# States of the Union

## Federalism and the Origins of American Intergovernmental Relations, c. 1789-1820


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Table of Contents

Abstract

This dissertation explores how American state governments adapted to governing in a new kind of federal union in the three decades following the ratification of the U.S. Constitution. Although existing political histories generally pay only anecdotal attention to the activities of state governments in the early national period, this thesis demonstrates that the creation and implementation of national policy was significantly shaped by interactions between state and federal officials. Minimal manpower and vast distances limited the capacity of the federal government to enforce its own laws across the nation, leaving the federal executive and Congress reliant on the support of state officials and institutions in the implementation of federal policies within the states. The line between state and federal areas of responsibility under the Constitution was often unclear, and the question of which government had the right to legislate in which policy area arose frequently. While state and federal officials regularly disagreed with one another about the interpretation of federal laws and of the Constitution, they learned to resolve these conflicts through negotiation, in most cases avoiding formal litigation. I denominate this pattern of interactions 'co-ordinated federalism.'

On the basis of archival research in five states, this dissertation builds an administrative history of early American federalism, investigating the impact of intergovernmental interactions on the making and execution of national policies concerning trade and finance, national defence, Indian affairs, and slavery. An introductory chapter summarizes the principal mechanisms by which the state and federal governments conducted their ongoing negotiations, and explores the roles of state governors and legislators in producing regulations, resolutions, and remonstrances designed to influence federal policy. While state governments generally co-operated in the enforcement of federal law, even where it was highly controversial, their considerable capacity for independent action could also pose a threat to the success of federal policies.

## Note on Spelling

In quotations from primary source material, spelling, grammar, capitalization, and punctuation are left as I found them. Where the authors have used abbreviations that might be unfamiliar to the twenty-first-century reader, I have expanded them in square brackets, for example 'natl.' to 'nat[iona]l,' 'agst.' to 'ag[ain]st.'

In quotations from secondary works published in the United States, I have changed American spellings to the British equivalent ('color' to 'colour,' etc.).

Abbreviations

**Archives:**

GHS – Georgia Historical Society, Savannah, Georgia.
MHS – Massachusetts Historical Society, Boston, Massachusetts.
MSA – Massachusetts State Archives, Boston, Massachusetts.
NYPL – New York Public Library, New York, New York.
TSLA – Tennessee State Library and Archives, Nashville, Tennessee.

**Source collections:**

*CWBH* – *The Collected Works of Benjamin Hawkins, 1796-1810*, ed. Thomas Foster (Tuscaloosa, AL, 2003)
Farrand – *The Records of the Federal Convention of 1787*, ed. Max Farrand (3 vols., New Haven, 1911)
*Federalist* – Alexander Hamilton, James Madison, and John Jay, *The Federalist with Letters of 'Brutus'*, ed. Terence Ball (Cambridge, 2003)
*PAH* – *The Papers of Alexander Hamilton*, ed. Harold Syrett et al. (New York, 1961 –)
*PGW* – *The Papers of George Washington: Presidential Series*, ed. W. W. Abbot et al. (20 vols., Charlottesville, 1987 –)
*PJM* – *The Papers of James Madison: Congressional Series*, ed. William Hutchinson et al. (17 vols.; Chicago, vols. 1-10, 1962-1977; Charlottesville, vols. 11-17, 1977-1991)
-- *The Papers of James Madison: Secretary of State Series*, ed. Robert Brugger et al. (11 vols.; Charlottesville, 1986 –)
-- *The Papers of James Madison: Presidential Series*, ed. Robert Rutland et al. (11 vols.; Charlottesville, 1984-2020)
*PTJ* – *The Papers of Thomas Jefferson: Main Series*, ed. Julian Boyd et al. (45 vols., Princeton, 1950 –)
*WAG* – *The Writings of Albert Gallatin*, ed. Henry Adams (3 vols., Philadelphia, 1879)
*WTJ* – *The Works of Thomas Jefferson*, Federal Edition, ed. Paul Leicester Ford (12 vols., New York, 1904-5)

**Legal records:**

Hening – *The Statutes at Large: Being a Collection of All the Laws of Virginia* . . ., ed. William Waller Hening (13 vols., Richmond, VA, 1819-1823).
1 Stat. 234 – [volume no.] United States Statutes at Large [page no.].
U.S. Const., art. I, §2 – Constitution of the United States of America, article no., section no.
Supreme Court cases are cited to the United States Reports.

**Journals:**

*AHR* – American Historical Review.
*JER* – Journal of the Early Republic.
*WMQ* – William and Mary Quarterly.
*YLJ* – Yale Law Journal.

N.B.: Acts and resolves of the Massachusetts General Court and Massachusetts governors' speeches from 1780 onwards are cited from a series of irregular, unnumbered printed volumes held by the Massachusetts State Archives. They are available digitally here: https://www.mass.gov/service-details/massachusetts-acts-and-resolves. They are cited in the form *Acts and Resolves of Massachusetts, 1790-1791* or (where the acts and resolves are bound separately) *Resolves of Massachusetts, January 1805-March 1806*. The dates indicate the volume consulted.

# Introduction

On October 14 1789, John Hancock, governor of Massachusetts, issued 'A Proclamation, for a Day of Thanksgiving' to be held on November 26 of that year. The thanksgiving day would mark a celebration of 'the great degree of tranquillity, union and plenty' that Americans had enjoyed since they had 'been enabled to establish Constitutions of Government for our safety and happiness, and particularly the National one now lately instituted.' The issuance of such a proclamation had been recommended to Hancock and the other state executives by President George Washington, but the governor gladly fell in line, 'calling upon Ministers and People to assemble on the same Day, and join with the other States in the Union, in rendering thanks to Almighty God, for the great blessings bestowed upon these confederated States.'[1]

In assembly chambers and executive mansions across the union, other state officials were making ready to celebrate the ratification of the U.S. Constitution and the success of the first session of Congress held under its auspices. In the midst of this jubilant atmosphere, however, governors and legislators were also contemplating their own roles within an American union remade by ratification. In the autumn sessions of their legislatures, they would swear an oath to support the Constitution of the United States, and over the coming years they would support the federal government in enforcing its laws within their boundaries, in return for the financial, diplomatic, and military assistance of the union. At the same time, state officials had their own constitutions to abide by, and maintained their own views on how the American union ought to work. They would do their utmost to shape the development of this union, and the policies of the national government, to suit their own governing interests.

This thesis is the first synoptic study of the changes to state constitutions, state legislation, and the practice of state government brought about by the ratification of the U.S.

[1] 'A Proclamation, for a Day of Thanksgiving,' *The Gentlemen and Ladies' Town and Country Magazine*, Boston, October 1789, 506-507.

Constitution in 1788. Where other studies have charted the ambitions of the Federalists for the new American union and their successes in fulfilling those ambitions through the implementation of federal policy, this dissertation takes into account the multiple sites and numerous occasions where the nature of union was contested in the early American republic. It demonstrates how, despite the increased power of the federal government under the new constitutional arrangements, government officials operating at the state level continued to influence the creation and control the implementation of national policy as the federal government found its feet. State and federal officials in the legislative and executive branches had to learn to govern together, working out the implications of constitutional and statutory texts, and organizing the distribution of responsibility between the different levels of government, through constant negotiation and joint problem-solving. This arrangement offered state legislators and governors frequent opportunities to contest the constitutional interpretations and policy preferences of national actors.

## Historiography

Although this work draws heavily on political history, legal history, and the history of political thought, it fits most comfortably into the category of administrative history – the study of the operation of government in the past. In his 2004 book *The Nation's Crucible*, Peter Kastor complained that 'we know a great deal about what the Federalists and Republicans believed, but not much about what they actually did. We know how they secured office, but not how they executed power.' While the history of political thought, political culture, and political partisanship were topics of perennial interest, 'the actual process of creating a functioning government,' Kastor wrote, remained 'an afterthought.'[2] Moving beyond the explorations of

[2] Peter Kastor, *The Nation's Crucible: The Louisiana Purchase and the Creation of America* (New Haven, 2004), 9.

the dynamics of partisanship that dominate the political history of the early American republic, this dissertation attempts to explain how it was that American governments developed the capacity to enforce their will upon the citizenry in a postrevolutionary world.

At the time Kastor was writing in the early 2000s, it was of course possible to point to older histories of government administration in the early United States. The most comprehensive of these was Leonard D. White's quadrilogy on the first century of federal governance under the Constitution, the last volume of which had been published in 1958. White's work explored the development of federal institutions between the First Federal Congress and the election of Theodore Roosevelt, considering how Congress, the president, the cabinet, the U.S. military, and the great departments of state faced the changes and challenges of each era.[3] Jack Ericson Eblen's 1968 book *The First and Second United States Empires* looked further afield, exploring the history of American territorial government from the Northwest Ordinance to Arizona statehood.[4] Richard R. John's *Spreading the News* (1995) was a media and communications history, but it was also a deep dive into policy-making, institutional design, and the activities of a large subset of federal employees in the pre-Civil War United States – postal workers.[5]

While John had looked at the postal service not only from the perspective of Congress but also from that of the operators and users of the system, older administrative histories were generally interested only in the highest levels of government. As Kastor noted, many works claiming to be histories of government were in fact 'discussions of political debate, constitutional relationships, or legal practice,' rather than explorations of 'the process by which

[3] Leonard White, *The Federalists: A Study in Administrative History* (New York, 1948); Leonard White, *The Jeffersonians: A Study in Administrative History* (New York, 1951); Leonard White, *The Jacksonians: A Study in Administrative History* (New York, 1954); Leonard White, *The Republican Era, 1869-1901: A Study in Administrative History*, with Jean Schneider (New York, 1958).
[4] Jack Ericson Eblen, *The First and Second United States Empires: Governors and Territorial Government, 1784-1912* (Pittsburgh, 1968).
[5] Richard John, *Spreading the News: The American Postal System from Franklin to Morse* (Cambridge, MA, 1995).

government agencies, constitutions, and laws actually manifested themselves."[6] This was about to change, however. Kastor's work would become part of a new wave of histories of American federal governance that would explore both the grand structures and the fine details of policy-making and law enforcement in the early republic.

Two works in particular provided the foundations for this new administrative history. Max Edling's *A Revolution in Favor of Government* (2003) turned the traditional history of the U.S. Constitution on its head, arguing that the Constitution's importance lay not in what it prevented the federal government from doing, but in what it enabled the federal government to do after 1788. Rather than adopting what he called the 'Madisonian interpretation,' wherein 'placing limits on government action' is considered the framers' great feat, Edling aimed to show how 'the Federalists tried to create a strong national state in America' through the Constitution. For framers like Alexander Hamilton and Robert Morris, he argued, the goal was to create a national government with the 'fiscal-military' capabilities of a contemporary European state. Though these aims were checked, to some extent, by the particular circumstances of the United States, including its federalism, Edling's thesis was that Americans of the founding era, on both sides of the ratification struggle, understood the Constitution as creating a government with real power to act.[7]

The second foundational work was Brian Balogh's *A Government Out of Sight* (2009). The question at the heart of the book was, 'what if . . . the United States governed *differently* from other industrialized contemporaries, but did not necessarily govern *less*?' Balogh made the case that it was money, discreetly distributed, and market regulation, discreetly applied, that gave the federal government the power to shape 'the life chances of millions of Americans' long before the New Deal. Government was able to remain 'out of sight' by funding and directing the

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[6] Kastor, *Nation's Crucible*, 10.

[7] Max Edling, *A Revolution in Favor of Government: Origins of the U.S. Constitution and the Making of the American State* (Oxford, 2003), 3-4, 7-10; John Brewer, *The Sinews of Power: War, Money, and the English State, 1688-1783* (Abingdon, 1989).

activities of proxies – corporations, voluntary organizations, state and local governments – and by intervening in markets. Many of its activities went unnoticed because they 'were directed at the margins of the nation,' notably the acquisition, management, and sale of lands in the territories claimed by the union.[8]

The implications of the claim that there has always been an activist federal government – that the Constitution's framers and ratifiers in fact intended one – are significant in the context of twenty-first century American political discourse. A bloated and oppressive federal government that trampled the rights of the states and of individual citizens was already a staple conservative talking point by 2001, when the anti-tax activist Grover Norquist infamously pronounced that he wanted to reduce government 'down to the size where I can drag it into the bathroom and drown it in the bathtub.'[9] Conservative political commentators in the era of the Tea Party turned to the founding era as a nostalgic counterpoint to contemporary ills, conjuring constitution-makers fearful of government intervention in almost any form.[10] As Gary Gerstle has written, for many conservatives, 'the ideal of limited government is sacrosanct, foundational, and constitutionally mandated.'[11] Edling, Balogh, and the historians who followed them have mounted a scholarly challenge to such interpretations of American history.

Edling's *Revolution in Favor of Government* was ultimately a history of political thought, and Balogh too left little room in his book for discussion of 'the hands that built' federal administrative capacity in the early republic.[12] Within a few years, however, a wide range of

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[8] Brian Balogh, *A Government Out of Sight: The Mystery of National Authority in Nineteenth-Century America* (New York, 2009), 2-4, 9-11.
[9] Grover Norquist quoted in William Nelson, 'The shutdown: Drowning government in the bathtub,' *The Conversation* (February 12 2019) https://theconversation.com/the-shutdown-drowning-government-in-the-bathtub-111333 (September 5 2021).
[10] Jill Lepore, *The Whites of Their Eyes: The Tea Party's Revolution and the Battle over American History* (Princeton, 2010).
[11] Gary Gerstle, *Liberty and Coercion: The Paradox of American Government from the Founding to the Present* (Princeton, 2015), 14-15.
[12] Gautham Rao, 'The New Historiography of the Early Federal Government: Institutions, Contexts, and the Imperial State,' *WMQ* 77/1 (January 2020), 116.

works appeared that demonstrated the on-the-ground impact of federal governance between the founding and the Civil War. One crucial matter was to understand how the federal government funded itself. Edling followed up his initial intervention by showing how early U.S. statesmen drafted and implemented the legislation that would turn the constitutional blueprint of a fiscal-military state into a functioning institutional infrastructure.[13] Robin Einhorn explained how and why the early U.S. government preferred to rely on import duties, not property taxes, to fund its activities, and Gautham Rao showed how, in practice, these duties were collected, uncovering how customs officials in the ports of the United States negotiated a path between the dictates of the Treasury Department and the needs and desires of the merchant communities who supplied the bulk of federal income in the early republic.[14]

A number of works have also explored the substantial role of the federal government in regulating slavery, including Don Fehrenbacher's *Slaveholding Republic*, and Ernest Obadele-Starks' overview of the enforcement of the international slave trade ban from 1808.[15] Of far greater concern to administrative historians, however, has been the management of the frontier. In line with Balogh's suggestion, scholars have pursued early federal power at the union's peripheries: Indian policy, territorial policy, and the interactions between the two. The legal historian Gregory Ablavsky began by showing how the problem of U.S. relations with Native Americans shaped the creation of the Constitution, and has now published a book on government administration in the Northwest and Southwest Territories. Ablavsky follows in the footsteps of Bethel Saler, who explored Northwestern governance and state formation in *The Settlers' Empire*. Lawrence Hatter has also turned to the Great Lakes to show how early

[13] Max Edling, *A Hercules in the Cradle: War, Money, and the American State, 1783-1867* (Chicago, 2014).
[14] Robin Einhorn, *American Taxation, American Slavery* (Chicago, 2006); Gautham Rao, *National Duties: Custom Houses and the Making of the American State* (Chicago, 2016).
[15] Don Fehrenbacher, *The Slaveholding Republic: An Account of the United States Government's Relations to Slavery*, ed. Ward M. McAfee (New York, 2001); Ernest Obadele-Starks, *Freebooters and Smugglers: The Foreign Slave Trade in the United States after 1808* (Fayetteville, AR, 2007).

federal officials worked to enforce treaties and trade regulations, and build a functioning U.S.-Canadian border, in the region after 1783.[16]

Gautham Rao has recently identified Indian policy as the site of the greatest and most brutal victories for early federal administrators. After controlling the outbreak of war along the frontier in the aftermath of St. Clair's Defeat, negotiating land cessions through dozens of treaties, and crushing Shawnee and Creek military resistance to American expansion during the War of 1812, the U.S. government concluded its long first campaign of pacification by organizing the removal of the Eastern Woodlands tribes to the trans-Mississippi West. David Nichols's detailed research has reconstructed federal Indian policy in the Federalist era, while Stephen Rockwell has made the case for the significance of federal control of the Indian trade through the factory system.[17]

This dissertation draws on the wealth of recent scholarship on early federal administration, building upon some of its central insights. In demonstrating how the federal government relied upon state assistance in the implementation of its policies, my work reinforces Balogh's argument by showing how the federal government could operate within the states while remaining 'out of sight.' Moreover, recent histories of federal officials on the union's maritime and territorial peripheries illustrate how the laws of Congress and the dictates of department heads were subject to interpretation, feedback, and negotiation from local agents who sought to reshape federal policy to suit local needs.[18] This dissertation demonstrates that

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[16] Gregory Ablavsky, 'The Savage Constitution,' *Duke Law Journal* 63/5 (February 2014); Gregory Ablavsky, *Federal Ground: Governing Property and Violence in the First U.S. Territories* (New York, 2021); Bethel Saler, *The Settlers' Empire: Colonialism and State Formation in America's Old Northwest* (Philadelphia, 2015); Lawrence Hatter, *Citizens of Convenience: The Imperial Origins of American Nationhood on the U.S.-Canadian Border* (Charlottesville, 2017).

[17] Rao, 'New Historiography of the Early Federal Government,' 99-100, 117; David Nichols, *Red Gentlemen & White Savages: Indians, Federalists, and the Search for Order on the American Frontier* (Charlottesville, 2008); Stephen Rockwell, *Indian Affairs and the Administrative State in the Nineteenth Century* (New York, 2010).

[18] Rao, *National Duties*, 6, 11-13; Lawrence Hatter, 'The Jay Charter: Rethinking the American National State in the West, 1796-1819,' *Diplomatic History* 37/4 (September 2013), 698.

state officials exhibited similar behaviour as they encountered federal laws and attempted to put them into practice in ways that conformed to local political and social conditions. In sum, this research shows that neither congressmen nor cabinet officials were, in the final instance, able to control how their instructions to federal and state officials would be interpreted or implemented.

At the same time as it draws on this scholarship, however, this dissertation seeks to temper some of the bolder claims made by historians of federal administration about the capacity of the young U.S. government to enforce its will upon the citizenry. Although the states co-operated in the enforcement of federal law, they were not, of course, merely administrative departments of the federal state. If they gave to the federal government, they also took from it, and worked to extract their own gains from the federal relationship. State officials allowed themselves to be guided not only by federal dictates, but also by their own understandings of the constitutional relationship between the federal and state governments. As a result, they were liable to throw the (not inconsiderable) weight of their own authority behind efforts to stymie the federal government's policies. This reality is too often overlooked by existing scholarship, which in seeking out the evidence of federal power sometimes ignores the evidence of federal powerlessness.

The scholarship on state government in the early republic is both less expansive and more balkanized than the work on federal administration, tending as it does to focus less on states as a class and more on the particularities of the individual republics comprising the American union. The history of partisan politics dominates accounts of individual states, which range from James Banner's formative history of Massachusetts and Richard Beeman's work on early national Virginia, to George Lamplugh's detailed investigation of Georgia politics and Rachel Klein's study of the rise of backcountry slaveholders as an unstoppable political force in late

eighteenth-century South Carolina.[19] Jackson Turner Main left an unmatched mark on the study of state-level party politics in two works of the early 1970s, *Political Parties before the Constitution* and *The Sovereign States, 1775-1783*, the latter a 500-page epic that could nevertheless support only brief sketches of each state in its social structure and political behaviour at the different stages of the Revolutionary War.[20]

State-level administrative history took on a new importance through the efforts of William Novak, whose masterful *The People's Welfare* demolished 'the myth of American statelessness' by showing how state governments throughout the nineteenth century made and enforced myriad laws regulating almost every aspect of daily life.[21] While Novak understood this American regulatory fervour as a positive feature of the nation's past, Gary Gerstle shone a more critical spotlight on state government twenty years later in his *Liberty and Coercion*. Gerstle noted that, while American conservatives habitually decried the growing power of the federal government and called for greater restraints on its authority, the tremendous power of state governments to coerce and intrude upon their citizens was rarely commented upon in the land of the free.[22] Christopher Pearl has argued in a recent study of eighteenth-century Pennsylvania that this habit of coercion is a congenital one, originating in the tumult of the Revolutionary War as Patriots struggled to bring justice to a frustrated people, regulate markets in a time of scarcity, and enforce ideological conformity in the midst of civil war.[23]

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[19] James Banner, *To the Hartford Convention: The Federalists and the Origins of Party Politics in Massachusetts, 1789-1815* (New York, 1970); Richard Beeman, *The Old Dominion and the New Nation, 1788-1801* (Lexington, KY, 1972); George Lamplugh, *Politics on the Periphery: Factions and Parties in Georgia, 1783-1806* (Newark, DE, 1986); Rachel Klein, *Unification of a Slave State: The Rise of the Planter Class in the South Carolina Backcountry, 1760-1808* (Chapel Hill, 1990).
[20] Jackson Turner Main, *Political Parties before the Constitution* (Chapel Hill, 1972); Jackson Turner Main, *The Sovereign States, 1775-1783* (New York, 1973).
[21] William Novak, *The People's Welfare: Law and Regulation in Nineteenth-Century America* (Chapel Hill, 1996).
[22] Gerstle, *Liberty and Coercion*, 2-5.
[23] Christopher Pearl, *Conceived in Crisis: The Revolutionary Creation of an American State* (Charlottesville, 2020).

Beyond regulating the daily lives of individuals, historians of state government have shown that states had considerable power to mould the contours of American society as a whole. Despite pressure from the new federal administrative history, the economic historians Naomi Lamoreaux and John Joseph Wallis continue to maintain the centrality of state governments in driving 'political and economic modernization' in the nineteenth century through their role in chartering banks and corporations.[24] Ryan Quintana and Sean Gallagher, among others, have also explored the deep interconnections between slavery and state-building in the early nineteenth-century South, where enslaved people laboured in lead mines and canal-building projects for the benefit not of private owners, but of the state.[25] Exciting recent scholarship in immigration history has shown that, beyond regulating slavery and promoting the exclusion of Black and Indigenous people from full citizenship, states also exercised considerable control over the admission of new American citizens from Europe in the early national period. Immigration historians such as Hidetaka Hirota, Anna Law, and Michael Schoeppner have shown that, before the Civil War, state governments constituted powerful regulators of international migration, with major reception centres like Massachusetts and New York unilaterally deporting thousands of recent arrivals whom they considered undesirable.[26]

While historians of early state politics and early republic social policy recognize the power and significance of the state governments, there remain two senses in which their role in

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[24] Naomi Lamoreaux & John Joseph Wallis, 'States, Not Nation: The Sources of Political and Economic Development in the Early United States,' Johns Hopkins Institute for Applied Economics, Global Health, and the Study of Business Enterprise, American Capitalism Working Papers, AC/No. 1/March 2016.

[25] Ryan Quintana, 'Slavery and the Conceptual History of the Early U.S. State,' *JER* 38/1 (Spring 2018); Sean Gallagher, 'The Prison of Public Works: Enslaved People and State Formation at Virginia's Chiswell Lead Mines, 1775-1786,' *Journal of Southern History* 86/4 (November 2020).

