselin, 1888).

[69]U.S. Congress, Senate, *Congressional Debates*, 21st Cong., 1st sess., 1830, pp. 132-145.

[70]Ellis, *Union at Risk*, pp. 171-172, 176.

years later, few supported its use after 1833.[71] During the crisis, no state legislature had endorsed nullification, and several even in the South had denounced it.[72] Notably, even Calhoun made little mention of it after 1833.[73] The specific argument for nullification had clearly failed.

The broader position of radical federalism was less clearly a failure, however. It served to create a compromise between the centrist and radical positions, until even more extreme positions gained support in the more immediate antebellum period. Jackson's second inaugural, delivered days after the passage of the Compromise, emphasized two points of domestic policy: "the preservation of the rights of the several states and the integrity of the Union."[74] This dual concern, with the tribute to the states being delivered first in the address, backed off the strident nationalism of the proclamation and sealed the fate of an emergent nationalist coalition. Instead of his earlier cautions that the federal government should be careful of the states in pursuing its policies, Jackson now stressed his willingness energetically to defend the states and their interests. The president offered only a minimal warning against disunion, betraying his continuing preoccupation with secession. While nationalist and secessionist sentiment continued in the North and the South, a new center solidified between them that dominated state and national politics.[75]

Upon Jackson's departure from office, Calhoun swung the support of the "states' rights" party behind the president's more orthodox successor, Martin Van Buren, who had carefully avoided antagonizing the nullifiers during the crisis and remained highly solicitous to states' rights concerns.[76] A mere five years after the Compromise, Calhoun introduced test resolutions in the Senate designed to force explicit recognition of the compact theory of federalism in relation to debates over the receipt of abolition petitions. Although not directly comparable, the contrast of the test resolutions with the discussions of the Foot Resolutions and the Force Bill is instructive. With relatively little debate, Calhoun's resolutions passed by

[71]Abel Parker Upshur, *A Brief Enquiry into the True Nature and Character of Our Federal Government* (1840; reprint, New York: Da Capo Press, 1971). The South Carolina legislature refused to pursue nullification in response to the tariff of 1842, and the 1859 Wisconsin legislature rather casually "nullified" a fugitive slave law as part of a more general noncompliance effort. Houston, *Critical Study*, pp. 154-155; Ames, *State Documents*, pp. 63-65. Although the federal government was firm in denying the power of nullification, executive branch officials were much more solicitous of Wisconsin than Jackson had been with South Carolina. Presidential response to such challenges is much less determined than many commentators suggest. Carl B. Swisher, *Roger B. Taney* (New York: Macmillan, 1936), p. 531.

[72]The replies to South Carolina are collected in *State Papers on Nullification* (1834; reprint, New York: Da Capo, 1970).

[73]For example, his final treatise on the Constitution barely mentions interposition. Calhoun, *Union and Liberty*, pp. 217-218. See also, Carpenter, *South as Conscious Minority*, pp. 136-141, 235-236.

[74]Jackson, *Presidential Messages*, 3: 1072. Cf., Sellers, *Market Revolution*, pp. 330-331.

[75]On the extremes impinging on this new center, see Richard Current, *Daniel Webster and the Rise of National Conservatism* (Boston, MA: Little, Brown and Company, 1955), and John McCardell, *The Idea of a Southern Nation: Southern Nationalists and Southern Nationalism, 1830-1860* (New York: Norton, 1979).

[76]Calhoun, *Papers*, 13: 636-640; Ellis, *Union at Risk*, pp. 141-157; Charles Wiltse, *John C. Calhoun: Nullifier, 1829-1839* (Indianapolis, IN: Bobbs-Merrill, 1949), pp. 358-61; Martin Van Buren, *Messages and Papers of the Presidents*, ed. James Richardson, vol. 4 (New York: Bureau of National Literature, 1897), pp. 1531, 1533-1536.

large majorities, indicating the partial success of the broader construction.[77] To little avail, Webster protested that Calhoun and, remarkably, Henry Clay "have attempted in 1838, what they attempted in 1833, *to make a new Constitution,*" failing to recognize that 1833 had seen a new construction of the Constitution.[78] While the Panic of 1837 restricted Van Buren to a single term, the limits of the Whig victory in 1840 were apparent as John Tyler, the only senator to vote against the Force Bill, soon rose to the presidency and appointed Calhoun as his secretary of state. The Democratic James Polk's 1845 inaugural address indicated the stability of the localist construction, as he emphasized the boundary between federal and state powers, recognized the different interests of the various states, denied the authority to intervene in local affairs, and noted the significance of minority rights against national majorities.[79]