[26] See for example Hidetaka Hirota, *Expelling the Poor: Atlantic Seaboard States and the Nineteenth-Century Origins of American Immigration Policy* (New York, 2017); Anna Law, 'Lunatics, Idiots, Paupers, and Negro Seamen: Immigration Federalism and the Early American Republic,' *Studies in American Political Development* 28 (October 2014); Michael Schoeppner, *Moral Contagion: Black Atlantic Sailors, Citizenship, and Diplomacy in Antebellum America* (Cambridge, 2019).

national affairs is still not taken seriously in the political history of the early republic. For one thing, they have a curious habit of disappearing from national political narratives upon the arrival of the Federal Convention in 1787.[27] States might pop up anecdotally here and there in national histories of the early republic – the Virginia and Kentucky Resolutions, the War of 1812, the Erie Canal – but there is no consistent sense of state governments as continuous participants in the national story.

For another, most of the accounts of administration, state and national, discussed above demonstrate a fundamental acceptance of the legitimacy of the model of dual federalism. This dissertation will break with the historiographical tradition of early republic studies by questioning whether this model provides a useful description of the American system at any point in its history.

The term 'dual federalism' was coined by the political scientist Edward Corwin in a 1950 essay in the *Virginia Law Review*. The essay contemplated with concern the growth, in recent decades, of the powers of the federal government, which seemed to have 'shifted base in the direction of a consolidated national power.'[28] In contemplating this change, Corwin mourned the demise of what he considered the natural state of the American federal system. This correct and constitutional form of the federal relationship, now on its way out, had operated according to four principal rules:

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[27] Jack Greene, 'Colonial History and National History: Reflections on a Continuing Problem,' *WMQ* 64/2 (April 2007), 248: 'During the past three or four decades, historical scholarship has . . . done relatively little to redress . . . the neglect of the states as the arenas in which most governance, most public life, and the domestic life of most Americans were principally centred. In the construction of the American past, what [David] Hendrickson calls "the national idea" has ruled and continues to rule virtually without challenge.' Pearl, *Conceived in Crisis*, 224, note 15: 'Historians of the American Revolution and Early Republic often focus on national identity and policy, whereas historians of nineteenth-century law, governance, and politics stress the autonomy and power of the states, creating a disconnect.'

[28] Edward Corwin, 'The Passing of Dual Federalism,' *Virginia Law Review* 36/1 (February 1950), 2.

1. The national government is one of enumerated powers only;
2. Also the purposes which it may constitutionally promote are few;
3. Within their respective spheres the two centres of government are "sovereign" and hence "equal;"
4. The relationship of the two centres with each other is one of tension rather than collaboration.[29]

This was dual federalism.

The arguments of the recent legal and administrative histories discussed above contest Corwin's first two rules of dual federalism. They question whether, even under the antebellum Constitution, the federal government's powers did not have a greater scope than we might previously have thought. Government may have been 'out of sight,' confined to the peripheries of the nation or disguised by co-operation with other organizations and institutions, but Congress was nevertheless able to accomplish much. These historians have challenged Corwin's presumption that the federal government had only a severely circumscribed role to play in the life of the early American nation.

This dissertation, however, will be one of only a very few works to make the case that rules number three and four do not accurately describe the historical relationship of the state and federal governments to one another. Whereas it has hitherto been convenient to national narratives, and particularly to the explanation of the Civil War's origins, to adhere to the view that the exercise of governmental power in the early republic was a zero-sum game, and therefore that the state and national governments existed in a state of constant tension over their respective rights and powers, it is time for historians to take seriously the body of scholarship that contradicts this position.

In an important recent essay, Gregory Ablavsky made a powerful case against the notion that the increase in federal power through the creation of the Constitution must have come at

[29] Corwin, 'The Passing of Dual Federalism,' 4.

a cost to state power. Instead, he argued, the drafting and ratification of the Constitution was a symptom of a broader drive toward centralization led by governing elites at both the state and federal levels. State power was threatened most not from above, by increased federal power, but from below, by local governments, corporations, and Western settlers fighting for independence from state control, drawing in the process on the radical ideology of self-determination that had undergirded the revolutionary struggle. Per Ablavsky, the Constitution's creation did not deprive the states of power but rather identified them as the only other source of sovereignty in the union beside the federal government, and promised to fortify them against the threat of fragmentation.[30] This dissertation supports the case that the state and federal governments were often mutually reinforcing, and contests Corwin's suggestion that conflict and tension were inherent features of nineteenth-century federalism.

Corwin made the case that dual federalism had existed in the United States since the Revolution and had been universally recognized as the proper way of things by all the major authorities on the Constitution, at least until the world wars and depressions of the early twentieth century had reformulated perceptions of the federal government's purpose, remodelling the union to produce a system of 'co-operative federalism.' To support his argument, Corwin cited the same famous names that later historians would come to rely upon in formulating their own visions of federalism in the early republic: members of the Federal Convention, Supreme Court justices, presidents, and vice-presidents.[31] Such nineteenth-century grandees had understood that – areas of concurrent jurisdiction aside – the state and federal governments had exclusive responsibility for the making and enforcement of policy within their respective spheres, and that each level constituted a check upon the powers of the other.

[30] Gregory Ablavsky, 'Empire States: The Coming of Dual Federalism,' *YLJ* 128/7 (May 2019), 1795-6.
[31] Corwin, 'Passing of Dual Federalism.'

The political scientist Daniel Elazar, undertaking his doctorate under the supervision of Morton Grodzins at the University of Chicago in the 1950s, was one of the first to mount a serious challenge to Corwin's interpretation. In his 1962 book *The American Partnership*, a work that prefigures Balogh's *Government Out of Sight* in important ways, Elazar used evidence from four states across the nineteenth century to argue that the federal government had been funding and directing state activities since the founding era. Using internal improvements as his case study, he argued that 'intergovernmental co-operation' had been the basis for governance within the American union for more than a century before the presidency of Franklin Delano Roosevelt. Corwin's nostalgia for an era of dual federalism was misplaced, not least because dual federalism had never existed in practice.[32]

Elazar's scepticism about the administrative reality of dual federalism chimes with the insights of twenty-first century legal scholars about the real-world operation of the American federal system. The world of contemporary federalism is one in which the state and federal governments maintain a constant awareness of one another's activities, and each regulates with the responses of its counterparts in mind; a world in which federal legislation is regularly interpreted and implemented by state officials alongside federal officials; and one in which, as Cristina Rodríguez has argued, state and federal responsibility for particular policy areas and questions is repeatedly re-negotiated, with certain areas which 'should' belong to one or other government in fact being overseen by both through joint task forces and other mechanisms.[33]

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[32] Daniel Elazar, *The American Partnership: Intergovernmental Co-operation in the Nineteenth-Century United States* (Chicago, 1962). Grodzins coined the term 'marble-cake federalism' to describe the American system, by which he meant that the functions of the different governments were messily intertwined and overlapping in a way that defied the metaphor of 'layers' or 'levels.' 'No important activity of government in the United States,' he wrote, 'is the exclusive province of one of the levels, not even what may be regarded as the most national of national functions, such as foreign relations; not even the most local of local functions, such as police protection and park maintenance.' Morton Grodzins, *The American System: A New View of Government in the United States*, ed. Daniel Elazar (Chicago, 1966), 7-8.

[33] Roderick Hills, 'Against Preemption: How Federalism Can Improve the National Legislative Process,' *New York University Law Review* 82/1 (April 2007), 4; Abbe Gluck, 'Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health

All of these features of contemporary federalism can also be observed in the founding era, albeit in the absence of such formal institutions as task forces and offices of intergovernmental relations.

Despite this research into the practice of federalism, historians have rarely questioned whether the dual federalism model offers an appropriate description of the relationship between the two levels of sovereign government in the early United States. After all, Corwin had appealed to the principal constitutional authorities of the early republic, from Marshall to Calhoun and beyond, to make his case. Daniel Elazar himself noted that the great jurists and political thinkers of the early American republic were accustomed to paint a picture of American federalism in which power was cleanly divided by policy area between the two sovereign levels of government.[34] More recently, Max Edling has also pointed out that such images of federalism were a commonplace in American political writings from the 1790s onwards, regardless of the author's partisan preferences.[35] Many of the leading characters in this dissertation regularly appealed to such visions of federalism.

What many readers of the political texts and legal treatises of the early republic have overlooked, however, is that historical articulations of the model of dual federalism were not simply neutral statements of fact, but were, rather, attempts to intervene in particular political debates and thereby to suggest appropriate boundaries between state and federal jurisdictions. They were, to use Quentin Skinner's term, 'speech acts,' which cannot be understood outside the contexts in which they were uttered.[36] By the 1820s, extant political and judicial declarations often hold as an article of faith that dual federalism was a distinctive and central aspect of the

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Reform and Beyond,' *YLJ* 121/3 (December 2011); Cristina Rodríguez, 'Negotiating Conflict Through Federalism: Institutional and Popular Perspectives,' *YLJ* 123/5 (April 2014), 2117.

[34] Elazar, *The American Partnership*, 11, 13-14.

[35] Max Edling, *Perfecting the Union: National and State Authority in the U.S. Constitution* (New York, 2021), 132-133.

[36] Quentin Skinner, 'Conventions and the Understanding of Speech Acts,' *Philosophical Quarterly* 20/79 (April 1970).

American system. But such axiomatic statements mask the fact that appeals to dual federalism always had a political purpose – they were intended to define boundaries that were ambiguous, blurry, and contested, rather than simply to indicate boundaries upon which there was already universal agreement.

In the hands of a Federalist or a nationalist, such appeals might be intended to carve out a sphere within which the federal government could act without reference to the states while commanding their automatic support. Corwin's first citation to a primary source, in his famous essay, is Chief Justice Marshall's opinion of the Court in *McCulloch* v. *Maryland*, the case which established the constitutionality of the Second Bank of the United States. It reads:

> This Government is acknowledged by all to be one of enumerated powers. The principle that it can exercise only the powers granted to it would seem too apparent to have required to be enforced by all those arguments which its enlightened friends, while it was depending before the people, found it necessary to urge; that principle is now universally admitted.[37]

The irony of this reference is that, in his attempt to defend the principle of limited government, Corwin referred the reader to a text in which the case was made, early in the history of the United States, for an expansive vision of federal power. In the words Corwin quoted, Marshall briefly acknowledged the principle of enumerated powers. He went on, however, to argue in favour of the concept of 'implied powers,' through which, under the necessary and proper clause, the federal government may use any 'means which are appropriate' to 'carry into effect any of the powers given by the Constitution to the Government of the Union.'[38] Marshall was stepping over enumeration on his way to a far broader conception of congressional rights and powers. 'Among the enumerated powers,' he wrote,

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[37] *McCulloch* v. *Maryland*, 17 U.S. 4 Wheat. 316 316 (1819) at 405; Corwin, 'Passing of Dual Federalism,' 6.
[38] *McCulloch* v. *Maryland* (1819) at 316-317.

> we do not find that of establishing a bank or creating a corporation. But there is no phrase in the instrument which, like the Articles of Confederation, excludes incidental or implied powers and which requires that everything granted shall be expressly and minutely described.[39]

Such a position was by no means uncontroversial in early national politics. It was rhetorically necessary for Marshall to establish his allegiance to the notion of enumerated powers at the same time as he put forward a reading of the Constitution with the potential to expand the scope of federal competence.

Conversely, in the hands of an Anti-Federalist or a Democratic-Republican figure of the same era, such axiomatic statements about enumerated and reserved powers were used to assert the importance of protecting state sovereignty and to argue for a closely circumscribed vision of federal powers. Many of the case studies in this work show states asserting their own sovereignty or arguing that the federal government has overstepped its constitutional powers. All of these instances were the result of policy disputes in which the majority of a state's legislators opposed the position of Congress or the federal executive. The most famous of these was the promulgation of the Virginia and Kentucky Resolutions, in which Thomas Jefferson and James Madison, writing in opposition to the Alien and Sedition Acts, declared that 'the powers of the federal government' were 'no further valid than they [were] authorised by the grants enumerated' in the Constitution.[40]

That the language of 'states' rights' and the images of a strict division between state and federal policy responsibilities which Jefferson and Madison articulated in the Resolutions later became so powerfully associated with the proslavery cause in the antebellum United States itself demonstrates how arguments about the 'true' nature of the American federal system were always linked to policy and to politics. In their capacity as legislators and executive officials,

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[39] *McCulloch* v. *Maryland* (1819) at 406.
[40] James Madison, Virginia Resolutions, December 21 1798, *PJM* Congressional Series, 17:185-191.

state and federal leaders immersed themselves daily in federalism's muddy waters, managing the ambiguities in the federal order through negotiation, and finding quick fixes where more permanent solutions seemed impossible. But in their capacity as politicians, these same leaders articulated a vision of federalism where ambiguity was a fault, rather than a feature, in the system, and where the state and federal governments operated independently of one another and without the mutual interreliance which, I argue, in fact defined intergovernmental relations in the early republic.

By exploring the place of state government within the new constitutional order after 1787, this dissertation builds up our broader understanding of the American transition from colonies to nation in the aftermath of the revolution. It shows how subnational institutions – in this case, state legislatures and executive departments – became central to promoting union at both an institutional and a cultural level in the early American republic.

The institutional history of the 1790s has generally focused on how Congress and the leading officers of the federal executive built the institutions and created the precedents that would facilitate the operations of the federal government from the founding to the present day. Kenneth Bowling, Donald Kennon, and Charlene Bangs Bickford led the way with their work on the First Federal Congress and the presidency of George Washington in the 1990s, and Lindsay Chervinsky is notable among those who have taken up their mantle in the 2010s.[41] Chervinsky and her academic forebears together show that the ratification of the Constitution was only the first step in creating a functioning system of government for the United States. Precedent and practice were often as important as constitutional text to shaping the structure

[41] See for example Charlene Bangs Bickford & Kenneth Bowling, *Birth of the Nation: The First Federal Congress, 1789-1791* (Lanham, MD, 1989); Kenneth Bowling & Donald Kennon, eds., *Inventing Congress: Origins and Establishment of the First Federal Congress* (Athens, OH, 1999); Kenneth Bowling & Donald Kennon, eds., *Neither Separate nor Equal: Congress in the 1790s* (Athens, OH, 2000); Kenneth Bowling & Donald Kennon, eds., *The House and the Senate in the 1790s: Petitioning, Lobbying, and Institutional Development* (Athens, OH, 2002).

of political and administrative institutions. In her recent book, for example, Chervinsky explores the invention of the president's cabinet, an institution not contemplated by the Constitution's framers, but one that has nevertheless become central to American politics and government.[42]

This dissertation contributes to this institutional history by considering how state-level institutions were integrated into the administration of American government in the early republic. It demonstrates how the occupants of newly created federal offices relied on much older state institutions – treasuries, militias, and prisons, alongside legislatures and governors – to facilitate the implementation of federal law within the states. It also draws on the insights of existing institutional histories by showing how precedent, practice, and interpersonal relationships defined the interactions between the state and federal governments alongside the texts of constitutions and acts of Congress.

Considering how the creation of the Constitution changed – and did not change – intergovernmental relations provides an opportunity to re-examine the extent to which 1787 marked a turning point in the history of the American union. Myriad studies of the Federal Convention and the ratification debates have made the case that the drafting and acceptance of this text profoundly altered the underlying structure of the American federal polity, most significantly by giving the federal government the power to enforce its own laws within the states. Contemporaries thought so too. On first reading the Constitution in Paris in the winter of 1787, Thomas Jefferson wrote to James Madison, 'I like much the general idea of framing a government which should go on of itself peaceably, without needing continual recurrence to the state legislatures.'[43] In his *Federalist* essays, Alexander Hamilton argued that the capacity to perform this function would mark a crucial difference between the Confederation Congress

[42] Lindsay Chervinsky, *The Cabinet: George Washington and the Creation of an American Institution* (Cambridge, MA, 2020).
[43] Thomas Jefferson to James Madison, December 20 1787, *PTJ* 12:439.

and the new federal government. 'If the interposition of the State legislatures be necessary to give effect to a measure of the Union,' he wrote,

> they have only NOT TO ACT, or TO ACT EVASIVELY, and the measure is defeated.... But if the execution of the laws of the national government should not require the intervention of the State legislatures, if they were to pass into immediate operation upon the citizens themselves, the particular governments could not interrupt their progress without an open and violent exertion of an unconstitutional power.[44]

In a real sense, the federal government did acquire the capacity to act independently through the ratification of the Constitution and the work of the First Federal Congress. It gained the power to tax imports, thereby securing the ability to fund itself and abandoning the fruitless requisitions scheme mandated by the Articles of Confederation. At the same time, however, the federal government continued after ratification to 'recur' to the state governments for legislative and administrative support in implementing its laws within the states. Federal reliance on state officials to pass legislation, expend resources, and mobilize manpower for the enforcement of the laws of Congress effectively amounted to a system in which state consent remained necessary for federal laws to be implemented within the states. In practice, state governments were still able to provide, or withhold, permission for the federal government to operate within their respective jurisdictions. By highlighting this aspect of American government administration, this dissertation shows the limits of ratification as a moment of transformation for the union.

A final aspect of institutional history on which this thesis both draws and builds concerns the resolution of conflict between the state and federal levels of government. Legal historians Alison LaCroix, Mary Sarah Bilder, and Daniel Hulsebosch have mapped the origins of the United States as a federal system, tracing its transition from colonies within an empire to states within a union, and showing how the lessons of imperial governance and imperial crisis

[44] Alexander Hamilton, *Federalist* XVI, 74.

informed federalism's institutional structure and the invention of American constitutional law.[45] A considerable problem confronting Revolutionary-era legal thinkers was that of ensuring that state law would not conflict with federal law, and of developing mechanisms through which to knock down those state laws that were 'repugnant' to the Constitution of the United States. Bilder shows how the precedent of Privy Council review of colonial legislation suggested judicial review as a solution to the problem of unconstitutional state laws, and LaCroix demonstrates how the Constitution's framers enshrined this solution in the document itself through the supremacy clause.[46]

As contemporary legal scholars point out, however, judicial review is a time-consuming, expensive, and unwieldy solution to conflicts between state law, federal law, and the Constitution.[47] This dissertation makes the case that judicial review was a last resort for the resolution of problems of constitutionality within the federal system. It shows how state legislators and executive officials grappled with the problem of reconciling state law with federal law and with the Constitution, and attempted, through their day-to-day communications with federal officials, to establish the constitutionality of their actions – or the unconstitutionality of federal actions – without taking federalism to court. State and federal officials regularly worked out legal questions surrounding the location of authority within the federal system through correspondence and negotiation, rather than waiting for formal rulings.

In a 2011 essay, Abbe Gluck drew attention to a fundamental problem in the theory of federal statutory interpretation in the modern United States. As a specialist in health law, Gluck had noticed an 'emerging' practice in the drafting of federal statutes relating to healthcare. Laws

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[45] Alison LaCroix, *The Ideological Origins of American Federalism* (Cambridge, MA, 2010); Mary Sarah Bilder, *The Transatlantic Constitution: Colonial Legal Culture and the Empire* (Cambridge, MA, 2004); Daniel Hulsebosch, *Constituting Empire: New York and the Transformation of Constitutionalism in the Atlantic World, 1664-1830* (Chapel Hill, 2005).
[46] Bilder, *Transatlantic Constitution*, 186-187; LaCroix, *Ideological Origins*, 161-162.
[47] Rodríguez, 'Negotiating Conflict Through Federalism,' 2111.

such as the Affordable Care Act (2010) were designed to be implemented partly by federal agencies, but partly also by the states themselves. Congress was delegating powers and duties to the state governments through statutes. It was already well understood, she noted, that federal agencies had to interpret statutes as part of their work in implementing federal law – but what of the states? Gluck was troubled by the failure of legal scholars to account for the fact that state governments were responsible for implementing, and therefore of necessity for interpreting, federal law.[48]

Despite Gluck's identification of 'intrastatutory federalism' as a relatively recent phenomenon, similar practices have been essential to the functioning of government administration in the American union since the founding era. Indeed, in the absence of the modern mass of federal agencies, the general government was considerably more reliant upon the states for the implementation of federal laws within their boundaries than it is today. State statute books of the early republic are full of laws whose purpose is either to bring the state government into alignment with federal policies, or in fact actively to implement those policies.

What kind of federalism was this? My work demonstrates that this pattern of intergovernmental interaction cannot fully be captured either by the designation of 'dual federalism' or by that of 'co-operative federalism.' Instead, I propose the term 'co-ordinated federalism' to describe the constant mutual awareness and negotiation that characterized intergovernmental relations in the early republic.

Gluck frames contemporary intrastatutory federalism as a system within which the federal government consciously delegates specific administrative responsibilities to the state governments through the laws of Congress.[49] This means of shaping the federal relationship exists within a union characterized by a powerful central government with the financial means

[48] Gluck, 'Intrastatutory Federalism,' 534, 537, 540, 541.
[49] ibid., 539-540.

to exert influence over the making and implementation of state policy.[50] This is 'co-operative federalism.' Daniel Elazar made the case in the 1960s that co-operative federalism was hardly a new phenomenon in the twentieth century, demonstrating how, in the early American republic, the joint-stock company had provided a vehicle for 'the federal government to supply funds, technical aid, and equipment to the states for internal improvements . . . without violating the letter of strict constitutional construction.'[51]

Both Elazar and Gluck offer fruitful ways of thinking about American federalism, then and now. Where their conclusions diverge from mine is in the relative significance they assign to the role of the federal government in the intergovernmental relationships they describe. Elazar's thesis for federalism in the early republic was that 'federal monetary aid . . . provided a fiscal climate for the growth of the American partnership.' In other words, like twentieth-century intergovernmental relationships, Elazar's founding-era co-operative federalism was characterized by considerable – though discreet – federal interventionism.[52] And though Gluck's intrastatutory federalism leaves important space for state discretion in the interpretation of federal statutes, it is also grounded in a top-down co-operative model in which Congress is the primary agent shaping the federal relationship.

To call the federalism I have observed in the early republic 'co-operative' would be misleading because of the top-down connotations this designation has accrued. In using instead the term 'co-ordinated federalism,' my interest is in conveying the centrality of state governments as agents that not only modified their own behaviour in response to federal actions but also worked constantly, and with some success, to alter the behaviour of the federal government in accordance with their particular policy interests. The term is intended to capture

[50] Deil Wright, 'Policy Shifts in the Politics and Administration of Intergovernmental Relations, 1930s-1990s,' *Annals of the American Academy of Political and Social Science* 509 (May 1990), 62.
[51] Elazar, *American Partnership*, 23, 34-35.
[52] ibid., 2, 35.

the extent to which the federal and state governments communicated and negotiated with one another in preparing and executing their respective administrative agendas.

Scope and Methods

This dissertation covers a historical period of acute uncertainty about the formal boundaries of state and federal power. It shows how this uncertainty generated patterns of intergovernmental co-ordination and co-operation that mitigated the absence of clear, detailed, formal rules of federalism. Each chapter begins by considering the intentions of federal constitution-makers and early congressmen to redistribute powers within the federal system, exploring how they attempted to resolve, for each of the different policy areas, the most dangerous problems of the Confederation period through constitutional reform and the creation of new federal laws and institutions. Each chapter then goes on to examine, through a series of case studies, how state and federal officials together grappled with the effective real-world implementation of the Constitution and of federal laws, demonstrating in the process the real limits of federal power and the ambiguities surrounding the rights and responsibilities of the state and federal governments in policy-making and law enforcement.

Chronologically, the content of the dissertation is skewed towards the 1790s, when the institutional foundations of union were created and when the fewest precedents existed for the state-federal relationship under the Constitution. Towards the end of that decade, moments such as the crisis over the Virginia and Kentucky Resolutions and Marshall's declaration of judicial supremacy in *Marbury* v. *Madison* (1803) began to shape the political culture of federalism by making it more controversial for state governments to claim the right to determine for themselves the constitutionality of federal laws and actions, though they would continue to do so over the years and decades to come.

Rather than focusing on traditional turning points, however, this study explores how practices of intergovernmental relations were developed and consolidated through the day-to-day interactions between state and federal officials, principally in the legislative and executive branches. These interactions were necessitated by the ambiguities in the Constitution, by federal reliance on the states for aid in implementing federal law, and by the desire of the states for federal approval and assistance in promoting their own individual interests.

Drawing a firm chronological line under the development of intergovernmental relations in the United States is not a simple matter. I make the case in this thesis for the creation, in the founding era, of ongoing patterns of behaviour, and for the existence of an ambiguity in the boundaries of the state-federal relationship that persisted unresolved far beyond the conclusion of the War of 1812. Nevertheless, in the interests of completing a doctoral thesis in four years, I have chosen to conclude my study with the series of landmark decisions handed down by the Marshall Court across the 1820s, starting in 1819 with *McCulloch* v. *Maryland*. The choice to conclude with these decisions arose out of the case studies I selected through which to observe the operation of intergovernmental relations across different policy areas. State-federal conflict over the Bank of the United States, and especially its branch structure, led me to *McCulloch*, which attempted to end this conflict by asserting the right of the federal government to charter a national bank.[53] Confusion over the proper locus of authority over public health in the early 1790s led me to *Gibbons* v. *Ogden* (1824), which determined a federal right to regulate interstate passenger shipping, and a state right to regulate quarantine.[54] The near-breakdown of relations between the federal government and certain New England states over control of the militia during the War of 1812 suggested *Houston* v. *Moore* (1820) and *Martin* v. *Mott* (1827), which confirmed the exclusive power of the U.S. president – rather than state governors or other individuals – to determine the circumstances under which the militia

[53] *McCulloch* v. *Maryland* (1819).
[54] *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1 1 (1824).

could be called into national service.[55] These cases attempted to lay down a firm line between state and federal powers in these different policy areas after the confusion of the previous thirty years, confirming the authority of the federal government in certain areas while also creating a more coherent sense of those powers retained by the states under the Constitution.

The fact that these rulings arrived years, or even decades, after the initial stirrings of conflict and confusion in each area indicates the limits of the federal judiciary's power to regulate the terms of the state-federal relationship. In the case of slavery, of course, uncertainties over the respective powers of the state and federal governments would only begin to be adjudicated by the Supreme Court in the 1840s and 1850s, and then with varied success. The enforceability of federal legal precedent was also a perennial issue. Marshall's ruling in *McCulloch* was followed up only five years later with a nearly identical ruling in *Osborn* v. *Bank of the United States* (1824), this time dealing with the activities of the Ohio state government.[56] Indian affairs offered the most egregious example of the Supreme Court's incapacity, as both state and federal governments flouted the Court's ruling in *Worcester* v. *Georgia* (1832).[57]

Given unlimited time and resources, it would have been ideal to undertake a study of all of the state governments in existence by 1820 (twenty-one of them). Realistically, however, it was only possible to examine a sample of the existing states within the constraints of a doctoral thesis. In designing my project, I chose to follow in the footsteps of Daniel Elazar, who in his 1962 book *The American Partnership* covered four states (Virginia, New Hampshire, Minnesota, and Colorado) in detail.[58] Since my study is limited to the earliest decades of the national government and seeks to explore the changes brought about by the introduction of the U.S. Constitution, I selected four states which experienced the transition from British colony

[55] *Houston* v. *Moore*, 18 U.S. 1 (1820); *Martin* v. *Mott*, 25 U.S. 12 Wheat. 19 19 (1827).
[56] *Osborn* v. *Bank of the United States*, 22 U.S. 9 Wheat. 738 738 (1824).
[57] *Worcester* v. *Georgia*, 31 U.S. 6 Pet. 515 515 (1832); Claudio Saunt, *Unworthy Republic: The Dispossession of Native Americans and the Road to Indian Territory* (New York, 2020), 166-168.
[58] Elazar, *American Partnership*, 2-3.

to independent republic, and then from government under the Articles of Confederation to government under the Constitution. Like Elazar, I sought to represent different geographical and economic regions through my sample, choosing from New England, Massachusetts; from the middle Atlantic, New York; from the Upper South, Virginia; and from the Deep South, Georgia.

Though both New York and Georgia had many of the characteristics of 'western' states in 1789, not least because they each, at that time, claimed a large territory inhabited principally by Indigenous nations, I also include a case study and some other evidence relating to early Tennessee, which gained statehood in 1796, and here represents the experiences of a frontier government making the transition from a U.S. territory to a member state of the union. While my archival research was limited to these five states, the reader will note some examples from other states which were both pertinent and readily available through print or online sources.

The differences between the economic and social structures and political, religious, and cultural histories of these sample states are abundant, and their particular circumstances and interests often shaped the interactions with the federal government that are explored in this work. Rather than focusing upon their differences, however, the principal aim of this study is to explore the similar changes that these state governments experienced in the period of implementation of the Constitution and the similar ways that state officials across the union sought to manage the power of the federal government and to pursue their own interests within the framework of the new federalism. What this investigation shows is that, although the language of states' rights or state sovereignty has become associated principally with the defence, unto death, of slavery by Southern state governments in the mid-nineteenth century, in the early decades of the republic it was a ubiquitous, and only mildly politically risky, touchstone for state governments everywhere when frustrated with the arrangements of the union. As the historian Alexander Johnston noted in the 1880s, 'Almost every State in the Union in turn declared its own sovereignty and denounced as almost treasonable similar declarations

in other cases by other States.'[59] At the same time as they were prepared to fall back on claims to sovereignty, however, all of the sample states also proved generally ready to co-operate with the federal government in the implementation of the laws of the union and to approach federal officials for advice or assistance in managing their own domestic affairs.

The history of national policy-making and the implementation of national laws has traditionally relied, understandably, on national records – congressional debates, presidential papers, and the documents of the great departments of state. While recent forays into the history of federal administration have yielded valuable insights, however, as Daniel Elazar pointed out in the early 1960s, 'It would be easy to attribute a greater role to federal activity if one's investigations were confined to examining the record through what would be, in effect, federal eyes.'[60] My work builds on our existing understanding of the nature of government administration throughout the union, and of the extent of federal power within the states, by focusing on the records of state government: the journals of state legislatures and the papers of state executive officials. I use the papers of federal officials, federal statute books, and federal legislative records principally to illuminate the negotiation and co-ordination between the state and federal governments over the creation and implementation of different policy programmes. By looking beyond statute books and considering also debates and discussions of laws and resolutions that were not passed by state legislatures, I am able to demonstrate the variety of national issues with which states engaged, even where their debates did not result in new regulations.

Exploring these records of day-to-day governmental activity allows me to build on the findings of existing works that privilege the intellectual history of the formation of the Constitution and of American federalism. These histories of political thought, whose principal

[59] Alexander Johnston, 'State Sovereignty' in John Lalor, ed., *Cyclopaedia of Political Science* (3 vols., New York, 1890), 3:794.
[60] Elazar, *American Partnership*, 2.

sources are speeches, essays, and other contemporary analyses or expressions of opinion, explain the intellectual frameworks within which government officials operated as they created and implemented laws and policies.[61] This dissertation moves the discussion forward by showing what happened when theories about the meaning of the Constitution and the nature of federalism came into contact with the messy business of governing the largest federal republic in the eighteenth-century world. It was the reality of governance in this context that made the theory of dual federalism and the clean and perfect division of authority between the state and federal levels an impractical proposition, despite its continued attractiveness as a way of thinking about the American system.

At the time of writing, the condition and accessibility of government records relating to my four sample states is highly variable. Between the subscription services available at the Bodleian Library and the New York Public Library, I was able to access some legislative records from Georgia and Virginia through ProQuest's digitization of the microfilm records in the Evans and Shaw-Shoemaker series of Early American Imprints. Nevertheless, the fact that a record is technically available online does not mean that it is easy to use. The legibility of the digitized microfilm is inconsistent, and multiple sessions are missing from the collection. The best-preserved and most complete records I encountered were the legislative journals of the New York state assembly held at the New-York Historical Society, where I was able to access not only contemporary print journals for each session, but also printed committee reports and other associated material in excellent condition. By contrast, and surprisingly, the records of the Massachusetts General Court for the same period are much less accessible, despite their obvious significance to the early history of the United States. The Massachusetts State Archives holds only manuscript journals of the General Court for the period 1789-1812, and many of the later

[61] See for example Michael Klarman, *The Framers' Coup: The Making of the United States Constitution* (New York, 2016); Edling, *Revolution in Favor of Government*; and LaCroix, *Ideological Origins*.

journals for that time period appear not to have been written up in fair copy, making them virtually unreadable.[62] The relative difficulty of accessing these records by comparison with national records must go some way to explaining why no other historian has yet undertaken a study of early intergovernmental relations on this scale, and why the literature on early state government remains thin by comparison with its national counterpart.

I sought out the correspondence of state officials in the manuscript and microfilm collections of state archives and historical societies across the different states. Nevertheless, it was often easiest to capture the interactions between state officials and the federal government by using the print and digital papers of federal personnel. The Papers of George Washington, Thomas Jefferson, James Madison, the Adams Family, and Alexander Hamilton together constituted a priceless resource, granting access to decades of state communications with the president and cabinet alongside meticulous scholarly commentary. The papers of most other federal officials are not available in such a functional format. The papers of some key individuals – Edmund Randolph and Timothy Pickering, to name two – remain scattered across different archives, while those of others – Albert Gallatin, Benjamin Hawkins – have been collected in smaller print editions, some of them dating to the Victorian era.

I have read these records with a particular eye to two categories of evidence. The first comprises instances when states engaged with policy areas that might traditionally have been considered to lie within the federal sphere of responsibility – foreign policy, Indian affairs, military and defence policy, national fiscal and commercial policy. In the second category, I have searched for examples of state-federal negotiation and co-operation over the creation and implementation of both local and national policies. To this category belongs much of the evidence discussed in the below chapter on slavery and intergovernmental relations, where

[62] For the period 1789-1812, only the 1807-1808 Journal of the Massachusetts House of Representatives appears to be available in print. 'Journals of the House of Representatives of Massachusetts, 1715-1922,' https://www.sec.state.ma.us/arc/arcdigitalrecords/housejournals.htm (September 8 2021).

federal officials were invited by state personnel to aid in the solution of state-level policy problems.

It is important to note at this stage that neither of these categories constituted a majority of the business of either the federal or the state governments in the early republic. As Max Edling has suggested with reference to a comparative quantitative study of the activities of the Pennsylvania state legislature and the federal Congress during the Washington administration, the federal and state governments generally dealt, in broad terms, with different groups of policy areas in the early republic. As Edling has previously argued, the policy interests of the federal legislative and executive branches were generally limited to control of fiscal and commercial policy, international relations, defence policy, and Indian affairs.[63] In the records of the four sample states I examine here, meanwhile, the quantity of legislation relating to traditional areas of 'internal police' – an expansive field – naturally outstrips instances of legislative and executive engagement with national matters.

The findings of this dissertation nevertheless challenge historians' exclusive reliance on the theory of dual federalism in explaining the operation of the federal union. In the first place, they show that both in creating policy and in attempting to implement the law, both state and federal officials quickly discovered that there was considerable overlap between the responsibilities of the state and federal governments. Disentangling their respective constitutional duties in these overlapping policy areas – which ranged from public health to militia management to Indian affairs – required continuous intergovernmental negotiation. Secondly, even where the state and federal governments legislated within their own 'proper' spheres, each might rely upon the aid of the other in carrying its policies to fruition.

[63] Edling, *Perfecting the Union*, 132-133.

Next Steps in Intergovernmental Relations

This dissertation aside, considerable work remains to be done if historians are to understand fully the relationships between the different governments of the United States in the eighteenth and nineteenth centuries and how they affected the politics and governance of the union. Far from being an encyclopaedic study, this thesis only begins to suggest, in its four thematic chapters, the range of different policy questions whose resolution was materially affected by state-federal negotiation. One significant area that could present a dissertation-length project in itself is the precise financial relationship between the state and federal governments between the Revolutionary War and the Civil War. In undertaking my research into the legal and administrative relationship between the two levels of government, I quickly became aware that the different states of the union maintained a debt-credit relationship with the federal government throughout this period, and that neither the exact numbers involved nor the real impact of debt and credit on intergovernmental relations had been substantially explored by any other historian. While my sources for this project did not suggest that intergovernmental debt became a source of conflict or necessitated any major negotiations between my sample states and the federal government in this period, the history of banking and public finance could certainly be combined with the history of politics and government to provide more answers in this area.

At its broadest, 'intergovernmental relations' as a field encompasses not only the state-federal relationship, but also the relationships between individual state governments; between state governments and local governments; between the federal government and local governments; between the federal government and territorial governments; and between the federal government and the leadership of the different Indian tribes. With the exception, perhaps, of the federal relationship with Native Americans, which is already a matter of great interest to historians and legal scholars, all of these intergovernmental relationships offer new

avenues for research, particularly with regard to the structure of power within the American union in the early republic.

In considering how state governments attempted to influence national policy, I discuss in several instances of co-ordination and co-operation between individual states, but state records have much more to offer the historian in this area. Fruitful topics for future inquiry include the sharing of legislation between states to build uniformity in the government of internal police, and the ongoing struggle over territorial boundaries between neighbouring states.[64] The considerable power of certain local governments and corporations, notably New England town governments and the city of New York, to make their mark on national affairs and negotiate with the federal government on their own behalf is also mentioned here upon occasion, but deserves further attention elsewhere.

Chapter Summaries

The bulk of this dissertation is structured around four thematic chapters, each of which explores the impact of the state-federal relationship on one broad policy area between the First Federal Congress and the War of 1812. Tracing the activities of four states across three decades did not lend itself easily to a single chronological narrative, but the records soon indicated four policy areas with undeniable national and international significance in which almost all of my sample states were, at one time or another, actively involved. Besides allowing for focused comparison between the different states by policy area, this thematic structure allows me to demonstrate the significance of intergovernmental relations as a problem across American government as a whole and across multiple historiographies. Each of the four thematic chapters is made up of

[64] Peter Onuf, *The Origins of the Federal Republic: Jurisdictional Controversies in the United States, 1775-1787* (Philadelphia, 1983) provides a starting point on territorial disputes between states.

case studies exploring the different sub-categories of a given policy area, and each is also broadly chronological in its internal structure.

Chapter II begins by exploring the response of the state governments to perhaps the most transformative policies implemented by the early federal government: the creation of a federal taxation infrastructure, the chartering of a national bank, and the regulation of national and international commerce. The chapter culminates with the crisis of federal authority over the enforcement of Jefferson's Embargo, where the centrality of state government support to the success of the federal agenda became painfully clear.

Chapter III engages with the trickiest area of overlap between the state and federal spheres of authority: the implementation of national defence policy. Intergovernmental conflict and confusion over control of the militia is the central theme of this chapter, but the problem of constructing and managing coastal fortifications within the states also plays a significant part. Together, militia management and coastal fortifications would come together to contribute to the greatest intergovernmental crisis in the American union before Nullification: the refusal of some New England governors to call out their militia in response to the threat of a British invasion at the beginning of the War of 1812.

Following on from Chapter III, Chapter IV turns to Indian affairs, an area of governance in which defence policy and international relations merged with questions of 'internal police' to give both the federal and state governments a stake in its management. Although many recent studies treat Indian affairs as a problem of 'the West' and of the federal territories, making it the natural preserve of the U.S. government, in fact many states continued to claim vast areas of land inhabited by Native peoples, claiming also the right to impose their laws on Indigenous tribes and to negotiate unilaterally with those tribes for the sale of their lands. Throughout the period, the federal government struggled for supremacy in Indian affairs and to prevent all-out war between state forces and Native nations.

The theme of the final chapter is the management of slavery, which, although ostensibly a matter of state responsibility, also drew in the federal government because of its considerable implications for defence policy and for international affairs. State legislators and governors actively sought out the assistance of Congress and the federal executive in developing mechanisms for the management of fugitivity across internal and external borders, and – in one striking instance – in developing schemes for the colonization of enslaved people outside the United States. States also negotiated the enforcement of the international slave trade ban and grappled with the suppression of 'domestic insurrections' in the context of the federal union. This chapter shows that major slaveholding states were accustomed to rely on the assistance of the federal government in controlling their enslaved populations in this period.

Before exploring all of these different policy areas in detail, however, Chapter I of this dissertation offers an overview of the mechanisms by which the state and federal governments interacted with one another for the resolution of conflict and the general co-ordination of their respective activities. Although there was little in the way of a formal institutional infrastructure for intergovernmental relations in this period, we can perceive patterns in the ways the different institutions of the union communicated with one another, how the states processed and acted upon the information they received from the federal government, how they supported the operation of the federal government within their boundaries, and by what means they attempted to influence the creation of federal policy. This chapter provides a reference guide to the main categories of intergovernmental interaction, which we then see in action in the thematic chapters that follow.

In the crisis-ridden postwar years, American political leaders struggled with the question of how to organize their vast federal republic in such a way that it could function with minimal conflict over the long term. The summer before the Annapolis Convention of September 1786, James Madison undertook an extensive study of confederated republics and empires through history, seeking out the constitutional causes of their failure. He determined that a 'want of authority in the whole over its parts' had usually been responsible for the collapse of such polities, and entered on his ensuing campaign of federal constitutional reform with the goal of remedying this defect in the Articles of Confederation.[1]

Madison was only partially successful. His prized constitutional provision for strengthening federal authority, a national veto over the laws of the states, was rejected by the Convention, which sought solutions to congressional impotence that savoured less of the British imperial past. In place of Madison's veto, the delegates created two provisions designed to empower the federal government and to manage conflict between the state and federal levels. The first was the enumeration of the powers of Congress, by which the Convention attempted to build two distinct and separate levels of government within the union, each with a different set of policy responsibilities. The second was the supremacy clause, by which the laws, treaties, and Constitution of the United States would automatically override state constitutions and statutes, and which would apparently be enforced by a federal court system only vaguely outlined in the Constitution itself.

Beyond these provisions, the operation of the federal system and the functional relationship between the state and federal governments were left largely untouched by the Convention. Despite a gesture in the direction of state representation in the federal Congress

[1] James Madison, Notes on Ancient and Modern Confederacies, c. April-June 1786, *PJM* Congressional Series 9:11.

through the design of the Senate, the Constitution did not either explicitly or implicitly create a set of institutions for the management of this intergovernmental relationship. How exactly the states would accommodate the imposition of an entirely new constitutional regime, and how the state and federal governments would in practice interact with one another, were questions, like many others in 1787, to be determined later.

This chapter offers an overview of the mechanisms by which the federal and state governments learned to communicate, negotiate, and resolve their differences in the years following the implementation of the Constitution. Much of this communication and negotiation was driven by the federal government's reliance on the assistance of state officials in implementing the laws of the union within their jurisdictions. To facilitate state participation in federal law enforcement, Congress and the federal executive organized procedures for the sharing of information with the state governments. At the state level, governors were the natural point of contact, and became intermediaries between state legislators and federal officials. The custom of a regular gubernatorial address to the state assembly offered governors the opportunity to frame federal policy initiatives within the context of the state's own policy interests, and suggest ways in which the legislators might respond, through their own laws and resolutions, to the federal government's lawmaking activities. States made new laws, and some revised their constitutions, to accommodate the implementation of the Constitution and the accompanying shift in the respective policy responsibilities of the state and federal governments.

The conversation was not all one-way. The federal government did not simply dictate its wishes while the states silently complied. States used acts, resolves, addresses, and remonstrances to comment upon federal policies and to attempt to shape the rules of federalism from below. State officials also regularly – though not uncontroversially – commented upon the constitutionality of federal actions. While political opponents frequently extolled the dangers of such declarations, they made sense in a federal system where state governors and

legislators were active participants in the enforcement of federal laws, and were therefore frequently called upon to interpret those laws for themselves.

Managing Conflict in a Divided Sovereignty

By the time the Constitutional Convention met in 1787, American political thinkers had arrived at two very broad conclusions about how they wanted their federal system to work. On the one hand, they wanted what Alison LaCroix calls 'multiplicity' – several legislatures all operating at once. On the other hand, as Mary Sarah Bilder has argued, they had come up in an imperial legal culture that abhorred 'repugnancy,' or incompatibility, between the laws of the metropole and the laws of the colonies. A pressing question before them in framing a functioning federal system, then, was how to achieve a multiplicity of legislative authorities while avoiding, managing, and resolving the repugnancies or conflicts that might arise when many legislatures were making laws at the same time.[2]

In April 1787, James Madison proposed a radical solution to the problem of mediating conflicts between multiple legislatures. Writing to Thomas Jefferson in Paris, and to George Washington and Edmund Randolph, fellow members of Virginia's delegation to the convention, Madison argued that the 'national authority' of the union should have the power to veto state laws. 'Let it have a negative,' he wrote to Randolph, 'in all cases whatsoever, on the legislative acts of the states, as the king of Great Britain heretofore had.'[3]

The delegation was receptive to Madison's proposal. The Virginia Plan that Randolph presented to the Convention on May 29 contained a modified version of the provision, granting Congress the power 'to negative all laws passed by the several States, contravening in the

[2] LaCroix, *Ideological Origins*, 9, 132-135; Bilder, *Transatlantic Constitution*, 1-3, 191-192.
[3] James Madison to Edmund Randolph, April 8 1787, *PJM* Congressional Series 9:368-371; LaCroix, *Ideological Origins*, 138-139.

opinion of the National Legislature the articles of Union.' Borrowing a provision from the constitution of New York, the Virginians proposed a system whereby 'the Executive and a convenient number of the National Judiciary' would 'compose a council of revision with authority to examine every act of the National Legislature before it shall operate, & every act of a particular Legislature before a Negative thereon shall be final.'[4] The council of revision would therefore review not only congressional statutes, but also Congress's use of the veto over state legislation.