The judicial rhetoric of the period provides another illustration of this shift in constitutional understandings. The constitutional settlement of 1833 formed the intellectual and political context for the federalism cases of the antebellum period, shaping both the nature of the legal controversies and the concerns expressed in the opinions.[80] Under the leadership of Chief Justice Roger Taney, Jackson's attorney general during the crisis, the Court downplayed Marshall's strongly nationalist arguments in favor of a more centrist position consistent with the post-nullification settlement.[81]

Chief Justice Marshall had expressed his nationalist sentiments in any number of judicial opinions, especially in the decade prior to nullification. Marshall contended that the general government was "a government of the people. In form and substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit." Tying the popular roots of the federal government with its supremacy, Marshall emphasized that it "is supreme within its sphere of action. This would seem to result necessarily from its nature. It is the government of all; its powers are delegated by all; it represents all, and acts

[77]Wiltse, *Calhoun*, pp. 369-373; U.S. Congress, Senate, *Congressional Globe*, 25th Cong., 2nd sess., 1838, p. 74; appendix, pp. 53, 70, 74.

[78]Webster, *Writings*, 18: 33 (emphasis in original).

[79]James K. Polk, *Messages and Papers*, 5: 2224-2225.

[80]Cf., Robert Lowry Clinton, "Judicial Review, Nationalism, and the Commerce Clause: Contrasting Antebellum and Postbellum Supreme Court Decision Making," *Political Research Quarterly* 47 (December 1994): 857. Clinton's concerns obscure the degree of difference in the constitutional logic employed by the Marshall and Taney Courts and the degree to which that changing discourse reflected changes that had occurred in the political arena. Similarly, Howard Gillman attributes the divisions on the Taney Court over federalism to the inadequacy of Marshall's doctrinal elaboration. Those divisions are traceable to the disintegration of the political consensus on federalism that fed shifts in the Court's docket, rendered earlier doctrines inadequate, required a shift in judicial reasoning, and legitimated the more extreme states' rights position. Howard Gillman, "The Struggle Over Marshall and the Politics of Constitutional History," *Political Science Quarterly* 47 (December 1994): 883, n8.

[81]Taney himself had been uninvolved in the nullification crisis, having been preoccupied with Jackson's conflict with the bank. Swisher, *Taney*, pp. 207-208. It should be emphasized that I am not contending in this section that judicial action can or should be reduced to "politics by other means," or that either the Marshall or Taney Court's decisions should be explained in political terms to the exclusion of legal considerations.

for all."[82] As one commentator concluded, for Marshall "national supremacy becomes the informing spirit of the Constitution and the guiding principle of its interpretation. The government of the United States has the crucial prerogative...."[83]

Marshall later expanded on the implications of this reading of the federal government's constitutional nature. The powers of the general government were to be construed expansively, as a generous grant by the people for their own benefit, because the Constitution was "an investment of power for the general advantage."[84] As a result, Marshall recognized no distinct interests residing in the states. The U.S. Constitution only took cognizance of the "general advantage" of the collective people. Even when the states exercised their legitimate police powers, the U.S. Congress could readily overrule them through its own commercial regulatory action. Marshall even flirted with the strong position that the commerce clause was a grant of exclusive power to the U.S. Congress, such that the states could never regulate those objects even in the absence of congressional action.[85]

As would be expected from the partial failure of radical federalism, the Taney Court did not completely reverse Marshall's nationalism in order to move in the opposite direction, but rather limited his precedents and adopted a more decentralizing perspective.[86] The new attitude emerged in a number of areas. Unlike Marshall, Taney gave full support to the states' rights history of the founding. The founding itself was done "by the people of the United States," but for Taney this meant "by those who were members of the different political communities in the several States" and those "people of the several States [remained] absolutely and unconditionally sovereign" after ratification.[87] Ultimately, however, Taney committed

[82]*McCulloch v. Maryland*, 17 US (4 Wheat.) 316, 403, 405, 410 (1819). Marshall later expanded on the history, admitting that the states were independent prior to ratification but insisting that the "whole character in which the States appear, underwent a change" with ratification. *Gibbons v. Ogden*, 22 US (9 Wheat.) 1, 187 (1824).

[83]R. Kent Newmyer, *The Supreme Court under Marshall and Taney* (New York: Thomas Y. Crowell Company, 1968), p. 41; see also, Ibid., 50.