This language was adopted by the Committee of the Whole House on May 31. The following week, on June 8, Madison and Charles Pinckney of South Carolina upped the ante by proposing not only that the federal government should be allowed to veto state laws 'contravening...the articles of Union,' but rather any law 'which to them shall appear improper.' This marked a return to Madison's original vision of a veto 'in all cases whatsoever' – something approaching an arbitrary power vested in federal officials to supervise the regulatory activities of the states.[5]

What was the rationale behind a vision of federalism in which federal supremacy would come at such a clear cost to state autonomy? Madison told the Convention that he 'could not but regard an indefinite power to negative legislative acts of the States as absolutely necessary to a perfect system.' If the state governments retained the power to pass laws that threatened the survival and success of the independent United States – a power they had exercised with impunity, in the view of many politicians, throughout the post-war period – the federal government would have no peaceful means of saving the union from disintegration. The only alternative to a national veto power, Madison argued, would be to create a federal government prepared to resort to violence – to countenance the 'use of force' to 'control the centrifugal tendency of the States.' A government whose only recourse was to military action in the case

[4] Madison's Notes, May 29, Farrand 1:20. Cf. Constitution of New York (1777), art. III.
[5] Journal, May 31, Farrand 1:47; Madison's Notes, June 8, Farrand 1:164.

of unconstitutional behaviour by the states 'w[oul]d prove as visionary & fallacious as the Gov[ernmen]t of Cong[res]s.' Under such circumstances, 'a negative was the mildest expedient that could be devised for preventing these mischiefs.'[6]

That Madison should present such a diabolical vision of the future for a union that lacked a sovereign authority of last resort in cases of conflict between state and federal law was hardly surprising. The very problem that he now confronted – disputes over the proper locus of power in a multi-centred polity – had ripped apart Britain's North American empire over the course of the previous decade. The failure to produce a proper answer to the question of which governing authority had the right to pass which laws, and the failure to provide an appropriate mechanism for defusing such disputes, had ended in bloodshed before. The suggestion for a national veto was an attempt to head off the possibility that such conflicts would threaten the union in years to come.[7]

In the debate that followed Madison and Pinckney's motion, James Wilson of Pennsylvania proved the proposal's most eloquent supporter. Wilson compared the state governments to 'the savage . . . in a State of nature,' unwilling to give up his 'personal sovereignty' so as to coexist peacefully with others in society. 'Leave the whole' of the union, Wilson said, 'at the mercy of each part, and will not the general interest be continually sacrificed to local interests?' John Dickinson agreed that there were only two choices: 'We must either subject the States to the danger of being injured by the power of the Natl. Govt. or the latter to the danger of being injured by that of the States. He thought the danger greater from the States.' What Dickinson wanted most of all was certainty about the relative power of the state and national governments. 'To leave the power doubtful,' he remarked, 'would be opening another spring of discord."[8]

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[6] Madison's Notes, June 8, Farrand 1:164-165.
[7] For an overview of this background, see Jack Greene, *The Constitutional Origins of the American Revolution* (New York, 2011).
[8] Madison's Notes, June 8, Farrand 1:166-167.

Though Wilson and Dickinson agreed with Madison and Pinckney that an effective and unconstrained supremacy must reside in the national government, others protested the national veto over state law, or called for a defined set of circumstances in which such a veto could be used. A vote on the amendment was lost, with only Massachusetts, Pennsylvania, and Virginia in favour.[9] Nevertheless, the Virginia Plan's provision for a national veto and council of revision survived another five weeks of debate.

On Tuesday 17 July, the Convention considered the question of a national veto once more. Madison remained passionate in defence of the idea, arguing that 'the negative on the laws of the States' was 'essential to the efficacy & security of the Gen[era]l Gov[ernmen]t.' The delegates had seen 'the propensity of the States to pursue their particular interests in opposition to the general interest . . . . Nothing,' Madison said, 'short of a negative, on their laws will controul it.' The state judges could hardly be relied upon to review unconstitutional legislation, since they were in many cases 'depend[en]t on the Legislatures.' Strikingly, Madison turned in the last resort to the example of the British Empire to demonstrate the necessity of a national veto. 'Nothing could maintain the harmony & subordination of the various parts of the empire, but the prerogative by which the Crown, stifles in the birth every Act of every part tending to discord or encroachment,' he urged.[10]

This proposal to return to an overtly British model did not go over well, even among the more pronounced nationalists. Though Charles Pinckney remained in favour, Gouverneur Morris 'was more & more opposed to the negative,' particularly on the grounds that it 'would disgust all the States,' jeopardizing the viability of the new constitutional arrangements. Roger Sherman saw the judicial, not the legislative, branch as the correct arbiter of constitutionality. 'The Courts of the States,' he said, 'would not consider as valid any law contravening the Authority of the Union.' Morris still foresaw a role for the federal Congress. 'A law that ought

[9] ibid., 1:168.
[10] Madison's Notes, July 17, Farrand 2:27-28; LaCroix, *Ideological Origins*, 139.

to be negatived will be set aside in the Judiciary department,' he said, or 'may be repealed by a National law.' Seven out of ten delegations voted to remove Madison's national veto from the text under discussion.[11]

If the power to determine the constitutionality of state acts was not to be lodged in the national legislature, the constitution-makers would have to develop other means of resolving repugnancies between state laws and federal constitutional norms. After the rejection of the federal veto, the delegates developed two provisions through which to manage the distribution of power in the federal system, both of which also stemmed from imperial precedents. The first was the enumeration of the powers of Congress, and the limits on the powers of the states, in Article I, sections eight, nine, and ten. As Alison LaCroix has shown, theorists of imperial political organization in the late colonial period had already imagined a hierarchy of legislative authorities, 'each with a legislative brief defined by subject matter.'[12] By confining the regulatory responsibilities of the state and federal governments, respectively, to separate policy areas, enumeration offered one means of preventing multiple legislatures from passing conflicting laws on the same topic.

The possibility remained, of course, that states would continue to trespass on the regulatory turf of the federal government. The supremacy clause of Article VI suggested a solution to this problem. Echoing the supremacy of the laws of England under the imperial system, the clause declared that the Constitution, laws, and treaties of the United States 'shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.' This language suggested that judges might play an important role in maintaining the supremacy of the

[11] Madison's Notes, July 17, Farrand 2:27-28; LaCroix, *Ideological Origins*, 147, 154-155.
[12] LaCroix, *Ideological Origins*, 8.

Constitution, though it did not lay out a clear procedure for judicial oversight of the constitutionality of state or federal laws.[13]

Historians of early federalism have identified judges – not legislators or executive officials – as the institutional actors with the greatest responsibility for resolving constitutional disputes between the state and federal levels of government. Mary Sarah Bilder has shown how the 'transatlantic constitution' of the colonial period centred on avoiding 'repugnancy' between metropolitan and colonial laws while tolerating 'divergence' in particular circumstances. The adherence of colonial governments to these imperial constitutional principles could be tested by means of appeals to the Privy Council, which provided the institutional precedent for the system of judicial review which emerged in the newly independent United States. Not only did state judges begin to review state legislation from the 1780s onward, but the federal court system created by Congress through the 1789 Judiciary Act also reviewed state legislation from the 1790s.[14] The federalism of the Constitution, as LaCroix puts it, was defined by 'a judicialized approach to the problem of multi-layered authority.'[15]

While these historians have undertaken essential work in illuminating the ideological and institutional basis for a court-centred approach to mediating conflict in the federal system, however, this dissertation makes the case that a focus on the courts alone cannot fully explain the successful functioning of the American federal system in this area for the seven decades between the First Federal Congress and the Civil War. For one thing, the judicial review function of both federal and state courts was constrained by the fact that they could only review legislation that happened to be at issue in justiciable cases. Although in some places – notably New York – there was mandatory state review of state statute law, after the failure of Madison's

[13] U.S. Const. art. 1, §8-10; U.S. Const. art. VI.
[14] Bilder, *Transatlantic Constitution*, 2, 73-76, 187.
[15] LaCroix, *Ideological Origins*, 135.

council of revision at the Federal Convention, there was no system of mandatory review in the federal union as a whole. In fact, the circumstances under which review could take place were severely constrained by justiciability. Unlike in modern states like Germany and Austria, where a 'constitutional court' model allows for the 'abstract' review of legislation for constitutionality outside the context of a court case, American federal courts could not review either state or federal legislation unless it was pertinent to a case that either fell within their original jurisdiction or was brought to them on appeal.[16]

Moreover, as contemporary legal scholars recognize, it was and continues to be staggeringly impractical to attempt to litigate every conflict or controversy over the relative powers of the state and federal governments. As legal scholar Cristina Rodríguez has written of contemporary federalism, 'The pre-emption remedy' – which is to say, when the federal government uses the courts to attempt to assert its absolute supremacy in a particular policy area – 'will only infrequently be available, not least because litigation is slow and costly.'[17] Political actors in the early republic had neither the time nor the inclination to take every dispute of this kind to court.

The Constitution's ratification and the rapid-fire programme of institution-building undertaken by the early Congresses created the potential for massive repugnancy across the federal system. Before ratification, as LaCroix writes, 'the general government was less a distinct level of government than a shell organization that occasionally served as a venue for meetings of the constituent entities.'[18] Now, it would be a permanent presence, with not only the legal

[16] In fact, as LaCroix notes, federal courts did not enjoy 'original federal question jurisdiction' until 1875, meaning that cases arising under federal law were regularly heard by state courts until the Reconstruction era. LaCroix, *Ideological Origins*, 185. On the differences between the constitutional court model and the U.S. model of judicial review, see Juliane Kokott & Martin Kaspar, 'Ensuring Constitutional Efficacy' in Michael Rosenfeld & András Sajó, eds., *The Oxford Handbook of Comparative Constitutional Law* (Oxford, 2012; paperback ed., 2013), 807-815.

[17] Rodríguez, 'Negotiating Conflict Through Federalism,' 2111.

[18] LaCroix, *Ideological Origins*, 134.

authority but also the means to legislate and to enforce its will across a range of policy areas in which the states had become accustomed to managing their own affairs independently of federal interference. Numerous state laws therefore became, theoretically at least, redundant or invalid in a short period of time as the federal government began actively to regulate interstate and international commerce, finance, military affairs, slavery, and relations with Indigenous peoples. While this overhaul of the federal relationship would certainly result in court cases, it would often take decades for this litigation to cause meaningful change in constitutional doctrine. In the meantime, the ambiguities, overlaps, and conflicts between state and federal assertions of supremacy would regularly be worked out, not through the courts, but through an everyday process of intergovernmental negotiation – an ongoing dialogue between state and federal officials.

Neither the Constitution, nor early federal law, nor any major policy document of the founding era contemplates a formal institutional infrastructure for intergovernmental relations. While this explains why historians of politics and government at the founding have referred only anecdotally to this ongoing federal conversation, the lack of an obvious institutional framework for intergovernmental relations does not mean that these relationships between state and federal officials were not fundamental to the everyday functioning of union. Twenty-first century legal scholars have highlighted the continuing significance of intergovernmental dialogue today, with Rodríguez noting that national policy is regularly shaped by debates in 'the discretionary spaces of federalism, which consist of the policy conversations and bureaucratic negotiations that actors within the system must have to figure out how to interact with one another.'[19] Moreover, as Roderick Hills has written, 'each level of government is acutely aware of what the other is doing, and . . . each level regulates with an eye to how such regulation will affect the other.'[20] This chapter is devoted to explaining how, in practice, the state and federal

[19] Rodríguez, 'Negotiating Conflict Through Federalism,' 2097.
[20] Hills, 'Against Preemption,' 4.

governments of the founding era developed processes through which to co-ordinate their activities and to express, negotiate, or simply to overlook their differences. Without taking into account this catalogue of intergovernmental interactions, we can understand neither the formation of national policy nor the functionality of the American union.

This thesis makes the case that, in the early republic, inconsistencies between state and federal laws were in many cases processed not by judges, but rather by legislative and executive personnel at the state and federal levels. Generally speaking, the reconciliation of federal policy programmes with state law was not a matter for the courts, but instead resulted either from the voluntary and independent cooperation of the state legislatures with the implementation of federal law, or the negotiation and resolution of individual conflicts through everyday communication between state and federal officials. The federal government attempted to foster the cooperation of the states by instituting at an early stage the circulation of information between Congress and the states through correspondence and the print media. These mechanisms were highly significant in facilitating the transition to a new kind of federal union after 1789.

## Information Flow in the Young Republic

The first step in avoiding repugnancy between state and federal law was to ensure that each level of government was, as Hills puts it, 'aware of what the other was doing.' Beyond simply avoiding inconsistency, such mutual awareness was necessary because both the state and federal governments were often called upon to take action in respect to one another's laws. States had to pass laws to cede land to the federal government, to facilitate the federal assumption of state debts, to reorganize the militia in line with national guidelines, and much more. At the federal level, meanwhile, Congress passed bills recognizing the legality of certain state actions, such as the passage of small state import duties for the support of mariners' hospitals.

To improve this cross-governmental awareness, Congress took important steps in its early sessions, bolstering the existing national communications network through reform of the Postal Service, and implementing a legal requirement that federal laws be printed and distributed to state and local authorities on a regular basis. Alongside this statutory framework, correspondence between federal and state officials kept state governments informed of what was happening at the federal level. The more difficult problem, for which there was no uniform national solution, was ensuring federal awareness of state laws. State legislatures were so prolific that they struggled to keep track of their own output, a matter that several of them sought to address in the 1780s and 1790s by appointing committees to produce up-to-date digests.

As it went about constructing the institutions of the new nation from scratch, Congress was careful to ensure that the states could not claim ignorance of federal law. Per the Records Act, passed September 15 1789, the Secretary of State was entrusted with the responsibility for publishing all national laws in at least three different American newspapers. The Post Office Act of 1792 would admit these 'newspapers into the mail on unusually favourable terms,' as Richard John has written, which facilitated the general spread of pressing news around the union.[21] The Secretary of State was also required to transmit 'two fair copies, duly authenticated . . . to the Executive Authority of each State.'[22]

An act of March 1795 built on this system by requiring the Secretary of State to 'cause to be printed and collated at the public expense, a complete edition of the laws of the United States, comprising the constitution of the United States, the public acts then in force, and the treaties, together with an index to the same.' Four thousand five hundred copies were to be printed up and distributed

> among the respective states, and the territories northwest and southwest of the river Ohio, according to the rule for apportioning representatives; and . . . the proportion of

[21] John, *Spreading the News*, 31, 34, 36, 38.
[22] 1 Stat. 68.

> each state or territory shall be transmitted by the said secretary to the governor or supreme executive magistrate thereof, to be deposited in such fixed and convenient place in each county . . . as the executive or legislature thereof shall deem most conducive to the general information of the people.

This process was to be repeated at the close of every session of Congress, thus ensuring that both the state legislatures and 'the people' were aware of their rights and duties under the national government.[23]

Federal laws also travelled to the states in other guises. Since Revolutionary days, Congress had facilitated communication between federal representatives and their state counterparts by allowing them unlimited free access to postal services, which was known as the franking privilege. Especially before 1792, individual congressmen took it upon themselves to send newspapers and other printed materials of interest home to their constituents at the public expense.[24] More than just keeping their constituents informed, however, senators and members of the House of Representatives also had a political interest in demonstrating the hard work they had been doing in Congress. Many wrote circular letters intended for publication in local newspapers, or sent home copies of presidents' messages and congressional journals.[25] Senator William Maclay of Pennsylvania composed his three-volume political diary – now an essential source on the early years of the Senate – at least in part at a means of justifying his own political actions to the state legislators who had elected him.[26] In 1797, Senator William Cocke of Tennessee sent a copy of the Senate Journal to his state legislature, assuring them, in an accompanying note, 'that every part of my public Conduct has been directed by the Best Judgment I have been able to form.'[27]

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[23] 1 Stat. 443.
[24] John, *Spreading the News*, 31-32.
[25] Terri Halperin, 'The Special Relationship: The Senate and the States, 1789-1801' in Kenneth Bowling & Donald Kennon, eds., *The House and Senate in the 1790s: Petitioning, Lobbying, and Institutional Development* (Athens, OH, 2002), 285-286.
[26] Joanne Freeman, *Affairs of Honor: National Politics in the New Republic* (New Haven, 2001), 18.
[27] *Journals of the Senate and House of the Second General Assembly of the State of Tennessee . . .* (Kingsport, TN, 1933), 11.

A mixture of formal and informal mechanisms ensured the regular transmission of federal laws to the state governments. But the infrastructure for the sharing of state laws with the federal government is more difficult to sketch. Even in the Federal Convention's debates on Madison's proposed national negative on state legislation, some delegates had raised the question of the logistical practicality of federal review of all state laws. As John Lansing of New York noted, 'There will on the most moderate calculation, be as many Acts sent up from the States as there are days in the year.'[28]

Such was the volume of this legislation that the state legislatures themselves struggled to keep up with which laws were in fact in force at a given time. A Virginia act of November 1789 reveals assemblymen's concerns about their own knowledge of the state's laws. 'The great number of the laws of this Commonwealth,' they explained, 'dispersed as they are through many different volumes, renders it often questionable, which of them are in force.' In response to this confusion, the assembly appointed a number of eminent Virginia lawyers, including one John Marshall, to put together 'a new edition of the Laws of this Commonwealth,' fully indexed.[29] Three years later, an act of the assembly provided for the creation of yet another new edition of the state's laws, which was to be distributed to officials and staff throughout the different branches of the state government.[30]

What is not clear is whether the new edition of the laws was also transmitted to Virginia's representatives in Congress. In Tennessee in April 1796, shortly before the state's formal admission to the union, the legislature resolved not only to print the acts and the journals of its legislature, but also to send 'one copy to each of the members of this state in Congress.'[31] The record does not reveal whether the states in general were reliable in providing their federal

[28] Madison's Notes, June 20, Farrand 1:336-337.
[29] Hening 13:8-9.
[30] Hening 13:531-533.
[31] *Journal of the Senate of the State of Tennessee . . . 1796* (Knoxville, 1796; re-print, Nashville, 1852), 45.

representatives with up-to-date statute books. Many federal representatives had already served in their state legislatures, in the judiciary, or in the state's executive branch – even, in some cases, as governor – so considerable familiarity with state laws was generally to be expected. Congressmen sometimes put this prior knowledge of state law to use by basing federal bills on state statutes, as in the case of the Collection Act, which was closely based on a Maryland law.[32] Still, although newspaper reports from the federal capital, and the legal requirement to print and distribute federal laws, created a reliable source of information on the activities of the federal government for consumers beyond the national capital, there was no consistent mechanism by which laws were passed upward from the state to the federal level.

While the federal government, and some states, implemented procedures for sharing laws between the different levels of the federal system, intergovernmental communication could still break down, sometimes with dramatic consequences. Mary Sarah Bilder has noted the difficulties of transatlantic communication during the colonial period, and the extent to which the months-long wait for laws to cross the ocean could both create and defuse conflict.[33] The Revolution and especially the creation of the federal government is seen as a turning point, with Richard John emphasizing the vast improvements in American communications in the early republic, thanks not least to federal intervention. But failures of, or considerable delays in, communication constitute a recurring theme in this dissertation, especially where they offered state officials the opportunity to ignore – at least temporarily – the wishes of the federal government where these conflicted with state goals. Nineteenth-century estimates put the time it took, in 1789, to send a letter from Portland, Maine to Savannah, Georgia and receive a reply at forty days.[34] Hundreds of miles from the federal capital of Philadelphia, the Georgia state

[32] Rao, *National Duties*, 64.
[33] Bilder, *Transatlantic Constitution*, 3-4.
[34] John, *Spreading the News*, 17-18.

government of the 1790s proved particularly adept at acting in its own interests while time and distance kept federal censure at bay.

Constitution-Making

Constitutions would seem the most natural place to look for state adaptation to the reconfigured federal system after ratification. By revising their fundamental governing documents, state politicians had the opportunity not only to emulate the new model of republican government embodied in the federal Constitution, but also to express their understanding of the different role the states would now play in the post-ratification federal union. Political scientist Robinson Woodward-Burns argues that state constitutional reform has historically acted as a shock absorber in the federal system, with ongoing constitutional change at the state level allowing for constitutional stability at the national level.[35] It would be reasonable to expect that state constitutional change might have played a role in stabilizing the federal system after the upheaval of the federal constitutional revolution.

In the five years after 1787, Pennsylvania, Delaware, South Carolina, and Georgia created new constitutions for themselves from scratch, while New Hampshire made significant amendments to its fundamental law. Pennsylvania's 1790 constitution represented an about-turn, throwing out the revolutionary features of the state's 1776 document – the unicameral legislature, the plural executive – in favour of a model closely resembling the new federal Constitution.[36]

[35] Robinson Woodward-Burns, *Hidden Laws: How State Constitutions Stabilize National Politics* (New Haven, 2021), 2.
[36] Constitution of Pennsylvania (1776); Constitution of Delaware (1792); Constitution of South Carolina (1790); Constitution of Georgia (1789); *The Constitution of New Hampshire: as altered and amended by a convention of delegates, held at Concord, in said state, approved by the people, and established by the Convention, on the first Wednesday of September, 1792* (Concord, NH, 1792).

Five states are, of course, rather less than half of thirteen. This was hardly a tidal wave of constitutional reform in response to ratification, despite the drama of the Pennsylvanian volte-face. In a sense, the federal Constitution is better understood as an effect than as a cause of state constitutional change. Both the new Pennsylvania constitution and the federal Constitution represented the culmination of a process that had begun during the Revolution itself. Pennsylvania's astonishingly democratic and egalitarian 1776 constitution had not only prompted political conflict within the state, which in turn became a significant driver of the 1790 reforms, but had also sparked a backlash in several of the union's other governments, whose constitution-makers went on to craft new documents in response to what they saw as the flaws in Pennsylvania's scheme of government. The constitutions of Massachusetts, New York, Virginia, North Carolina, and South Carolina were all influenced by the thought of John Adams, a critic of the Pennsylvania model. This pre-1787 state constitutional reform would go on to shape the federal Constitution, with a large minority of delegates to the Federal Convention arriving with hands-on experience of state constitution-making. Existing state constitutional texts guided the process from the outset, with delegates 'imitating the states' proven bicameral, tripartite plan,' as Woodward-Burns writes. While there were certainly innovations, like the Electoral College, and borrowings from the Articles of Confederation, like equal representation in the Senate, the federal Constitution was certainly recognizable to Americans already familiar with state documents.[37]

The Federal Convention's deference to the states was not restricted to the Constitution's organization. In dividing up the substantive responsibilities of the state and federal levels, the federal framers also chose to respect the diversity of state laws governing the controversial, interlinked questions of slavery and the franchise. Though they reached for a tighter grip on the fiscal-military powers already claimed – albeit fruitlessly – by the

[37] Woodward-Burns, *Hidden Laws*, 36-37, 40; Pearl, *Conceived in Crisis*, 206-217.

Confederation Congress, the delegates continued to leave the regulation of freedom, and of membership of the political community, almost exclusively to the states.[38] And though the federal government accrued to itself, on paper at least, considerable power in the fiscal-military sphere through the creation of the U.S. Constitution, this did not materially affect the basic outlines of state government. States would still, for example, need treasuries to handle their own financial affairs and their financial relationships with other governments. They would still have militias, which would by and large remain under state control. They would still need the legislatures, executives, and judiciaries that had come down to them, more or less intact, from the colonial period. In this sense, it is not such a surprise that so few states reformed their constitutions in the immediate aftermath of ratification.