[84]*Gibbons v. Ogden*, 22 US (9 Wheat.) 1, 189 (1824). Although rarely encountered, Marshall still did insist that there were judicial cognizable limits to federal power. See for example, Ibid., 203; *Marbury v. Madison*, 5 US (1 Cranch) 137, 176-177 (1803); *McCulloch v. Maryland*, 17 US (4 Wheat.) 316, 405 (1819).

[85]Ibid., 194, 197, 210-211; see also, *Brown v. Maryland*, 25 US (12 Wheat.) 419 (1827). Compare the Jeffersonian Justice William Johnson's opinion; Ibid., 235. Marshall subsequently qualified this strong exclusivity position with a "dormancy" thesis. In those cases, the Court must exercise its own discretion in order to ensure that the states did not trench on the delegated, if unused, powers of the federal government. *Willson v. Black Bird Creek Marsh Co.*, 27 US (2 Pet.) 245, 252 (1829). On Marshall's flirtation with exclusivity, see Newmyer, *The Supreme Court*, p. 52; Swisher, *Taney*, pp. 393-394; Felix Frankfurter, *The Commerce Clause Under Marshall, Taney, and Waite* (1937; reprint, Chicago, IL: Quadrangle Books, 1964), p. 50.

[86]Newmyer, *The Supreme Court*, p. 115.

[87]*Dred Scott v. Sandford*, 60 US (19 How.) 393, 434, 410, 411 (1857); *Ohio Life Insurance and Trust Co. v. Debolt*, 57 US (16 How.) 416, 428 (1853).

himself to the "divided sovereignties" interpretation of this history consistent with the more centrist position.[88]

As in the U.S. Congress and presidency, the Court's adoption of a different constitutional logic had practical implications. For example, the states were given both a more expansive sphere of control and a firmer basis for the exercise of that control over interstate commerce. Against Marshall's suggestion and Webster's and Story's advocacy, Taney thought that states could regulate commerce even up to the point that state regulations came into direct conflict with congressional law.[89] The rationale for such deference was the recognition that the reservation of state powers was of more than administrative convenience. The state power to regulate commerce was exercised "according to its own judgment and upon it own views of the interest and well-being of its citizens."[90] Taney grounded himself on the key decentralizing claims that the states had distinct and contradictory interests, which required constitutional recognition, and that there often was no "national interest." For Taney, the federal government was not the only government exercising powers at the bequest of and to the advantage of the people.[91]

Although "they are sovereign states," there was also an "intimate union of these states, as members of the same great political family" sharing certain "deep and vital interests."[92] The familial metaphor served to extend the comity relationship between the states sufficiently that the Court adopted the presumption that states recognized the legal actions of other states. There are two significant points to note here. First, Taney reserved to the states the right to override the judicial comity presumption. A nationalist reading would have barred the states from ever refusing to recognize out-of-state corporations because such divisions could not be tolerated within a seamless nation. Taney's federalism recognized a state's right to protect its

[88]"And the powers of the general government, and of the State, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their separate spheres." *Abelman v. Booth*, 62 US (21 How.) 506, 516 (1858). Such language borrowed from and was consistent with Marshall's earlier opinions. It is notable, however, that Taney approached such conclusions from the opposite direction and most explicitly reached them only in the context of significant challenge to federal authority. The *Abelman* decision also emphasized *Martin's* holding that a state court could not contradict a federal ruling on constitutional law. Ibid., p. 516. For a somewhat simplistic account of Taney's position on states' rights, see Charles W. Smith, Jr., *Roger B. Taney: Jacksonian Jurist* (Chapel Hill, NC: University of North Carolina, 1936), pp. 82-105.

[89]*The License Cases*, 46 US (5 How.) 504, 579 (1847). See also, Frankfurter, *Commerce Clause*, pp. 50-52. In *Cooley*, the Court did assert that some aspects of navigation were implicitly removed from state jurisdiction. However, the Court upheld Pennsylvania's regulation of the port of Philadelphia, explicitly reaffirmed concurrent state jurisdiction over and interest in interstate commerce, and did not extend federal authority beyond a narrow issue of navigation regulations or indicate what exclusive federal jurisdiction would mean outside the context of an existing federal law. *Cooley v. Board of Wardens of the Port of Philadelphia*, 53 US (12 How.) 299 (1851). In addition, *Cooley* went beyond *Willson* by recognizing in the states an inherent concurrent power over commerce, not just a residual claim to a dormant federal power.