Nevertheless, the small number of state constitutions re-drafted in the years following the Federal Convention reflect a new understanding of what it meant to be a member of the union under the Constitution. Comparing the language of the 1780 Massachusetts Constitution, which would not be revised until 1821, with that of the 1790 South Carolina Constitution reveals a striking absence in the latter text. Article IV of the Massachusetts Declaration of Rights announces, 'The people of this commonwealth have the sole and exclusive right of governing themselves, as a *free, sovereign, and independent state* [my emphasis]; and do now, and forever hereafter shall, exercise and enjoy every power, jurisdiction, and right, which is not, or may not hereafter, be by them expressly delegated to the United States of America in Congress assembled.'[39]

South Carolina's post-ratification constitution contained no such strident claims to state sovereignty or independence. Indeed, Article IV laid down the oath to be taken by 'all persons who shall be chosen or appointed to any office of profit or trust,' under which the appointee

[38] Woodward-Burns, *Hidden Laws*, 42-43.
[39] Constitution of Massachusetts (1780), part I, art. IV.

swore to 'preserve, protect, and defend the Constitution of this State and of the United States.'[40] Rather than reiterating its independence, South Carolina signalled its commitment to union by authorizing the oath to protect and defend the U.S. Constitution – a provision of the federal 'Act to regulate the Time and Manner of administering certain Oaths' – not just through ordinary statute, but rather through the language of its fundamental law.[41]

State conventions meeting immediately after ratification also took the opportunity to address the increased likelihood of plural officeholding that was introduced by the implementation of the U.S. Constitution. Ratification and the institution-building activities of the early Congresses produced a considerable increase in the number of elected and appointed federal positions. These positions offered experienced and prominent state officeholders new opportunities to become major actors on the national stage as congressmen, senators, and judges, or to fill their pockets as customs officials, federal commissioners, and Indian agents. State constitution-makers responded accordingly, devoting substantial text to prohibiting state officeholders from taking on 'any other office of profit or trust under . . . the United States.' With the notable exception of militia officers, all state officials, be they judges, legislators, or governors, would have to resign their state positions upon accepting work from the federal government, and vice versa. Pennsylvania's framers also accounted for the possibility that candidates for state office might have spent time outside the commonwealth in the service of the federal government, deducting from the qualifying period of residence within the state or electoral district any time in which the candidate 'shall have been absent on the public business of the United States.'[42]

While Pennsylvania and South Carolina both made abundantly clear through their new constitutions that plural officeholding would not be tolerated, however, Massachusetts was

[40] Constitution of South Carolina (1790), art. IV.
[41] 1 Stat. 23-24.
[42] Constitution of Pennsylvania (1790), art I, §3; art. II, §8. Constitution of South Carolina (1790), art. I, §21; art. II, §2.

forced, early in 1790, into a legislative tussle over whether state assemblymen should be obliged to resign their seats in order to accept opportunities in the federal government. The failure to adapt constitutional provisions to the realities of the new federal system prompted a minor crisis.

In January 1790, the General Court was met with a flood of resignations from state officers who had received appointments to new federal positions. Benjamin Lincoln was resigning 'as a Representative for the Town of Hingham' to become 'Collector of Impost for the District of Boston and Charlestown,' and called upon the Court to facilitate 'the choice of another Representative in his room.' William Pickman resigned 'as a Representative for the Town of Salem, he having received an appointment from the Supreme Executive of the United States'; James Lovell and Thomas Melvill were following Benjamin Lincoln into the customs service; Christopher Gore was vacating 'his seat as a Representative from the Town of Boston' to become U.S. attorney for Massachusetts. Two justices of the Supreme Judicial Court 'had resigned their commissions,' William Cushing to sit on the U.S. Supreme Court, and David Sewall to sit as district judge for Maine.[43]

The 1780 constitution prohibited judges of the Commonwealth from accepting offices, salaries, or pensions 'from any other State, or government,' so it was constitutionally clear that the Cushing and Sewall had to resign their state offices in order to take up their federal appointments. Nevertheless, while the constitution banned legislators from simultaneously holding a range of state offices, it did not address the question whether assemblymen could simultaneously hold offices under the federal government.[44] Nowhere in the state's fundamental law had its framers discussed whether assemblymen could remain in their seats while holding an office under the United States. As a result, the assembly found itself at a loss as to what to do with the resigning legislators.

[43] Boston, MSA, SC1/series 532, House Journal 10th Session (1789-1790), 145, 146, 156, 189.
[44] Constitution of Massachusetts (1780), part II, ch. VI, art. II.

On January 14 1790, the House of Representatives proposed a joint committee to consider and report whether assemblymen holding offices under the United States similar to those state offices from which they were prohibited under the state constitution 'have a right to continue to sit as members.' On January 22, they took a vote on the question whether legislators who had accepted such offices under the United States 'can have a constitutional right to retain their seats in this House?' Though the answer was 'no' to the tune of 137 votes to twenty-four, the problem of plural officeholding was still not laid to rest.[45]

Christopher Gore, appointed U.S. attorney for the state, became the focal point of the controversy. On January 27, a motion was made that the House consider 'whether the seat of Christopher Gore . . . has become vacant, by his accepting the appointment of attorney to the United States, within this Commonwealth.' At a vote, the House refused to consider the question, but Gore's situation arose again two days later, when the peculiar question was put whether a 'Letter from Christopher Gore Esqr. asking leave to resign his seat . . . contains the resignation of Mr. Gore to his seat in the House.' The question was determined in the affirmative – yes, Gore's resignation letter did in fact contain his resignation – and the motion that followed, 'to consider whether the attorney of the United States, or a collector of their customs, within the District of Massachusetts, has a right to a seat in this House,' was lost.[46]

By May 1791, the General Court had apparently come to a firmer position on legislators and federal offices. On May 26, the House appointed a committee to discover whether any of the returned representatives held offices under the federal government from which they would have been barred in the state context.[47] Such an investigation suggests an intention to remove plural officeholders from their seats, and a growing understanding that federal offices were in fact incompatible with state legislative duties.

[45] MSA, SC1/series 532, House Journal 10th Session (1789-1790), 149, 183-185.
[46] MSA, SC1/series 532, House Journal 10th Session (1789-1790), 207.
[47] MSA, SC1/series 532, House Journal 12th Session (1791-1792), 19.

A minority of states enacted major constitutional reforms in the aftermath of the ratification of the U.S. Constitution. The reasons for this are readily comprehensible when one considers that the basic structure of state government was little impacted by the federal reforms of the late 1780s, and that states could also recognize changes in the federal system through ordinary statute.

Nevertheless, the dearth of state constitutional reforms after ratification could also cause problems. No state, including those that drafted new constitutions after 1787, limited the powers of its legislature in line with the restrictions on state action enumerated in the U.S. Constitution. Revolutionary constitutions like that of Massachusetts were accustomed to grant to their legislatures 'full power and authority . . . to make, ordain, and establish all manner of wholesome and reasonable orders, laws, statutes, and ordinances.' The only requirements were that they 'be not repugnant or contrary to this constitution' and 'be for the good and welfare of this commonwealth.'[48] State constitutional reformers after 1787 did not place any further limits on this expansive grant, despite the arrival of a newly empowered federal government. South Carolina went no further than to note that 'the legislative authority of this State shall be vested in a general assembly,' and Pennsylvania used similar language. The scope of the state legislative power was not defined any more narrowly in these new constitutions than it had been in the Revolutionary era.[49]

Moreover, the language of state independence and sovereignty to which state officials would later cling in times of state-federal conflict was often a holdover from the Revolutionary era, fossilized in the state constitutions themselves, as the example of Massachusetts demonstrates. Recalcitrant legislators and governors relied on the authority of pre-ratification governing arrangements in asserting their right to resist federal measures. The failure to account

[48] Constitution of Massachusetts (1780), part II, ch. I, sec. I, art. IV.
[49] Constitution of South Carolina (1790), art. I, §1; Constitution of Pennsylvania (1790), art. I, §1.

for the existence of the federal government in state constitutional texts could lead to difficulties in accommodating the lived reality of participating in a nation of multiple governments.

Co-ordinated Federalism and the Legislatures

Despite the framers' interest in creating a federal government that could 'go on of itself,' neither the Constitution nor the laws of the new Congress were necessarily self-enforcing in the early republic. Certainly, the new constitutional framework and the administrative architecture constructed by the First Federal Congress allowed the government to hire a range of new officials whose exclusive purpose was to enforce federal laws within the states and territories. Among them were officers of the customs, U.S. marshals, commissioners of loans, postal workers, military personnel, and Indian agents. Though ratification allowed for the expansion of federal capabilities, however, the U.S. government remained a small organization in a vast territory. Federal officials continued to rely on state infrastructure and state administrative personnel as they attempted to enforce the laws of the United States throughout the union.

One example of this federal reliance on state infrastructure was the prison system. In 1789, during its very first session, Congress passed a resolution which 'recommended...to the legislatures of the several states, to pass laws making it expressly the duty of keepers of their gaols, to receive and safe keep therein, all persons committed under the authority of the United States, until they shall be discharged by the due course of the laws thereof.'[50] There being as yet no federal prisons, judicial officers of the United States would have to rely on the carceral systems of the states to hold those imprisoned on federal charges. Many of the states appear to have passed with relative haste laws granting federal marshals access to state prisons for these purposes. New Hampshire's law was passed on January 14 1790, and Virginia's even earlier, on

[50] 1 Stat. 96.

November 12 1789.[51] Elsewhere, there was more of a time lag. Tennessee was not admitted as a state of the union until 1796, but it would take the legislature another five years to pass, in 1801, an act carrying into effect Congress's resolution on prisoners, which was by now some 12 years old, within the state's boundaries.[52]

Over the years and decades to come, states would pass laws to allow the United States to assume their Revolutionary War debts; to cede land to the federal government for the construction of lighthouses and coastal forts; and to reorganize their respective militias in line with national guidelines of the kind found in the 1792 Militia Uniformity Act.[53] The existence of these state laws in and of itself gives the lie to Alexander Hamilton's claim, in *Federalist* XVI, that under the Constitution 'the execution of the laws of the national government should not require the intervention of the State legislatures' and would instead 'pass into immediate operation upon the citizens themselves.'[54] These laws also demonstrate that the phenomenon observed by Abbe Gluck in the case of the Affordable Care Act – the state participation in the enforcement of federal laws that Gluck calls 'intrastatutory federalism' – is part of a pattern dating back to the earliest years of the American republic. State officials were involved in interpreting and implementing the laws of Congress from the very beginning.

States used their statutory contributions to the intergovernmental conversation to define the terms of the federal relationship from below. The provisos that states included in their lighthouse land cessions are instructive in this regard. New Hampshire and Massachusetts both included lengthy clauses dictating the terms of their acts of cession. They granted themselves concurrent jurisdiction over the ceded territory in criminal and civil matters, declared the cessions to be void if the federal government did not care for and operate the

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[51] Hening 13:3-4; *Constitution and Laws of the State of New-Hampshire . . .* (Dover, NH, 1805), 39.
[52] *Acts Passed At The First Session Of The Fourth General Assembly of the State of Tennessee . . .* (Knoxville, 1801), 100-101.
[53] See below: on assumption, 110-114; on lighthouses, 103-105; on fortifications, 160-161; on militia reforms, 152-155.
[54] Alexander Hamilton, *Federalist* XVI, 74.

lighthouses to a prescribed standard, and added most-favoured-nation clauses insisting that they be paid for their cessions on the same terms as any of the other states. Congress later acknowledged such provisos in a 1795 act confirming concurrent jurisdiction over these small parcels of ceded state land.[55]

There were echoes of the transatlantic constitution in a Georgia act for militia reform passed by the assembly in 1792, the first article of which announced that the state's militia was to be 'laid off' and reorganized 'in order to comply as nearly as may be convenient with the act of congress of the United States' for the establishment of 'an uniform militia' across the union.[56] Like their pre-Revolutionary counterparts in the British colonies, Georgia lawmakers demonstrated a belief that the implementation of national laws might diverge to accommodate local circumstances. Through their responses to federal laws, state legislators could express their own visions of the federal relationship.

While states legislated to acknowledge and implement federal laws, Congress also participated in the intergovernmental legislative conversation by formally recognizing certain state legislative acts, especially those whose subject matter overlapped with policy areas of national responsibility. One significant category of state laws to which Congress officially and regularly assented was the tonnage or import duty. Though the Constitution declared that 'No State shall, without the Consent of Congress, lay any Duty of tonnage,' and though Congress had imposed its own national tonnage duty in July 1789, states continued to collect such duties in order to raise funds for specific public purposes.[57] In order to collect these taxes, they did as the Constitution prescribed and sought the consent of Congress. In August 1790, the national legislature passed an act 'declaring the assent of Congress to certain acts of the states of Maryland, Georgia, and Rhode Island and Providence Plantations.' Some of these laws were

[55] *Constitution and Laws of the State of New Hampshire*, 45; *Acts and Resolves of Massachusetts, 1792-1793*, 444-445. Land cessions are discussed further below, 103-105.
[56] Robert & George Watkins, *A Digest of the Laws of the State of Georgia* (Philadelphia, 1800), 458.
[57] U.S. Const. art. I, §10; 1 Stat. 27.

relatively old – one Maryland act dated to 1783 – while others were more recent, including a Rhode Island act of January 1790. The Maryland laws provided for the support of port wardens for Baltimore, while the Georgia act was designed to raise funds 'for the purpose of clearing the river Savannah, and removing the wrecks and other obstructions therein.' Congress's assent to these acts was only temporary, but it would be renewed in subsequent sessions and Congresses.[58]

Federal laws in other areas demonstrated congressional awareness of existing state statutes and positioned federal policies in relation to those existing laws. The Naturalization Act of March 1790 laid down the rules by which 'any alien, being a free white person,' could become a naturalized citizen of the United States. In its final clause, however, it provided that 'no person heretofore proscribed by any state, shall be admitted a citizen as aforesaid, except by an act of the legislature of the state in which such person was proscribed.' Congress thereby acknowledged Revolutionary-era state laws excluding loyalists from citizenship.[59]

National quarantine regulations also reflected an attempt to co-ordinate state and federal efforts. Rather than prescribing detailed federal quarantine rules, Congress in 1796 passed an act authorizing the president to command customs officers and military personnel 'to aid in the execution of quarantine, and also in the execution of the health laws of the states, respectively.' In 1799, the national legislature commanded 'that the quarantines and other restraints, which shall be required and established by the health laws of any state . . . shall be duly observed by the collectors and all other officers of the revenue of the United States . . . and by the masters and crews of the several revenue cutters, and by the military officers who shall command in any fort or station upon the sea-coast.' Congress left the details of public

[58] 1 Stat. 184-185, 189.
[59] 1 Stat. 103-104. On measures taken by states against Loyalists during the Revolution, see Robert Middlekauff, *The Glorious Cause: The American Revolution, 1763-1789* (New York, 1982; 2005), 565-567.

health policy to the states while offering them its manpower to assist in the enforcement of their diverse regulations.[60]

It hardly bears repeating that, at the time of ratification, the definition of the particular rights and powers of the state and federal governments had been accomplished only in the broadest terms. The beginning of the federal government's practical operations within the union necessitated an ongoing and minute redrawing of the boundary between state and federal responsibilities. It was through these statutes that both the state and federal legislatures worked out how to share the government of the union. The processes by which they negotiated who would take control of which policy matters is the subject of the remainder of this chapter.

## A Committee on Federal Affairs?

The principal means by which state assemblies organized their everyday legislative business was the committee. Committees allowed legislators to break down the mass of documents they received from constituents and executive officials into manageable portfolios and parcel them out for deeper consideration by smaller and more specialized subsets of the legislative body. Strikingly, in the early republic, none of the four states considered in this thesis organized a committee for the specific management of federal affairs or intergovernmental relations. This section will explore what this omission can tell us about how states understood their own place within the American union, and how they conceptualized the differences between state and federal rights and responsibilities.

By the time of the American Revolution, committees had long since been established as essential tools of legislative governance in the Anglo-American world. Standing committees, which remained operational throughout a given legislative session, were the foundation of the

[60] 1 Stat. 474, 619. Quarantine federalism is discussed further below, 99-102.

committee system. The *Lex Parliamentaria*, compiled in the era of the Glorious Revolution, described the 'five standing Committees' to be found in the Mother of Parliaments, which were 'appointed in the Beginning of the Parliament, and remain[ed] during all the Session.' These standing committees were 'for *Priviledges and Elections*,' 'for *Religion*,' 'for *Grievances*,' and 'for *Courts of Justice*.' There was also a standing committee 'for *Trade*,' though this was sometimes merely a select committee, one of a number of 'other Committees . . . made occasionally, and dissolved, after the Business committed to them was reported.'[61]

The committees appointed by the Assembly of the State of New York in January 1808 are immediately recognizable as echoes of those that met in Parliament in the reign of William III. Though the legislators deviated slightly from the Commons model, some of the standing committees they organized bore the very same names as their British counterparts. There was to be 'a committee of privileges and elections,' 'a committee of ways and means,' 'a committee for grievances,' 'a committee of claims,' and 'a committee for courts of justice.'[62] Georgia legislators moved further beyond the parliamentary model in 1789 when they 'appointd . . . a standing Committee . . . to confer with his Excellency the Governor on the State of the Republic.'[63] Massachusetts assemblymen expressed a more fluid attitude to standing committees when they appointed a committee, in 1789, 'to consider what standing Committees may be necessary.' Their permanent committees for that session included one 'for the encouragement of arts, agriculture and manufactures,' another 'on applications for the incorporation of Towns, and other Town matters,' one 'on applications for staying Executions, new trials, & for hearing of parties,' and another 'on the subject of Finance, whose duty it shall be, to enquire into the

[61] George Petyt, *Lex Parliamentaria* (London, 1690), 222-223.
[62] *Journal of the Assembly of the State of New-York: At Their Thirty-First Session* (Albany, 1808), 11.
[63] Savannah, GHS, *House Journal of Georgia November-2-1789-June-11-1790, Copied and Indexed With the Authority Of John B. Wilson Secretary of State Under the Direction Of Mrs J E Hays State Historian 1939* (Original Book in the Department of Archives and History of Georgia, WPA Project NO. 5993), 288-289.

expenses of the several offices of Government, the state of its revenues, & devise measures for the encrease of them."[64]

Neither in 1789 nor in 1808, however, did any of these legislative chambers appoint a standing committee whose explicit purpose was to oversee the relationship between their state and the government of the United States. This is striking by comparison both with modern-day state government and with member states of other federal unions in the twenty-first century. Several contemporary American state legislatures appoint standing committees and other sub-legislative bodies with jurisdiction over the federal relationship. Kansas has its House Committee on Federal and State Affairs, Massachusetts its Joint Committee on Veterans and Federal Affairs, and New York its Office of State-Federal Relations, which channels communications between the assembly and the state's congressional delegation, among other duties.[65] The Texas House of Representatives has its grandly named International Relations and Economic Development Committee,

> with jurisdiction over all matters pertaining to: (1) the relations between the State of Texas and other nations . . . ; (2) the relations between the State of Texas and the federal government . . . ; (3) the relations between the State of Texas and other states of the United States.[66]

[64] MSA, SC1/series 532, House Journal 10th Session (1789-1790), 35-36.
[65] 'House Committee on Federal and State Affairs,' http://www.kslegislature.org/li/b2021_22/committees/ctte_h_fed_st_1/ (June 24 2021); 'Joint Committee on Veterans and Federal Affairs,' https://malegislature.gov/Committees/Detail/J31/About (June 24 2021); 'Office of State-Federal Relations,' https://nyassembly.gov/comm/?id=36 (June 24 2021).
[66] 'International Relations and Economic Development Committee,' https://house.texas.gov/committees/committee/?committee=C039 (June 24 2021).

Meanwhile in the United Kingdom, the House of Lords until recently appointed a European Union Committee, a select committee with five specialized sub-committees whose purpose was to 'scrutinise[] the UK Government's policies and actions in respect of the EU.'[67]

In the absence of specialized committees for the management of state-federal relations, state legislators usually debated the most pressing questions of federalism and national affairs in the committee of the whole house. The committee of the whole is composed of all the members present, but has a different chair to the plenary session and operates under different rules. Most significantly, it allows members to speak more than once on the same question. Debates in committee of the whole formed an important stage in the drafting of the federal Constitution in 1787. Erskine May records that in Parliament, matters assigned to the committee of the whole include 'bills of major constitutional importance' and 'particularly controversial clauses' of other bills whose remaining language is dealt with in a smaller committee.[68]

This usage is borne out by the evidence from the state legislatures of the early republic. When, in 1794, New York's Senate prepared a bill to repair and extend its system of coastal fortifications in conjunction with a national programme of works initiated by the Secretary of War, the bill was also referred to the committee of the whole house, which deliberated on the problem of co-ordinating the state and federal building programmes.[69] These were fairly technical matters, but the senators nevertheless considered them en masse rather than handing them off to a smaller committee, likely because of the sums involved and the national significance of the measures. In November 1795, the Virginia House debated at length the question whether the state legislature had a right to take Jay's Treaty with the United Kingdom

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[67] 'The work of the EU Committee,' https://old.parliament.uk/business/committees/committees-a-z/lords-select/eu-select-committee-/role/ (June 24 2021).
[68] Erskine May, part 4, chapter 28, paragraph 28.83-84.
[69] *Journal of the Senate, of the State of New-York, at their Seventeenth Session* (Albany, 1794), 28, 72. New York's fortifications are discussed further below, 161-163.

into its official consideration, and it also conducted its debates in committee of the whole.[70] The question of the correctness of state intervention in an area of federal responsibility was clearly an item of 'major constitutional importance' belonging to the remit of the committee.

Matters concerning the operation of the federal government and its relationship to the individual states were therefore generally integrated into the operations of a given legislature, rather than being cordoned off from the rest of the state's business. Like other matters of great importance, pressing problems around the state-federal relationship were usually debated in the committee of the whole house. The integration of state and federal matters in the organization of legislative business suggests that legislators did not imagine the two to exist in fundamentally separate categories. Federal matters were understood to have general implications for 'the State of the Republic' – which is to say, the state of the state – and to be significant enough to require the input of the whole house.

## The Uses of a Congressional Delegation

Where the Congress of the Confederation had been a gathering of delegations chosen by the state governments, Article I of the U.S. Constitution made the national legislature accountable to the people. Historians have shown how Americans of the early national period understood themselves to have a direct relationship with the officials they elected to serve in the national capital, inundating their representatives with petitions for the redress of grievances from the early months of the First Federal Congress.[71] At the same time, however, legislators and executive officials also understood themselves to have an important relationship with the congressional delegations of their respective states after ratification. Senators and

[70] Thomas Farnham, 'The Virginia Amendments of 1795: An Episode in the Opposition to Jay's Treaty,' *Virginia Magazine of History and Biography* 75/1 (January 1967), 83-84.
[71] Raymond Smock, 'The Institutional Development of the House of Representatives, 1789-1801' in Bowling & Kennon, eds., *The House and Senate in the 1790s*, 326-327.

representatives in the national capital continued to have a variety of uses for the states in the early republic, both as voices in favour of state interests in the two chambers of the national legislature, and as agents of the state governments in the broader political life of New York, then Philadelphia, then Washington.

Between 1788 and the passage of the 17th Amendment in 1913, U.S. senators were chosen, not by the people of their states, but by the legislatures. In a sense, therefore, it was the interests of the state assemblies that were represented in the Senate, rather than those of the people. With their six-year terms in office, U.S. senators were perhaps the least accountable of all the elected officials in the American constitutional system, but certain states nevertheless attempted to press their advantage in the earliest years under the Constitution by issuing binding instructions to their senators in Congress. Terri D. Halperin has shown how such demands for obedience backfired in the case of North Carolina, where the state's first two U.S. senators, Benjamin Hawkins and Samuel Johnston, cordially refused to press for the opening of the Senate's doors in conformity with the wishes of the state legislature.[72] Nearly twenty years later, however, some states were still using the language of instruction. In an 1807 resolution calling for a constitutional amendment allowing the president to remove federal judges from office, the General Assembly of Vermont resolved 'That the senators in congress from this state be and they are hereby instructed, and our representatives in congress are also requested, to use their best endeavors, to procure such an amendment.'[73] The assemblymen recognized a distinction between the senators, whom they could instruct, and the popularly elected representatives, whom they could not.

Regardless of the language they used to characterize this relationship, however, all states called upon their congressmen in the House and the Senate to press their interests in the national capital. One aspect of the congressman's role vis-à-vis his state was to introduce bills

[72] Halperin, 'The Special Relationship,' 273-275.
[73] *Journal of the Assembly of the State of New-York: At Their Thirty-First Session*, 12.

on the floor of his chamber that furthered the state's agenda or resolved problems that state officials were encountering with respect to federal law. When, in 1809, Governor John Tyler of Virginia was confronted with a flood of white French refugees from the Caribbean who sought admission to the United States with their enslaved servants, he was troubled to discover that the federal ban on the international slave trade would impose punitive fines on whites entering with enslaved property. Tyler contacted Virginia's senators in Congress and asked them to secure changes to federal law that would allow white refugees to bring their slaves into the country. The two senators successfully prosecuted Virginia's interests in the national legislature, and the chapters following explore how other states relied upon their congressional delegations to do the same.[74]

From the perspective of the state governments, however, congressmen had a diverse set of potential functions that extended far beyond their formal role as legislators. In the Revolutionary period, John Adams had referred to the Massachusetts congressional delegation as 'our embassy,' and while under the Constitution congressional representatives were directly elected by the people, states continued after ratification to treat congressmen as something like agents of the state in the national capital.[75] During the contentious business of settling the accounts between the state of Virginia and the U.S. government during the First Federal Congress, Governor Beverley Randolph sent Colonel William Davies to New York 'there to represent the particular situation of the business' to the federal Treasury. Randolph wrote to all the members of the state's delegation that he had 'recommended' Davies 'to your assistance and attention in all things belonging to the object of his journey.' Davies was also 'instructed in all cases of difficulty to confer' with Virginia's congressmen.[76] Davies's mission to New York

[74] See below, 267.
[75] John Adams to Abigail Adams, September 18 1774, *The Adams Papers. Series II: Adams Family Correspondence.*, ed. L.H. Butterfield et al. (15 vols., Cambridge, MA, 1963 –), 1:157-158; LaCroix, *Ideological Origins*, 134.
[76] Governor of Virginia to James Madison, March 14 1789, *PJM* Congressional Series 12:11-12.

took place in 1789, but the practice of treating congressmen as state agents in the capital continued for decades. In 1808, Georgia passed a law 'providing for the arming of the militia,' and Governor Jared Irwin wrote to the state's 'Senators in Congress, constituting them agents on the part of the state to contract for the arms' with the federal government.[77] The utility to the state of its federal congressmen lay not only in their position as national legislators, but equally in the plain fact of their residence at the seat of government, their social status, and their political connections.

State Governors in the Union

After 1790 and the implementation of a new constitution in Pennsylvania, every state in the American union was headed by a single 'supreme executive magistrate' called a governor. Though many governors were elected on an annual basis, making them both more accountable to their electorates and more precarious in their employment than the presidents of the United States, they were nevertheless powerful figures with the capacity to influence not only state, but also national affairs. The governor of each state constituted a major node in a national communications network that connected up the state and federal governments. Through him flowed the new federal laws sent down by Congress, requests for militia mobilization and other state action from the president and cabinet secretaries, and correspondence from lower-level federal officials such as Indian agents, customs officers, and army officers. The governor processed this information about the state's place in the union and conveyed it to the legislature through frequent addresses to the assemblymen. The assembly, in turn, instructed him in his communications with other states and with the federal government. The early republic state governor was likely to be personally acquainted with leading national officials through service

[77] *Journal of the Senate of the State of Georgia, at the Annual Session of the General Assembly, Begun and Held at Milledgeville, in November and December 1808* (Louisville, GA, 1809), 6-7.

in Congress or on the battlefield, and, as a regional militia commander and a person of considerable local influence, national leaders were well aware of the significance of his support or opposition to their plans.

Much gubernatorial correspondence with the federal government was undertaken on the instruction of the state legislatures. Assemblies regularly passed resolutions instructing the governor of the state to contact either the officers of the federal administration or the state's delegation in Congress to express grievances or press for changes to federal law. Governors were also responsible for conveying to the assemblymen the responses they received from the cabinet and the congressmen. As the designated intermediaries between the legislatures and the federal government, governors had the opportunity to shape the interactions between the two, and indeed to mould legislators' perceptions of the nature of the union and the place of their state within it.

Governors were in regular contact with their legislators, sending down notes and documents from the council chamber or the official residence via their private secretaries. Their major opportunity to mould the state's policy towards the federal government was the formal address to the legislature, generally given at the opening of each session and laying out a legislative agenda for the assembly to consider. The governors of some states were constitutionally bound to address the assembly. By its constitution of 1789, Georgia's governor was to give to the lawmakers 'from time to time, information of the state of the republic, and recommend to their consideration such measures as he may deem necessary and expedient.'[78] In New York, it was 'the duty of the governor to inform the legislature, at every session, of the condition of the state' and 'to recommend such matters to their consideration as shall appear to him to concern its good government, welfare, and prosperity.'[79]

[78] Constitution of Georgia (1789), art. II §8.
[79] Constitution of New York (1777), art. XIX.

Many of these matters naturally concerned the position of the state within the union and its relationship with Congress and the federal executive. When, in January 1790, Governor Hancock presented the first acts of the new Congress to his legislators, he drew a clear connection between the activities of the federal government and the welfare of the state. 'As these acts begin a system of government in which the prosperity of each State in particular, as well as that of all the States in general is concerned,' he said, 'they will command your careful attention.'[80] As the federal government addressed itself in the mid-1790s to the problem of fortifying the nation's coastline, Governor John Jay of New York also insisted on the importance of lending the attention and support of the state to this federal policy programme. 'Altho' it belongs to our national government to provide for the defence of the United States,' he said, 'yet it is also highly interesting, that nothing properly depending on us be omitted, to give efficacy to their laws and measures.'[81]

On the basis of the laws and other information that he received from federal officials, the governor crafted addresses to the state legislature that framed federal actions in terms of their impact on state policy. Through these messages, he could attempt to shape the legislature's broader understanding of the state's place in the federal system by endorsing or criticizing federal policies, and by emphasizing the significance, either of preserving the union, or of protecting the independence of the individual state.

Strikingly, it was not uncommon for state governors to appeal to the general benefits of union in their addresses to the assemblies. In January 1790, just two months after North Carolina's long-awaited ratification of the U.S. Constitution, Governor John Hancock of Massachusetts addressed his General Court in joyful tones. 'I congratulate you, Gentlemen, on the accession of another State to our union,' Hancock said. He was 'persuaded,' he added, that Rhode Island would soon follow where North Carolina had led, at which point 'every patriot

[80] MSA, SC1/series 532, House Journal 10th Session (1789-1790), 153.
[81] *Journal of the Senate of the State of New-York, at their Nineteenth Session* (New York, 1796), 5.

will rejoice to see all these States, which have most nobly contended for civil freedom, uniting in their endeavours to preserve, and in their measures to enjoy, the invaluable blessings which flow from it.'[82] Twenty years later, Governor Elbridge Gerry used his June 1810 address to the General Court to insist upon the continued advantages of union in spite of the 'divisions' Americans had lately encountered over the nation's commercial and diplomatic relationship with Great Britain. 'Whatever may be the points of difference between parties,' he argued, 'in this they will undoubtedly agree, *that union is the vital principal of liberty*: for as well may the physical body have a being without air, as the body politic of our republic, without that principle.' Gerry attempted to impress upon disgruntled Federalist legislators the virtues of 'our federal rulers, robed in justice and honour,' and even appealed to them in biblical terms, reaching for a verse, Mark 3:25, that would later come to be associated with a different Northern politician. 'Will not every friend to his country recollect the sacred truth,' Gerry asked, "'that an house divided against itself cannot stand?'"[83]

Regardless of the governors' personal feelings about the union, federal officials relied upon them to assist in the cultivation of national identity and of support for the federal government's actions among the people at large. On New Year's Day 1795, President Washington proclaimed a national day of thanksgiving to take place on the nineteenth of February. The object was to celebrate the successful suppression, a few months earlier, of the Whiskey Rebellion, 'which so wantonly threatened . . . the great degree of internal tranquillity we have enjoyed.'[84] Secretary of State Edmund Randolph sent a circular 'transmitting' to each governor 'six copies of a Proclamation issued by the President . . . recommending a day of

[82] MSA, SC1/series 532, House Journal 10th Session (1789-1790), 168.
[83] Boston, MHS, P-362: Elbridge Gerry Papers 1706-1895 (Microfilm Edition), reel 3, 'His Excellency Governor Gerry's Speech to the Legislature of Massachusetts, Delivered Thursday, June 7, 1810.'
[84] Proclamation, January 1 1795, *PGW* 17:354.

thanksgiving. I must take the liberty,' Randolph wrote, 'of requesting you to cause it to be promulgated in any manner, which you may think likely to render it most public."[85]

Circulars like this were a central tool of administration in the early republic. As commander-in-chief of the Continental Army, General Washington had used them to communicate with the state governments during the Revolutionary War, and, as Gautham Rao has noted, cabinet secretaries continued to use them in the early national period to distribute uniform instructions to federal employees spread across the union.[86] Department heads also used circulars to transmit information to the state governments and to request state assistance in enforcing the laws of the union. Many of these circulars, like Randolph's letter of January 1795, accompanied congressional laws or presidential proclamations. The first official printing of the Bill of Rights was ordered by Secretary of State Thomas Jefferson, shortly after the ratification of those amendments, for distribution to the governors by circular.[87]

Although the bulk of circulars to the governors comprised routine notices of new laws, proclamations, and amendments, some circulars also reveal the extent to which the federal government relied upon state officials to manage policy matters of national and indeed international import at the local level. Faced with the problem of maintaining American neutrality during the French Revolutionary Wars, for example, the federal government made it the responsibility of the governors, alongside customs officers and other federal employees, to ensure local compliance with national policy vis-à-vis the belligerents. In April 1793, President Washington issued the Neutrality Proclamation, declaring that the United States would 'pursue a conduct friendly and impartial toward the belligerent powers,' and that any American who found themselves 'liable to punishment or forfeiture under the law of nations' for breaching

[85] New York, NYPL, MssCol 4591: Edmund Randolph Papers 1775-1801, Circular to the State Governors, January 3 1795.
[86] Glenn Phelps, 'George Washington and the Founding of the Presidency,' *Presidential Studies Quarterly* 17/2 (Spring 1987), 350-351; Rao, *National Duties*, 83.
[87] Circular to the Governors of the States, March 1 1792, *PTJ* 27:815.

neutrality 'will not receive the protection of the United States.'[88] Secretary of State Jefferson circulated the proclamation to the governors, declaring the president's certainty 'that injunctions so interesting to the happiness and prosperity of the United States, will have the benefit of Your Excellency's aid towards their general and strict observance by the citizens of the State over which you preside.'[89]

Governors did not merely receive and unquestioningly act upon the requests put to them by federal officials. This was a dialogic relationship in which state executives also regularly contacted cabinet secretaries and the president himself, requesting aid in handling local problems and advice on how best to implement federal instructions. Governor William Moultrie of South Carolina wrote to the president on April 26 1793 – the very day of the Neutrality Proclamation – that he was uncertain as to how he should respond to the state of war between the great powers of the Atlantic world. 'In consequence of the rupture between the French Republic and other powers in Europe,' he wrote, 'I have taken as my guide the Treaties which subsist between the Several powers and the United States; and as in Some instances these will clash, I am to request your instruction respecting that line by which I should conduct myself during the existence of the war.'[90]

Over the course of the neutrality crisis, the governors of the seaboard states continued to keep the federal government informed of developments in their ports, especially where problems arose in their attempts to maintain neutrality. Governor Richard Dobbs Spaight of North Carolina professed himself 'extremely mortified' in October 1793 when he discovered that a French privateer, *Vainqueur de Bastille*, had been busily capturing British and Spanish ships off the North American coast and bringing them into the ports of his state since September. The privateer herself now lay in the port of Wilmington, 'quite dismantled and unrigged,' and

[88] Neutrality Proclamation, April 22 1793, *PGW* 12:472-474.
[89] Circular to the Governors of the States, April 26 1793, *PTJ* 25:588-589.
[90] William Moultrie to George Washington, April 26 1793, *PGW* 12:484.

could not be made to leave. Spaight wanted to 'know what is to be done with her,' and whether the federal government would pay the expenses of the militia called up to deal with the *Vainqueur*'s activities.[91] This is but one example of the constant back-and-forth that characterized intergovernmental relations throughout this period.

The president and the cabinet were far from the only federal personnel with whom the governors regularly corresponded. Among the papers of the early republic governor can be found letters containing updates and questions from a range of lower-level federal officials such as customs officers, Indian agents, and local Army commanders. The case studies that follow reveal how these federal officials, who usually operated within a single state or region, kept state legislators and executive officers informed of their activities, and relied upon the co-operation and assistance of the state governments in putting federal policies into effect. The correspondence, negotiation, and co-ordination between state governors and the federal officials operating within their local jurisdictions indicates the extent to which federal and state administrative activities were integrated and chains of command were uncertain. Lower-level federal officials had to be sensitive both to the wishes of their department and to the requirements of their relationship with the state in which they served.

A Culture of Civil Remonstrance

In 1798, Thomas Jefferson and James Madison secretly drafted two sets of resolutions condemning Congress's passage of the Alien and Sedition Acts, a series of laws providing for the prosecution of seditious libel and the deportation of immigrants at the pleasure of the president. Jefferson and Madison sent these resolutions to the state legislatures of Kentucky and Virginia, respectively, which affirmed them and proceeded to circulate them to the other

[91] Richard Dobbs Spaight to George Washington, October 21 1793, *PGW* 14:249-252.

fourteen state governments, seeking their approval. The contemporary Federalist press, and a majority of later historians, recorded that the reception of the Virginia and Kentucky Resolutions by the other states was resoundingly negative. Unable to countenance the audacity of the two states in taking it upon themselves to declare the unconstitutionality of federal statutes, stunned by the suggestion that state governments might 'interpose' themselves to prevent the implementation of federal law, and often supportive of the repressive measures embodied in the Alien and Sedition Acts, the remainder of the states shunned Virginia and Kentucky in horror.[92]

The legal historian Wendell Bird has challenged this dominant view of the resolutions' reception. On returning to the archives, Bird found a range of responses from other states, from the outright rejection of the Jeffersonian and Madisonian positions reported by earlier writers, to division among legislative chambers as to how to answer the resolves, to silence. A majority of states failed to object explicitly to the concept of state interposition, or non-enforcement of unconstitutional federal laws. Two states – Tennessee and Georgia – actually affirmed the stance of Virginia and Kentucky by passing resolutions calling for the repeal of the Alien and Sedition Acts. Governor John Sevier sent Tennessee's resolutions to the state's delegation in Congress, requesting action on their part to secure the repeal of the acts.[93]

As Bird remarks, the varied positions taken by the legislatures of the other states in response to the resolutions 'implies that those constitutional theories embraced by Madison and Jefferson and adopted by Virginia and Kentucky (nullification excepted) were widely seen as less extreme. In fact, they were widely accepted.'[94] But despite Bird's important intervention,

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[92] Frank Maloy Anderson, 'Contemporary Opinion of the Virginia and Kentucky Resolutions I,' *AHR* 5/1 (October 1899), 45; Adrienne Koch & Harry Ammon, 'The Virginia and Kentucky Resolutions: An Episode in Jefferson and Madison's Defence of Civil Liberties,' *WMQ* 5/2 (April 1948), 147; Wendell Bird, 'Reassessing Responses to the Virginia and Kentucky Resolutions: New Evidence from the Tennessee and Georgia Resolutions and from Other States,' *JER* 35/4 (Winter 2015), 519-522.
[93] Bird, 'Reassessing Responses to the Virginia and Kentucky Resolutions,' 528-537.
[94] ibid., 549.

no historian has yet fully situated the Virginia and Kentucky Resolutions within the rich contemporary landscape of state claims about the constitutionality of the federal government's laws and activities. Though many state officials were uncomfortable with the more extreme implications of the Resolutions, Madison's conviction that state legislatures might express opposition to acts of the federal government which they perceived to be unconstitutional was descriptive as much as it was normative. The passage and circulation of the Virginia and Kentucky Resolutions in response to the Alien and Sedition Acts was just one notably dramatic instance of a regular occurrence in the life of federal governance in the early United States: state objection to, or remonstrance against, federal measures on the grounds of constitutionality.

Eight years earlier, in November and December of 1790, the General Assembly of Virginia debated a series of resolutions, and finally composed a memorial to Congress, calling for the repeal of the Funding Act of August 4 1790. 'Your memorialists,' the Virginians wrote, 'can find no clause in the constitution authorizing Congress to assume the debts of the states!' Since 'every power not granted was retained' by the states and the people, the state legislators could 'never reconcile it to their consciences, silently to acquiesce in a measure, which violates that hallowed maxim.' Recurring to the language of 'repugnancy' they had inherited from their colonial counterparts, they argued that not only was the act 'not warranted by the constitution of the United States,' but it was also 'repugnant to an express provision of that constitution.' This was, in their view, the first clause of Article VI, according to which 'All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.'[95]

On hearing, in November, that 'the house of representatives of Virginia' had passed two resolutions on the subject, Secretary of the Treasury Alexander Hamilton was horrified. 'A

[95] '2. Virginia on the Assumption of State Debts. December 23, 1790,' *State Documents on Federal Relations: The States and the United States*, ed. Herman Ames (Philadelphia, 1906; repr. Clark, NJ, 2007), 4-7; U.S. Const. art. VI, clause 1.

spirited remonstrance to Congress is talked of,' Hamilton wrote to Chief Justice of the United States John Jay. 'This is the first symptom of a spirit which must either be killed or will kill the constitution of the United States.'[96] Hamilton's response fits neatly with our post-Civil War understanding of the potential consequences when state governments attempt to intervene unilaterally in national affairs. But his correspondent, from his seat on the Supreme Court, did not suffer such a sense of foreboding. On the question of what was to be done about Virginia's resolutions, Jay replied, 'To treat them as very important might render them more so than I think they are . . . . Every indecent Interference of State assemblies will diminish their Influence.'[97]

Jay's implication that Virginia's actions constituted 'indecent Interference' did not reflect how state governments generally perceived their own role in relation to the Constitution of the United States. Having taken oaths to protect the Constitution and having considered the interactions of the union's new fundamental law with their own legislative activities, state assemblymen felt a comfort and a confidence in making claims about the constitutionality of the federal government's laws and actions. On some occasions, these claims were made more or less quietly, in the context of internal communications within the state government itself. On others, objections to supposedly unconstitutional acts were made through the vehicle of the remonstrance, a formal address to Congress laying out the substance of a state assembly's complaint.

Governor John Hancock of Massachusetts demonstrated the model of internal discussion of the federal government's actions in November 1792. He addressed both houses of the General Court jointly on the subject of a recent act of Congress concerning the appointment of electors to the electoral college. By the federal Constitution, Hancock pointed out, the appointment of electors was to take place 'in such manner as the Legislature' of each

[96] Alexander Hamilton to John Jay, November 13 1790, *PAH* 7:149-150.
[97] John Jay to Alexander Hamilton, November 28 1790, *PAH* 7:166-167.

state 'shall direct.' By this recent law, however, Congress had directed 'that the Supreme Executive of each State shall cause three Lists of the names of the Electors of such State to be made & certified to the Electors on or before the first Wednesday in December.' This brief and tediously technical item of federal legislation had given Hancock serious pause, as he explained to the assemblymen. Though he felt 'the importance of giving every Constitutional support to the General Government,' he said, he was also 'convinced that the existence & well being of that Government depends upon preventing a confusion of the authority of it with that of the States separately.' It was his understanding that the federal government 'cannot exert any force, upon, or by any means controul the Officers of the State Governments as such:'

> Therefore when an Act of Congress used compulsory words with regard to any Act to be done by the Supreme Executive of this Commonwealth I shall not feel myself obliged to obey them, because I am not in my official capacity amenable to that Government.

Though he did not propose a formal remonstrance to Congress on the subject, Hancock assembled his legislators to lay down a boundary in the state-federal relationship for the future benefit of the Commonwealth. His object was 'to prevent any measure to proceed thro' inattention, which may be drawn into precedent hereafter to the injury of the People, or to give a constructive power where the Federal Constitution has not expressly given it.'[98] Hancock clearly felt within his rights, not only to comment upon the constitutionality of federal laws, but even to refuse to act upon the instructions of the federal government where they conflicted with his own understanding of the Constitution.

Southerners led the way in public remonstrances to Congress. Five years after its protests against Hamilton's programme of financial reforms, Virginia's General Assembly determined to involve itself in federal policy once again, passing a series of resolutions in response to the ratification of John Jay's extraordinarily unpopular commercial treaty with Great

[98] *Acts and Resolves of Massachusetts, 1792-1793*, 689-690.

Britain. Among these resolutions were proposals to amend the U.S. Constitution, which were circulated among the states.[99] Then, in 1798, came the Virginia and Kentucky Resolutions, but even the controversy these generated did not close off remonstrance as an acceptable mode of state-federal communication.

In November 1800, Governor James Jackson of Georgia opened a session of the state legislature with a typically fiery address. His target was the federal government. Two and a half years earlier, in April 1798, Congress had passed 'an Act . . . authorizing the establishment of a government in the Mississippi territory.' The act authorized the president to appoint three federal commissioners to meet with commissioners appointed by the state of Georgia and 'to receive any proposals for the relinquishment or cession' of Georgia's western lands. Before these negotiations had taken place, however, the act also officially brought into being the new territory, declaring that the land to be ceded 'hereby is constituted one district, to be called the Mississippi Territory: and the President of the United States is hereby authorized to establish therein a government.'[100] Now, in May 1800, Congress had passed a supplementary act organizing elections to a general assembly of the Mississippi Territory, and calling for federal commissioners 'finally to settle by compromise' with Georgia's commissioners a formal cession of the territory, to be 'made and completed before the fourth day of March' 1803. While the act declared 'that nothing in this act shall in any respect impair the right of the state of Georgia to the jurisdiction' or 'to the soil of the said territory,' Congress was at the same time clearly setting up a territorial government on lands that were still claimed by the state.[101] Pressure was unmistakably being applied to encourage a rapid cession.