[90]*The License Cases*, 46 US (5 How.) 504, 574 (1847). See also, Newmyer, *The Supreme Court*, p. 116.

[91]For example, *Charles River Bridge v. Warren Bridge*, 36 US (11 Pet.) 420, 547 (1837). Taney's comments came in the context of a state-corporation conflict, but the views expressed there are representative of his conception of the states and federalism more generally.

[92]*Bank of Augusta v. Earle*, 38 US (13 Pet.) 519, 590 (1839).

own domestic interests, only requiring that it do so consciously and explicitly. The union of states was a presumption only; it could always be rescinded. Second, Taney used the metaphor in dealing with state-chartered corporations. As a dissenting justice pointed out, the effect of Taney's decision was to give each state an "imputed national power" to impart an extraterritorial application to its laws.[93] Again, in Taney's hands, as in those of the radical federalists, the "intimate union" empowered not the general government but the state governments.[94] In recognition of the states' independent responsibility for maintaining their constitutional faith, Taney repeatedly deferred to the role of state officials in construing and enforcing provisions of the federal Constitution. The Constitution did not fearfully take power away from the states, but expressed the sovereign states' commitment to the union.[95]

Whereas Marshall was driven by the fear of state encroachment on federal powers, Taney emphasized the opposite danger. Throughout the government, post-nullification political actors were emphasizing their duty to protect the states from the consolidating tendencies of the general government. In the judicial context, this claim reflected a judicial willingness to respect the settlement reached in the political sphere.[96] In the political context, it required greater care on the part of national officials and an active effort on the part of state officials to exercise their own extensive constitutional responsibilities.

CONCLUSION

The constitutional text, even aided by the traditional instruments of legal interpretation, does not provide a single, decisive solution to the problem of how to structure federal-state relations. Nonetheless, there is an interest in portraying constitutional meaning as closed. Thus, the Marshall Court's routinization of the legal interpretation of the text helped support the

[93]Ibid., 598.

[94]The case represented a "change in trend from the Marshall court" on federalism issues toward a more states' rights stance, though the federalism aspect was less recognized at the time. Swisher, *Taney*, p. 385; Charles Warren, The *Supreme Court in United States History*, vol. 2 (Boston: Little, Brown and Company, 1922), pp. 57-62. On a different application of state extraterritoriality, see Arthur Bestor, "State Sovereignty and Slavery: A Reinterpretation of the Proslavery Constitutional Doctrine, 1846-1860," *Journal of the Illinois State Historical Society* 54 (Summer 1961): 117.

[95]*The License Cases*, 46 US (5 How.) 504, 579 (1847); *Prigg v. Pennsylvania*, 41 US (16 Pet.) 539, 628 (1842); *Kentucky v. Dennison*, 65 US (24 How.) 66 (1861). Compare, for example, Story's nationalist *Prigg* opinion; *Prigg v. Pennsylvania*, 41 US (16 Pet.) 539, 611-612, 615-616 (1842).

[96]*Abelman v. Booth*, 62 US (21 How.) 506, 517-520 (1858). The compromised nature of the post-nullification construction of federalism was also reflected on the Court. The Court was not willing to reopen federal judicial supremacy over the state courts, but other issues were less settled. *Miln* put the Court on record as supporting state exclusivity over police powers, allowing the states to trump even active use of the federal commerce powers. Taney demonstrated the more centrist position by retreating to a position similar to Johnson's: that commercial regulations were distinct from the proper subject of the police powers. Newmyer, *The Supreme Court*, p. 103; Swisher, *Taney*, pp. 374-376, 394-396, 404-405. Similarly, Taney avoided ruling on the constitutionality of old internal improvements as a dead issue, but Justice Peter Daniel asserted the radical position in a concurrence. *Searight v. Stokes* et al., 44 US (3 How.) 151, 163, 166, 180-181 (1844). In the judiciary as elsewhere, the radical federalism position was not adopted, but the terms of the debate and the new centrist position had moved in that direction.

judiciary's power against the elected branches,[97] and Webster sought to defend his favored economic policies by insisting that the constitutional vision that underlaid them was a necessary, if not natural, feature of American political life. Likewise, subsequent commentators have been able to dismiss nullification as "departing from an adherence to the letter of the Constitution," thus clearing the way for consideration of more mundane and credible issues as economic interests and partisan politics, reemphasizing the construct of the political realm as non-deliberative and unprincipled.[98]