Governor Jackson did not mince words in responding to the federal government's actions. Of the May 1800 law, he said, 'The act . . . is, I humbly conceive, as well as the act to

[99] Farnham, 'The Virginia Amendments of 1795,' 83-85.
[100] 1. Stat. 549-550.
[101] 2 Stat. 69-70.

which it is supplementary, a violation of the rights of Georgia, and a constitutional infringement.' He argued the unconstitutionality of the law on the basis of 'the ninth article of confederation, and perpetual union which provides that "no state shall be deprived of territory for the benefit of the United States," which engagement,' he added, 'is ratified by the sixth article of the federal constitution,' by which he presumably meant the first clause ('All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.') Jackson also took the first clause of Article IV, Section 3 to conflict with the recent act of Congress – 'no new State shall be formed or erected within the Jurisdiction of any other State.'[102]

Jackson foresaw a slippery slope ahead, asking his legislators, 'If Congress have a constitutional power to erect the territory claimed by Georgia on the Mississippi, into a government without her consent,' why should they not also 'erect Glynn and Camden counties into a territorial government?' He waved away the federal disclaimer 'that the rights of Georgia shall not be impaired by that act,' asking, 'Is not its very existence an impairing and violation of them, and the principle dangerous to all state rights'? Jackson continued throughout his speech to appeal to the Articles of Confederation as if they were still in force, noting that the territorial government 'has been formed in violation of the confederation, and the constitutions of this state, and of the United States.' He begged the legislators 'to take some step to preserve . . . the rights and privileges of [Georgia's] citizens committed to your care,' and not to 'pass over this unconstitutional stride, for such, however hard the term, it certainly is.'[103]

The house of representatives followed Jackson's advice, preparing in December a 'remonstrance from this state to the Congress of the United States,' hoping 'to lay the complaints of Georgia before it, and to solicit a redress of the grievances which her citizens

[102] *Journal of the House of Representatives of the State of Georgia for the year 1800* (Louisville, GA, 1801), 4.
[103] ibid., 5-6.

feel.' Laying out the basis of Georgia's claim to the territory, the assembly asked 'that the Legislature of the union will meet them on a point so desirable for public interest . . . by removing jealousies between the United States and the state of Georgia.' The state senate concurred, and authorized the governor to sign the remonstrance.[104] Having made their point, in 1802 the Georgians negotiated with Congress a 'highly advantageous' cession of their western lands, as David Nichols has written, receiving $1.25 million from the federal government, along with a federal promise to 'extinguish all remaining Indian land claims in Georgia' as soon as possible.[105]

It is important to note that in the cases of both Massachusetts and Georgia, the disgruntled state officials took pains to assure their respective audiences of their continued loyalty to the federal government and to the union. The Georgians concluded their remonstrance with assurances, not only of their 'most profound respect for the Legislature of the United States,' but also 'of their inviolable attachment to the Constitutions of their country and their inalienable fidelity to the United American Nation.'[106] Perhaps in the aftermath of the Virginia and Kentucky Resolutions, they understood more clearly than ever that challenges to the federal government must be framed in terms of loyalty and concern for the welfare of the union. Even in 1792, however, in his private address on the mode of appointing electors, John Hancock was already assuring the Massachusetts General Court that he was not driven by 'a disposition to regard the proceedings of the General Government with a jealous eye.'[107] State objections to federal laws were couched in cautious language.

In the early American republic, state officials across the union embraced a vision of federalism in which they were within their rights to comment upon the constitutionality of the

[104] *Journal of the House of Representatives of the State of Georgia for the year 1800*, 54-63.
[105] David Nichols, 'Land, Republicanism, and Indians: Power and Policy in Early National Georgia, 1780-1825,' *Georgia Historical Quarterly* 85/2 (Summer 2001), 218-219.
[106] *Journal of the House of Representatives of the State of Georgia for the year 1800*, 59.
[107] *Acts and Resolves of Massachusetts, 1792-1793*, 690.

federal government's actions. This was, as they repeatedly assured Congress and one another, neither an expression of disloyalty to the union nor a rejection of the authority of the federal government. Rather than acting unilaterally to oppose federal laws and policies, in most cases the states relied upon established procedures for gaining a more generalized support for their positions. In the case of remonstrances, they sought to persuade Congress that it ought to redress their grievances. In other cases, the states relied upon one another, circulating resolutions from governor to governor and legislature to legislature, working from the state level to alter national policy.

Constitutional Amendment and Collective Action

That the final texts of many successful amendments to the U.S. Constitution were drafted in Congress disguises the crucial role state governments played both in proposing amendments and in gathering support for their enactment in the early republic. Proposing and supporting amendments offered a clearly constitutional means of objecting to the structure and administration of the federal government from the state level and, despite the extremely high barriers to amendment at the federal level, promised considerable benefits to the states in the event of their adoption. Whereas remonstrances offered only a starting point for negotiations between the state and federal governments, constitutional amendments that favoured state power embodied a more stable victory.

The Eleventh Amendment, ratified in 1795, overturned the U.S. Supreme Court's contentious decision in *Chisholm* v. *Georgia* (1793) and guaranteed sovereign immunity to the individual states. State records allow us to trace how the response of assemblies to the threat posed by *Chisholm* generated the pressure that led to the amendment's drafting and passage. Even before the case went to the Supreme Court, the Georgia house of representatives debated a resolution to the effect that if the Court were to side with the plaintiff against Georgia and

validate the precedent of suits against states, the state would not consider itself bound by the decision, but would view it 'as unconstitutional and extra-judicial.' The resolution also called for 'an explanatory amendment' to the U.S. Constitution. This resolution was not adopted in Georgia, but other states, aware of the danger that the Court's unfavourable decision represented, soon took it upon themselves to act.[108]

A similar suit to *Chisholm* was already pending in Massachusetts, so Theodore Sedgwick, U.S. senator from that state, proposed to Congress in February 1793 a constitutional amendment to prevent further suits of this kind. The state legislatures of Massachusetts, Virginia, and Connecticut then proposed their own amendments through resolutions that were circulated to the other states.[109] At the end of September 1793, the Massachusetts General Court passed a resolve 'on the question of the suability of a state.' Arguing 'that a power claimed . . . of compelling a State to be made defendant in any Court of the United States at the suit of an individual' was 'repugnant to the first principles of a federal Government,' the legislators 'instructed' their U.S. senators, and 'requested' their representatives in Congress, 'to adopt the most speedy and effectual measures in their power to obtain such amendments in the Constitution of the United States' as to prevent its being construed to allow such suits against states. They also asked the governor 'to communicate the foregoing resolves to the Supreme Executive of the several States, to be submitted to the consideration of their respective Legislatures.'[110]

In January 1794, Governor John Jay of New York laid before his legislators 'communications received from the states of Massachusetts and Virginia, relative to the Suability of a state.' The house and senate appointed a joint committee to discuss the question, and produced their own resolutions, which – in language similar to that of Massachusetts – they

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[108] '3. Georgia and the Federal Judiciary. 1792, 1793' in Ames, *State Documents on Federal Relations*, 7-8.
[109] '3. Georgia and the Federal Judiciary. 1792, 1793,' 8.
[110] *Acts and Resolves of Massachusetts, 1792-1793*, 590-591.

requested to be communicated to the state's congressional delegation and to the other state governments. Towards the end of March, Governor Jay wrote again to his legislators, forwarding 'an amendment to the judiciary department of the constitution of the United States, proposed by Congress; and also certain resolutions of the Legislature of the state of North-Carolina on the subject.'[111] This paper trail demonstrates how the states successfully generated a national conversation around the 'suability' question, with an amendment approved by Congress landing back on their desks a little over a year after the decision was handed down in *Chisholm*.

The state legislatures also played a significant role in securing the passage of the Twelfth Amendment, which provided for the separate election of the president and vice president of the United States. The 1796 presidential election had resulted in the elevation to the highest offices in the land of two men, President John Adams and Vice President Thomas Jefferson, who shared almost no common political ground – a problematic outcome in an increasingly partisan nation. In January 1797, Rep. William Loughton Smith of South Carolina proposed in Congress an amendment 'that the Electors of a president and Vice President be directed to designate whom they vote for as President, and for whom as Vice President.'[112] Though nothing came of Smith's proposal at this time, the following year the state of New Hampshire passed a resolution in favour of an amendment for designation. In February 1799, the New York state senate adopted a similar resolution to that of New Hampshire, and Vermont's assembly followed in November of that year. Federalists in Congress pressed for an amendment of the kind proposed by New Hampshire over the course of 1799, but without success.[113] The flaws of the electoral college as it then existed were blindingly exposed in the tumultuous course of

[111] *Journal of the Senate, of the State of New-York, at their Seventeenth Session*, 7, 16, 79.
[112] Annals of Congress, 4th Congress, 2nd Session, 1824.
[113] *Journal of the Senate of the State of New-York; At their Twenty-Second Session, Second Meeting* (Albany, [1799]), 42-43; Tadahisa Kuroda, *The Origins of the Twelfth Amendment: The Electoral College in the Early Republic, 1787-1804* (Westport, CT, 1994), 109.

the 1800 presidential election, and the states of New York and North Carolina helped to revive the designation amendment early in 1802, passing their resolutions up to Congress, where a considerable period of debate followed on the correct way to alter the procedure for electing the president and vice president.[114] The Twelfth Amendment ultimately passed Congress on December 9, 1803.[115]

The Eleventh and Twelfth Amendments were of course the only successful instances of federal constitutional amendment between the ratification of the Bill of Rights in 1791 and the beginning of Reconstruction. Despite the clear difficulty of securing an amendment to the federal constitution, state governments in this period nevertheless treated the process of proposing and debating constitutional amendments as a means of intervening in national political discussions.

In response to the ratification of Jay's Treaty in 1795, Virginia's General Assembly proposed a series of constitutional amendments, including one that would have prevented the ratification of treaties without the approval of the U.S. House of Representatives. These were forwarded to the other states of the union, where they failed to gain traction, despite widespread Democratic-Republican dissatisfaction with the treaty.[116] At the other end of the political spectrum, Massachusetts proposed and circulated in 1798 a resolution seeking 'an amendment of the Constitution of the United States to provide against the introduction of Foreign influence into our National Councils,' as Governor Jay told New York's legislators when he presented the resolution to them at the opening of their legislative session that August. The sinister detail of the resolution was that it called for an amendment 'providing, that none but natural born subjects be eligible to certain offices.' Perhaps with the likes of Jeffersonian political mastermind Rep. Albert Gallatin in view, Massachusetts proposed making seats in the U.S. Senate and

[114] Kuroda, *Origins of the Twelfth Amendment*, 118-119.
[115] Annals of Congress, 8th Congress, 1st Session, 775.
[116] Farnham, 'The Virginia Amendments of 1795,' 84-87.

House of Representatives available only to men born in the United States, or who had lived there since the Revolution. New Hampshire followed a few months later with its own resolutions in support of this position. Governor Jay told his assembly, 'I think it my duty to lay these interesting papers before you, and to recommend the important subject of them to your consideration.'[117] Though the state senate went on to pass a similar resolution to that circulated by Massachusetts, the proposed amendment was guaranteed to meet with intense opposition from Democratic-Republicans, and would never pass.[118]

The Constitution did not specify that amendments must be proposed by Congress, and states clearly considered it appropriate to draft amendments and circulate them both to Congress and to the other states. Nevertheless, such proposals were still sometimes treated with hostility, not least because of the clear partisan motives of most amendment campaigns. When Virginia's 1795 resolutions arrived in the New York state legislature, one lawmaker proposed a counter-resolution declaring it improper for state assemblies to pass sentence on the federal government's actions.[119] Such exchanges were commonplace. States would continue to intervene in national conversations, while political opponents would continue to claim that the federal system could not countenance such behaviour.

## Conclusion

The language of sovereignty was everywhere in the discourse around federalism in the early American republic. States across the nation, from North to South, maintained that they were sovereign entities, not only in the context of frustrated responses to what they saw as federal overreach, but also in the texts of their constitutions, the legal bedrock of each small republic.

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[117] *Journal of the Senate of the State of New-York; At their Twenty-Second Session* (Albany, [1798]), 6; *Acts and Resolves of Massachusetts, 1798-1799*, 211-212.
[118] *Journal of the Senate of the State of New-York; At their Twenty-Second Session, Second Meeting*, 34, 39.
[119] Farnham, 'The Virginia Amendments of 1795,' 85.

This sense of their own sovereignty was generally compatible with respect for federal law and a desire on the part of the states to facilitate its enforcement within their limits. Nevertheless, while the lingering sense of their own right and capacity to act independently rarely constituted a major threat to the union in this period, it complicated the implementation of federal law within the states on a regular basis.

From the First Federal Congress onward, federal officials integrated state legislative and executive authorities into the making and enforcement of U.S. law. This co-ordination between the different governments of the union was essential to maintaining coherence across state and federal law, ensuring effective implementation of federal policy across the country, and building a sense of the United States as a nation, rather than a collection of disparate polities. The corollary of this state involvement in the implementation of the Constitution and of federal laws, however, was that states regularly claimed the right to interpret federal laws for themselves and adjudge the constitutionality of federal actions, usually through the lens of their own local and partisan interests.

Furthermore, though the federal government delegated responsibilities to the state governments and carried on regular and respectful correspondence with their elected officials, the states continued to act – especially in times of political stress and crisis – without regard to the dictates of the U.S. Constitution or of federal law. The following chapters demonstrate that across a range of policy areas, the federal and state governments relied upon one another's support for the successful pursuit of their respective interests. When the states refused or failed to hold up their end of the deal, however, the federal government often found itself powerless to respond.

The Treasury and the States:
Regulating Trade and Finance in a Federal System
from the Hamiltonian Programme to Jefferson's Embargo

## Introduction

Why did the United States need a new constitution in 1787? If it were necessary to give a one-word answer to this question, that one word would certainly be, 'Money.'[1]

By the time the exhausted parties to the Revolutionary War concluded a peace treaty at Paris in 1783, the United States was heavily in debt. The poverty of independence reverberated from Philadelphia's Congress Hall to the lowliest backcountry farmhouse. Both Congress and the state governments had borrowed extensively from European bankers, certainly, but they had also relied in different ways upon the financial support of their own citizens to fend off the might of the British Empire. Americans had given both their property and their persons to the battlefield and the war effort more broadly. Houses and farms had been damaged or destroyed, and thousands of enslaved black men and women had escaped bondage whose living flesh had constituted the wealth of white proprietors. In return for service in the field or surrendering their private property, farmers and soldiers had not been paid, but had instead become

[1] Historians of the Confederation period are sharply divided over whether the creation of the Constitution was a positive or a necessary development, and have cited many factors – western expansion, slavery, and fundamental divisions over political theory – as causes of the political revolution of 1787. Nonetheless, at the heart of almost every analysis is the shared understanding that the constitution-makers, for better or worse, aimed to centralize control of fiscal policy in the young nation, seizing it from the state legislatures. Among those who argue that the inability of the Confederation Congress to pay its debts was a genuine threat to the viability of the new nation, a significant recent voice is George Van Cleve, *We Have Not A Government: The Articles of Confederation and the Road to the Constitution* (Chicago, 2017). Historians who argue that the real impetus for constitutional change came from wealthy conservatives who wished to protect their own property include Charles Beard, *An Economic Interpretation of the Constitution of the United States* (New York, 1913); Merrill Jensen, *The New Nation: A History of the United States During the Confederation, 1781-1789* (New York, 1950); and Klarman, *Framers' Coup*, who notes on p. 5, 'The Constitution was in part designed to block legislation for tax and debt relief' and to protect private property.

'involuntary "public creditors,'" as George Van Cleve puts it, of the state and federal governments.[2]

The end of the war was not the end of American financial woes. Struggling to pay interest on its debt to foreign and domestic creditors, Congress demanded from the states that they raise taxes for the use of the federal government. Under the Articles of Confederation, however, Congress had no executive power and no independent means of enforcing the laws it passed. The states ignored its pleas, and the government of the confederation teetered on the brink of a humiliating default on its loans. Meanwhile, international and interstate trade foundered, as European empires imposed commercial restrictions on the United States, and the states imposed restrictions on each other. With little gold or silver in circulation, both Congress and the state governments printed paper money, which depreciated rapidly. Wealthy speculators purchased cheap government debt from its original holders and waited patiently for payment.[3]

In the mid-1780s, the United States was a post-war society, and would remain one for decades. The question was, who would take responsibility for clearing up the financial mess of revolution? A group of financially-literate eastern elites had an answer. Rather than relying on the state governments to hold up their end of the bargain and provide for the debts of the union, they would create a new government with the power to raise funds all by itself.[4]

Alexander Hamilton hoped for great things from his adopted country, even as it struggled to rise from the ashes of war. Once a stable central government had assumed responsibility for American finances, he believed, international credit could be restored, and the ability to build commercial and industrial wealth, and to wage war, would come within the grasp of the young United States. Only then, as a modern fiscal-military power, could it stand on

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[2] Van Cleve, *We Have Not a Government*, 19-24; Klarman, *Framers' Coup*, 75; Fehrenbacher, *Slaveholding Republic*, 91-92.
[3] Klarman, *Framers' Coup*, 11-12, 82-83; Van Cleve, *We Have Not a Government*, 10, 22-23, 51, 53.
[4] Klarman, *Framers' Coup*, 86-87; Edling, *A Revolution in Favor of Government*, 8-9.

terms of equality beside the European states which governed the Atlantic world, and whose colonial possessions still hemmed in the territory of the union on the continent of North America.[5]

Standing in the way of all this, to Hamilton's thinking, were the state governments. It was these institutions which had, since the Treaty of Paris, stymied the efforts of the Confederation Congress 'to retrieve the national credit, by doing justice to the creditors of the union.'[6] The states had damaged American credit by refusing or failing to pay the requisitions which Congress had asked of them.

Hamilton struggled to make his voice heard at the Constitutional Convention of 1787, as the junior delegate and only real nationalist in a party of New Yorkers uncomfortable with the Convention's approach. Ratification, too, was a drawn-out battle in his home state, which would retain an Antifederalist governor in George Clinton even after the state had reluctantly ratified the Constitution.[7] After the first meeting of Congress in 1789, however, Hamilton could rejoice: 'the embarrassments of a defective constitution, which defeated [the] laudable effort' to repay revolutionary creditors 'have ceased."[8] With the Articles of Confederation consigned to history, and a new Constitution in place, the execution of federal policy, he believed, would no longer be subject to the whims of individual state governments.[9] The federal government would have the authority and the capacity to bypass the states altogether in the execution of national policies.

This chapter shows that Hamilton would not, in fact, be granted his wish. It explores how the state governments responded to the creation of a national Treasury Department after 1789, and how these governments that Hamilton had fought to exclude from the

[5] Edling, *A Hercules in the Cradle*, 45, 81; Edling, *Revolution in Favor of Government*, 8-10.
[6] Alexander Hamilton, 'Report Relative to a Provision for the Support of Public Credit,' January 9 1790, *PAH* 6:69.
[7] Klarman, *Framers' Coup*, 127, 486-510.
[8] Hamilton, 'Report Relative to. . . Public Credit,' *PAH* 6:69.
[9] Alexander Hamilton, *Federalist* XVI, 74.

process of policy implementation became important partners – and sometimes opponents – in the enforcement of federal finance and trade policy over the course of the two decades to follow. The documents in which these policies originated – the Reports on the Public Credit and the National Bank, and the resulting Acts of Congress – do not expressly lay out a role for the state governments, but when it came to the implementation of both broad policy and specific detail, the states would become critical.

Between his confirmation as Secretary of the Treasury in 1789 and his resignation early in 1795, Hamilton managed the creation of a national system of taxation through custom houses in major American ports, and through an intensely unpopular excise on domestically-produced spirituous liquors. Drawing on European models, he invented a system for funding the national debt that, along with the Bank Bill of 1791, would precipitate the formation of the first party system. All of this is well-known; but what has been less clear from the existing literature is that, in spite of his professed disdain for the state governments, Hamilton relied on them and their long-standing bureaucratic systems to implement these controversial policies. State legislatures passed and changed laws to allow Hamilton's programme to take effect; state treasuries communicated and negotiated with the national Treasury Department to overcome local difficulties and ensure smooth implementation. States legislated to open branches of the Bank of the United States in their cities, and invested their capital in its stock. In spite of the tempestuous political discourse of the time, the states complied with and indeed aided in the creation of a nationally-led system of financial and commercial management. Indeed, Hamilton would have struggled to do it without them.

While Federalist policies of the 1790s had caused fireworks on the floor of Congress and led to periodic outbursts of backcountry violence, the Treasury Department faced an unprecedented challenge when Congress imposed far-reaching restrictions on maritime commerce during the presidency of Thomas Jefferson. The second part of this chapter discusses Treasury Secretary Albert Gallatin's attempts to secure the compliance of the state

governments in his efforts to enforce Jefferson's Embargo between 1807 and 1809, and how the federal government learned the hard way that the co-operation of the states could make or break federal policy.

Customs

From the time of its creation by the First Federal Congress in 1789, Hamilton's Treasury took responsibility for effecting a series of major reforms designed to rescue the union's failing finances. To build confidence among the nation's foreign and domestic creditors that it would be capable of paying interest on loans, the federal government would first have to establish a reliable system of taxation. Even before Hamilton was placed at the head of the Treasury, the First Congress busied itself with this problem, eventually deciding that it could best fill the nation's coffers through an impost, or import duty, on a variety of articles, and with a tonnage duty on foreign vessels, designed to protect domestic shipping. Where direct taxes on people and property, and excise taxes on 'the production, retail sale, and possession of goods' would both have required a team of tax collectors to knock on the doors of ordinary homes and businesses, import and tonnage duties would be collected only at ports of entry, and would most visibly affect the urban mercantile class of the Atlantic coast. While this system of taxation came with its own challenges, the risk of social disturbance would be reduced by minimizing interactions between the American people and the taxman.[10]

During the debates on the impost in April 1789, Congressman Elias Boudinot of New Jersey was troubled by 'the want of better information' as the Committee of the Whole House plunged headfirst into the detail of the matter. 'It appears to me,' he declared, 'that this business of raising revenue, points out two questions of great importance, demanding much

[10] Edling, *Hercules in the Cradle*, 47.

information.' The first: which imported goods should be taxed, and how much revenue would they bring in? The second: how to collect the tax and avoid losing all value by driving traders to smuggling? To answer these two questions, he suggested investigating three sources of information. The first was 'the revenue laws of the different States,' which could be used as templates for the federal bill; the second, merchants themselves; and the third, 'the Executives of the States,' whose information on 'the operation and production of the different revenue laws in the States respectively' would allow Congress to 'judge the effect likely to be produced by the system we establish.'[11] Thus, in May 1789, Maryland's congressional delegation approached state impost collector Otho Holland Williams for help. The bill that Williams drafted, and which eventually became the Collection Act of 1789, was based on a Maryland law of 1784.[12]

To enforce the collection of the impost, the Treasury would have to send its operatives into the states, setting up federal custom houses in the designated ports, which were usually major coastal cities, in each of which a trio of officials appointed by the president would inspect incoming ships and then calculate and collect the amount owed to the Treasury by their owners. As Gautham Rao's study of the custom houses has shown, these officials would have to walk a tricky line between, on the one hand, loyally and effectively representing the federal government, and, on the other hand, building relationships with the powerful local merchants of each port so as to ensure their co-operation in the enforcement of the law. Rao shows that federal customs officials did not, in practice, have the means to coerce the merchants into paying their taxes. This left them reliant on the merchants' consent – on their voluntary co-operation. As a result, the taxman-taxpayer relationship was one of give-and-take. It was, as Rao puts it, 'negotiated.'[13]

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[11] Annals of Congress, 1st Congress, 1st Session, 122-123.
[12] Rao, *National Duties*, 64.
[13] ibid., 6-13.

In a similar way, as the federal government went about building the infrastructure of a functioning national tax system, it had to negotiate not only with local moneyed elites, but also with local political elites, in particular the state governments. Much like the customs collectors themselves, the federal executive as a whole had to gain the trust of the states as it moved to implement its laws.

To enforce its new tax laws, Washington's government appointed groups of customs officials for each designated port of entry. In selecting customs officials, Rao writes, Washington looked for 'local status, military experience, commercial backgrounds, and officialdom.' Significantly, he 'turned to many with experience as impost duty collectors under the states.'[14] One applicant for the post of customs collector in the port of Savannah, Georgia, emphasized 'a Residency Since the first Settlement of the State, now fifty Six years' in his letter to Washington, while another wrote, 'From my long residence in that State, and from a diversified intercourse both in publick and private life, it has been in my power to acquire an intimate knowledge of its inhabitants and situation.' Yet another added that he had 'formerly held the Office of Collector for the Port of Savannah.'[15] Both the applicants and the selection committee knew it was essential for the official to be able to integrate into local social and political hierarchies. The principal aim was a smooth handover, and that meant respecting historic arrangements at the state and local level.