The U.S. Constitution is a political, as well as a legal, document. Political action is constitutive of, as well as constituted by, the governing structures and norms of the nation. The U.S. Constitution as written is incomplete.[99] Its meaning is unclear, and therefore requires effort to discover. It is also ambiguous and partial, and therefore requires the inclusion of external considerations—including partisan concerns, economic interests, independent political principles, and alternative political traditions—in order to build a determinate meaning. There are moments in American history in which alternative paths of political development are faced and chosen. Such decisions need not change the text or implicate constitutional law,[100] but, they do structure the future governing practices and policies with which politics is normally concerned.[101]

The Jacksonian debate over federalism did not occur along a single dimension. The different positions in the debate did entail different degrees of centralization, but they depended on radically different conceptions of the purposes and functions of federalism, the nature of American political economy, and the principles and values that should govern the nation. Calhoun did not advocate a little less central government than Webster. He proposed a different kind of political system. Likewise, no viable position simply entailed an atavistic return to the past. All the considered options built on past arguments and practices and offered a vision of future development that incorporated, even if modifying, that history. The ultimate outcome was a compromised settlement that was sufficient to be politically viable and was maintained through a new structuring of ideology, interests and institutions, not through judicial enforcement.[102]

[97]Sylvia Snowiss, "From Fundamental Law to the Supreme Law of the Land: A Reinterpretation of the Origin of Judicial Review," *Studies in American Political Development* 2 (1987): 1-67.

[98]Carpenter, *South as Conscious Minority*, p. 140.

[99]See also, Donald S. Lutz, "The United States Constitution as an Incomplete Text," *Annals of the American Academy of Political and Social Science* 496 (March 1988): 23-32.

[100]Cf., Bruce Ackerman, *We the People: Foundations* (Cambridge: Harvard University Press, 1991).

[101]Moreover, outside the confines of the judiciary concerned with providing determinate legal answers, the question can become one of degree rather than one of dichotomous absolutes. The case of federalism brings this to the fore, partly because it has not been defined primarily through constitutional law. See also, Sanford Lakoff, "Between Either/Or and More-or-Less—Sovereignty versus Autonomy under Federalism," *Publius: The Journal of Federalism* 24 (Winter 1994): 63-79.

[102]A similar understanding of federalism can be found in *The Federalist*. For example, "[T]he partition between state and nation will not be as much a legal issue as a political one... Parchment can neither limit the nation's powers, nor assure them against encroachment. Two governments competing for the people's support form a structure more useful than fixed rules." David F. Epstein, *The Political Theory of The Federalist* (Chicago: University of Chicago Press, 1984), p. 53.

The Jacksonian example suggests that the judiciary is neither the primary force nor a major obstacle to a decentralizing conception of federalism. Since the New Deal, the Court has not protected the states, but neither has it imposed insuperable barriers to more decentralizing developments. Although the modern Court, like the antebellum judiciary, may illustrate and apply new understandings of federalism, it is unlikely to be their initiating or sustaining force.[103] The critical determinants of the nature of federalism are political, not legal. Additionally, it is not useful to examine current disputes in terms of either absolutes or conservative reaction. The U.S. Constitution develops, but not along a single trajectory. Less centralized conceptions of federalism constitute a political tradition, not a fixed position. Finally, although all political actions act to reaffirm or undermine the existing regime to some degree, some political disputes have more significant ramifications for the basic structuring of political decisionmaking. Those disputes do not occur in isolation. The success of constitutional alternatives depends on their capacity to restructure not only current policy, but also the larger political climate and the interrelated system of policy, political principle, and institutional constraints.

[103]As one recent commentator has noted, "no change in constitutional law was critical to the accomplishment of Reagan's major objectives; the U.S. Supreme Court did not stand in his way, as it stood in the way of Franklin Roosevelt." As a result, the judiciary and the trajectory of constitutional law were a mere "sideshow" to the "Reagan Revolution." Kent Greenawalt, "Dualism and Its Status," *Ethics* 104 (April 1994): 497-498. This assumes, however, that constitutional changes are pursued by national political institutions. As the Jacksonian example indicates, states may take actions to push reconsideration of the constitutional system, and they can help structure the political climate of those deliberations, but their actions cannot unilaterally determine constitutional relations. Although recent Court decisions mark a shift in judicial attitudes toward federalism, which is significant in its own terms, those decisions are quite limited in themselves and come only after several years of political rethinking of federal relations. For example, *United States v. Alfonso Lopez*, 115 S.Ct. 1624 (1995); *Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114 (1996).