Despite Washington's best efforts, however, the creation of a new government demanding its own taxes caused a certain amount of confusion at the state level. The states had their own pre-existing apparatus of taxation and their own tax laws, including some that provided for the collection of customs duties. Could the federal and the state governments both collect the same tax? Early in 1790, state legislator James Sullivan wrote to federal congressman

[14] Rao, *National Duties*, 54.
[15] Lachlan McIntosh to George Washington, February 14 1789, *PGW* 1:305-307; Oliver Bowen to George Washington, April 1789, *PGW* 2:177; John Berrien to George Washington, May 10 1789, *PGW* 2:251-252.

Elbridge Gerry (MA) on the subject of the difficulties caused by the extension of the federal government's reach into a policy area formerly controlled by the states. 'In the year 1736,' he wrote, 'our general Court made an act for raising a Revenue by impost.' Then, 'in June 1789 an act was made for continuing that act in force untill an Impost act of Congress should begin to operate. in Consequence of the said acts large duties have been Secured and Collected between the 4th of March and the 6th of August. some Seizures have been made' of vessels which had violated the Massachusetts law.

A federal impost had been signed into law by President Washington on July 4 1789. Certain parties within the state 'now contended that the State Imposts Ceased immediately upon the convention of Congress,' i.e., in March 1789. 'if this principle should be supported, the Vessels seized will be discharged and all the money received by the Commonwealth must be refunded.' Sullivan was chastened by the thought of this humiliation, telling Gerry it would 'make an uneasiness between the Government of the United States and that of this State.' He could only hope that 'Congress may interpose and by a recognition of the Right of the Several States put an end to this disagreeable controversy.'[16]

Quarantine

After the federal customs officials had been appointed and the Treasury had begun to enforce the collection of the impost, the construction of this new federal bureaucracy within the states continued to raise new questions about the rights and responsibilities of the two levels of government. Quarantine procedures, which existed at the intersection of commercial regulations and public health laws, crystallized the confusion over the precise boundaries of state and federal authority that persisted in the early republic despite the Constitution's

[16] MHS, P-362: Elbridge Gerry Papers 1706-1895 (Microfilm Edition), reel 2, James Sullivan to Elbridge Gerry, February 14 1790.

enumeration of the powers of Congress. In the 1790s, state and federal officials were forced to negotiate a solution to the question of who should be responsible for quarantine enforcement in the midst of continuous attacks of yellow fever in coastal towns.

In June 1793, Secretary of State Thomas Jefferson received a letter from Henry Lee, Governor of Virginia, with alarming news. Lee had heard that an epidemic had broken out in the Windward Islands, and that the Governor of South Carolina, William Moultrie, had already published a proclamation that the crews of vessels arriving at the ports of his state from affected areas would be subject to a medical examination before they could disembark. Lee was careful to signal to Jefferson that he did not agree with Moultrie's actions: he understood that 'the right to act on the subject. . . belongs to the general Government. The law in this Commonwealth relative thereto contemplates the Agency of the officers of the Customs who are now responsible only to the General Government and therefore could not be used by state Authority.'[17] According to his own understanding of the line between federal and state authority, Lee believed that he was constitutionally obliged to hand over the management of this crisis to the federally-appointed customs collectors.

When Jefferson sat down three weeks later to pen a response, however, he offered Lee no federal assistance in preventing a Virginian outbreak. 'No provision on the subject has been made by the laws of the general government,' he wrote, 'which would enable the President to interfere.'[18] Washington could not simply command the customs officials to initiate a quarantine process without any legislative basis. In September 1793, Lee informed Jefferson that he was making his own provisions in response to the crisis, and that if the president wished, he might direct the customs officers to 'contribute to the due execution of the regulations prescribed.'[19]

[17] Henry Lee to Thomas Jefferson, June 28 1793, *PTJ* 26:391.
[18] Thomas Jefferson to Henry Lee, July 17 1793, *PTJ* 26:516.
[19] Henry Lee to Thomas Jefferson, September 18 1793, *PTJ* 27:135.

Lee's question about responsibility for quarantine regulations suggested complexities that were left unacknowledged by the Constitution's decisive division of policy-making into separate 'federal' and 'state' categories. As Mark Harrison has argued, trade and disease in the early modern world were bound together by the ships that carried them – microbes and merchandise – from port to port and nation to nation. They were inseparable. The Constitution, however, proposed to divide their management between two different levels of government. Under Article I, §8, it delegated to Congress the power 'to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.' While interstate and international commerce became the responsibility of the federal government, however, the Constitution was silent on the question of public health. As William Novak has written, the *salus populi* – public welfare – was understood by early modern political theorists to belong to the broad category of state powers known as the police or *Polizei*. These police powers had been left largely untouched by the Constitution's explicit delegations to Congress.[20]

Quarantine could be understood both as a public health regulation and as a commercial regulation – 'tariffs by another name,' as Harrison puts it. Quarantining ships could be a way of discriminating against particular merchants and the regions they came from. Despite the risk that states might use quarantine as a commercial regulation, however, federal politicians and lawyers in the nineteenth century proved themselves committed to leaving responsibility for quarantine and other public health measures to the state governments. Although John Marshall's 1824 opinion in *Gibbons* v. *Ogden* affirmed the constitutionality of broad federal powers under the Commerce Clause, it also explicitly protected the states' right to make 'health laws of every description' for themselves.[21]

[20] U.S. Const., art. I, §8; Mark Harrison, *Contagion: How Commerce Has Spread Disease* (New Haven, 2012), xiv; Novak, *People's Welfare*, 13-14.
[21] Harrison, *Contagion*, xiii; Novak, *People's Welfare*, 193.

In the 1790s, however, almost thirty years before Marshall would offer a conclusive judgment on this complex constitutional question, the state and federal governments arrived at a pragmatic solution to the management of quarantine in the new federal system. In May of 1796, George Washington signed into law 'an Act relative to Quarantine.' The act, only a few lines in length, gave the president the power 'to direct the revenue officers and the officers commanding forts and revenue cutters, to aid in the execution of quarantine, and also in the execution of the health laws of the states, respectively, in such manner as may to him appear necessary.'[22] Though Henry Lee was no longer governor of Virginia, his original suggestion for the co-ordinated management of quarantine had now been enacted in federal law. The federal government had not usurped the role of the states, but had instead offered its co-operation in the enforcement of state laws.

In 1799, Congress expanded upon this duty of cooperation in the execution of quarantine regulations within the states through 'an Act respecting Quarantines and Health Laws.' The act authorized a far broader range of possible responses to epidemic disease on the part of the federal government, laying out the responsibilities of revenue officers, military personnel, judges, and U.S. marshals in cases where ports, courts, and prisons were at risk of deadly disease. It made the Secretary of the Treasury responsible for overseeing this state-federal cooperation, and provided for the building, at federal expense, of 'suitable warehouses . . . where goods and merchandise may be unladen and deposited, from any vessel which shall be subject to a quarantine.' Nevertheless, the 1799 act fundamentally adhered to the position that federal officials should defer to the state laws in force in their respective jurisdictions as they worked to prevent the spread of epidemic disease.[23]

[22] 1 Stat. 474.
[23] 1 Stat. 619-621.

Lighthouses

According to the laws of the First Federal Congress, the responsibilities of the new federal Treasury Department extended to that physical infrastructure, lying within the states, upon which the safety of commercial vessels relied: the system of lighthouses running the length of the eastern seaboard. As the federal government moved to take over control of the lighthouses, the state legislatures used the formal cession of the lights and the land on which they lay as an opportunity to express their own visions of the line between state and federal power.

On August 7 1789, Congress passed the Lighthouses Act, under which

> all expenses which shall accrue. . . in the necessary support, maintenance and repairs of all lighthouses, beacons, buoys and public piers. . . at the entrance of, or within any bay, inlet, harbor, or port of the United States, for rendering the navigation thereof easy and safe, shall be defrayed out of the treasury of the United States.

The act required that these areas 'be ceded to and vested in the United States, by the state or states respectively in which the same may be, together with the lands and tenements thereunto belonging, and together with the jurisdiction of the same.'[24] This was just one among several items of congressional legislation which required a response from the states, but it showcases effectively how the different state legislatures used such interactions to make their own demands of the federal government, just as the federal government had made demands of them.

Long after the Constitution had replaced the Articles of Confederation and Congress had embarked upon the process of making laws for the new nation, the state legislatures continued to participate, at their end, in the process of regulating their relationship with the federal government through legislation. It quickly became clear that in spite of the desire that the new federal government might operate independently, such a one-sided relationship with

[24] 1 Stat. 53.

the states would not be possible in practice. Although the Constitution had replaced the Confederation's single branch of government with three branches, including an executive branch which could be used to carry laws into effect, the permission of the states and their aid in putting certain legislation into practice remained a necessary part of the federal relationship.

On February 14 1791, the New Hampshire Assembly passed 'An *act* for ceding to the United States of America, one acre and three quarters of an acre of land, with the fort and light-house thereon, situate in New-castle.' Not only did the state legislature give its permission to the federal government to use the land, but it also followed up this permission with a series of provisos. 'Be it further enacted,' the legislators added,

> That if the United States shall at any time neglect to keep lighted, and in repair said light-house, the cession aforesaid shall in that case be utterly void and of no effect. Provided also, That all writs, warrants, executions and all other processes of every kind, both civil and criminal issuing under the authority of this State, or any officer thereof, may be served and executed on any part of said land, or in said fort, or any other building which now is, or hereafter may be erected upon the premises aforesaid, in the same way and manner as though this act had not been passed. And provided further, That if the United States shall at any time make any compensation to any one of the United States, for the cession of any light-house, fort or land, which hath been, or hereafter may be made to the United States, the like compensation be made to this State for the land, fort and light-house by this act ceded, in proportion to their respective values.[25]

How New Hampshire intended to enforce these provisos, or even to communicate them to the federal government, is not clear. Nonetheless, this string of terms and conditions symbolizes a continuing sense that federal law could only operate with the consent and co-operation of state legislatures themselves. Similar lighthouse laws were also passed in Virginia (November 12 1789) and Georgia (December 15 1791), among other states; these also made sure to reserve particular rights to the state and insist that the federal government maintain the lighthouses in good repair.[26]

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[25] *Constitution and Laws of the State of New-Hampshire*, 45.
[26] Hening 13:3-4; Watkins & Watkins, *Digest of the Laws of the State of Georgia*, 432.

These interventions by the state governments had an effect in the federal legislature. In March 1795, Congress passed an act 'relative to cessions of jurisdiction in places where lighthouses…have been, or may hereafter be erected.' Using almost exactly the same language as the New Hampshire proviso, it assured the states that 'all process civil and criminal, issuing under the authority of such state . . . may be served and executed within the places, the jurisdiction of which has been so ceded . . . as if no such cession had been made.'[27] Noting the state legislatures' concerns, Congress responded by recognizing explicitly the concurrent jurisdiction that now existed in these small parcels of land.

In spite of the much-vaunted increase in the power of central government brought by the ratification of the federal constitution, it is also worth noting how long it took both New Hampshire and Georgia to hand over their land to Congress. Where Virginia had taken only 3 months to respond to the August 1789 act, New Hampshire did not legislate to cede the land for a year and a half, and Georgia waited more than two years. Faced with a delayed response from the states, Congress had later revised the original act – which had given the states a year to cede the land, or risk forfeiting federal financial support – to allow them until 1792 to hand over the lighthouse land.[28] As powerful as the federal government may have seemed on paper under the new constitutional settlement, it still could not snap its fingers and expect the state legislatures to jump.

Debt

The case of the lighthouses demonstrates that the state governments were able to put pressure on Congress to alter and explain its laws, but so too could federal officials request the aid of state legislatures and bureaucracies in implementing complex federal policies. The process of

[27] 1 Stat. 426.
[28] Bickford & Bowling, *Birth of the Nation*, 33.

executing the Funding Act of 1790 within the states reveals the continued entanglement of federal and state governance long after the Constitution had created an independent federal executive.

Alexander Hamilton and Henry Lee became friends in the Continental Army, but between the late 1770s and the early 1790s, their career paths diverged somewhat. In the autumn of 1789, Hamilton received Lee's 'hearty congratulations on the proper honor you have received from our country' through his appointment as Secretary of the Treasury. 'I anticipate good to the public & new lustre to my friend notwithstanding the obstinate difficultys and embarrassments which oppress our finance. May complete success crown your endeavors.'[29]

While Secretary Hamilton worked to build the fiscal infrastructure of the new nation, Lee would serve as a member of the state legislature of Virginia before being elected governor in 1791. As his friend fought for national transformation and co-ordinated an extensive party-political network from Philadelphia, Lee felt most at home in Richmond, focusing on 'The State business.' Here, he claimed, 'ease & innocence accompany my execution of the duties of my station.' Lee took pride in keeping himself out of the party wrangling in which Hamilton so gleefully participated, writing, 'I have withdrawn myself from continental politics. My indifference has begot an ignorance & both together have established an uninterrupted calm in my breast.'[30]

The rest of Lee's correspondence with Hamilton belied his claims of indifference towards national affairs. Even before taking on the office of governor, Lee experienced tension between his genuine fondness for the Secretary of the Treasury and his concerns about the

[29] Henry Lee to Alexander Hamilton, September 30 1789, *PAH* 5:413.
[30] Henry Lee to Alexander Hamilton, June 23 1792, *PAH* 11:550; on Hamilton's party management, see Joanne Freeman, '"The Art and Address of Ministerial Management": Secretary of the Treasury Alexander Hamilton and Congress' in Bowling & Kennon, eds., *Neither Separate nor Equal*, 269-293.

direction of national policies. In August 1791, he wrote to Hamilton, 'I am solicitous for your increasing fame & yet cannot applaud your system. . . .'

> I wish I could know your mind on this subject & whether you cannot project a mode which will in our day gradually extinguish a debt which so many abhor & dread. This would cure the hurt of thousands, allay the fury of faction & re-laurel your brow.[31]

Though Lee would continue to be identified as a Federalist throughout the 1790s, including during a single term in the U.S. House of Representatives, 1799-1801, he shared with the majority of his fellow Virginians a deep discomfort with Hamilton's fiscal policies.[32] Heartbroken after the death of a son in 1792, Lee could no longer maintain a diplomatic tone with the Secretary, and railed against Hamilton's system of funding the national debt. 'Would to God you had never been the patron of the measure in its present shape,' he wrote, 'for I augur ill of its effect on yourself personally, as well as on the public prosperity.'[33]

The Virginia Assembly had already made clear its disapprobation of Hamilton's plan for the federal assumption of state debts. In December 1790, it had passed a resolution 'That so much of the act intitled "An act making provision for the debt of the United States," as assumes the payment of the state debts is repugnant to the constitution of the United States, as it goes to the exercise of a power not granted to the federal government.'[34] Nearly a decade in advance of the Virginia and Kentucky Resolutions, the state government of Virginia here expressed the belief that it had the right to adjudge the constitutionality of Congress's actions. On first hearing of the resolution, Hamilton wrote to Chief Justice John Jay, 'This is the first symptom of a spirit which must either be killed or will kill the constitution of the United States.'[35]

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[31] Henry Lee to Alexander Hamilton, August 12 1791, *PAH* 9:31.
[32] Beeman, *The Old Dominion & The New Nation*, 68-73.
[33] Henry Lee to Alexander Hamilton, September 10 1792, *PAH* 12:352-353.
[34] Hening 13:234.
[35] Alexander Hamilton to John Jay, November 13 1790, *PAH* 7: 149.

The Virginians' reaction to the Funding Act of 1790 fits comfortably within the familiar narrative of increasing partisanship – 'the fury of faction,' as Lee put it – over the course of the Washington administration. The funded national debt and the national bank which followed it early in 1791 were the essential Federalist crimes against the Revolution, in the eyes of many Americans. These measures gave the elite creditors who had purchased war debt, and who would purchase bank shares, a financial relationship with the United States government, and thus carried with them an unacceptable odour of the British ministerial cabal. By re-establishing the international credit of the United States, the Hamiltonian fiscal programme would also give the union the means to raise military forces, and even keep a standing army. 'It was in resistance to this,' as Stanley Elkins and Eric McKitrick have written, 'that the "Jeffersonian persuasion" was erected.'[36]

There were some within the states – men like Henry Lee – who feared that Congress had already overstepped constitutional boundaries by legislating to assume the state debt. They thought the unequal indebtedness of the states would mean that some states would have to pay unfairly high sums to finance the debts of others. They also knew that wealthy speculators had bought up many of the government certificates held by unpaid soldiers after the Revolutionary War. These rich men would now be able to make money off the largely unrewarded service of ordinary veterans.[37] This was enough to give pause even to supporters of the national government.

By contrast, other influential figures within the states were furious at the suggestion that governments should discriminate between the original holders of debt and the richer men who had later purchased it, when it came to paying off government debt. This, they argued, would constitute a breach of the public trust.

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[36] Stanley Elkins & Eric McKitrick, *The Age of Federalism: The Early American Republic, 1788-1800* (New York, 1993), 19, 24.
[37] Beeman, *The Old Dominion & The New Nation*, 68-71.

In March 1790, state legislator James Sullivan wrote again to congressman Elbridge Gerry to report a dramatic occurrence in the Massachusetts General Court. The legislators had been embroiled in a debate over 'the performance of public promises', that is, whether 'to pay off warrants and due bills indiscriminately,' even though this would send government money flowing into the pockets of speculators. A vote on the question had been lost by a single vote, and the government's creditors were furious. As Sullivan reported, 'The public creditors in and out of the Legislature openly declare that they look to the General Government alone for their debts, and the idea of suing the Commonwealth in the federal District Court is too frequently mentioned.'

Sullivan was shaken by the idea that citizens – even legislators themselves – could now turn the power of the federal government against the state legislatures. He wrote to Gerry, 'There is no process provided by the General Government for suing states, nor can they be amenable as states, perhaps there may be an attempt, and when there is one a civil war will be the consequence.'[38] Sullivan's dark prediction would not come true, but his question about the suability of states would be litigated throughout the Washington administration, with the Supreme Court ruling in 1793 that states could be sued because they did not have sovereign immunity. This ruling was overturned in 1795 with the ratification of the Eleventh Amendment to the Constitution.[39]

In spite of these disputes over the correct method of disposing of government debt, the Funding Act of 1790 would ultimately have considerable benefits for the individual state governments. Throughout the 1780s, state legislatures had often succeeded in alienating their own constituents by imposing extremely heavy taxes. The principal aim of raising these taxes, which often caused citizens significant material hardship, was to make payments on state and

[38] MHS, P-362: Elbridge Gerry Papers 1706-1895 (Microfilm Edition), reel 2, James Sullivan to Elbridge Gerry, March 7 1790.
[39] *Chisholm* v. *Georgia*, 2 U.S. (2 Dall.) 419 (1793); U.S. Const. amend. XI; David Currie, *The Constitution in the Supreme Court: The First Hundred Years, 1789-1888* (Chicago, 1985), 14-20.

federal war debts. State indebtedness and the tax burden it created was the direct cause of several popular uprisings during the Confederation period, including, most famously, Shays's Rebellion in Massachusetts, which was violently crushed in 1787, shortly before the Constitutional Convention met in Philadelphia.[40]

Max Edling has shown that 'seventy-five to eighty percent of government costs' in New York, Pennsylvania, and South Carolina between 1785 and 1787 'were related to debt charges and requisitions' from Congress. As a result, when requisitions ceased and the federal government assumed the state debts, state government spending fell dramatically, as did rates of taxation at the state level. In New York and Pennsylvania, direct taxes on property and persons ceased completely, and in Massachusetts, New Jersey, Delaware, Rhode Island, and New Hampshire, they were cut by more than seventy percent.[41]

Perhaps it was for this reason that, though the Hamiltonian programme generated controversy and spurred the growth of party prejudice, the states lent official time and resources to putting the complex plan for the federal assumption of state debts into effect. The execution of Hamilton's policy would require significant effort on the part of Treasury officials, and indeed the appointment of more officials, the federal commissioners of loans, one for each of the states. Per the Funding Act, these commissioners would be responsible for taking in the certificates, held by citizens and governments, which represented the domestic debt of the states. In return for these old certificates, they would issue to each creditor a new set of certificates declaring what the United States owed them in terms of principal and interest, and when they could expect to be paid.[42]

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[40] Richard Brown, 'Shays's Rebellion and the Ratification of the Federal Constitution in Massachusetts' in Richard Beeman, Stephen Botein, Edward Carter II, eds., *Beyond Confederation: Origins of the Constitution and American National Identity* (Chapel Hill, 1987), 116; Edling, *Hercules in the Cradle*, 51, 53, 58.
[41] Edling, *Hercules in the Cradle*, 63, 66-67.
[42] 1 Stat. 138.

But alongside the Treasury officials, a host of state-level treasurers and comptrollers would be called into service by their respective governments to calculate the state debt, report it to the federal government, and disentangle the legal issues that sometimes arose in the gaps between existing state statutes and the new act of Congress. In spite of the political furore, Hamilton was able to take advantage of the existing bureaucratic infrastructure of the states in executing his policy. Assumption became a collaborative effort between the federal and state governments – they had to work together.

Hamilton's circulars, and the letters he exchanged with the president and with individual commissioners, demonstrate the extreme complexity of assumption as an undertaking in an era before the telegraph and the railway, let alone the telephone, the computer, or the internet. First, there was the question of appointing commissioners – men who could be trusted with handling financial material, had experience in government, were politically open to the Hamiltonian programme, and would be happy to up sticks and move to their state's capital, where the necessary paperwork was filed.[43] The difficulty of finding such men was multiplied by the slowness of the mail. The commissioner appointed for North Carolina, William Skinner, at first wrote to decline the post, but his letter did not reach Hamilton in Philadelphia until the Treasury had already sent Skinner all the relevant papers for his position. Within a short time, Skinner changed his mind and decided he *would* take the job – but not before Hamilton had received his first letter, and asked the president to appoint someone else.[44]

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[43] Hamilton's papers suggest there was particular trouble with North Carolina and New Hampshire. William Skinner to Alexander Hamilton, October 5 1790, *PAH* 7:93; Alexander Hamilton to George Washington, October 6 1790, *PAH* 7:96-97; Alexander Hamilton to George Washington, October 26 1790, *PAH* 7:124-125; Alexander Hamilton to George Washington, November 4 1790, *PAH* 7:139-140.

[44] Skinner's situation was ultimately resolved when his second letter reached Hamilton, who determined that he should be allowed to continue in office. William Skinner to Alexander Hamilton, October 5 1790, *PAH* 7:93; William Skinner to Alexander Hamilton, October 19 1790, *PAH* 7:120; Alexander Hamilton to George Washington, November 6 1790, *PAH* 7:142.

Not logistics, however, but law would be the most confusing aspect of the assumption process. In executing Hamilton's policy, the commissioners of loans had to reconcile three types of law: the dead ordinances of the Confederation, which had controlled federal debt management throughout the 1780s; the new Funding Act of 1790, which in and of itself was difficult to understand; and the acts of each individual state to regulate its debt since the Revolution.

Just explaining the meaning of the Funding Act to the commissioners he had appointed to enforce it took up considerable space in Hamilton's Treasury circulars. The commissioners seemed to understand that they had to collect in certificates of state debt, exchange them for new federal ones, and transmit the old certificates to the Treasury in Philadelphia. But they were confused about which categories of debt qualified for assumption, and to whom the interest on the debt should be paid. In October 1790, for example, Hamilton got word that the act was being interpreted extremely narrowly in at least one state, as only relating to certificates which were specifically and explicitly 'issued for services or supplies toward the prosecution of the late war.' This, a frustrated Hamilton told the commissioners, 'is not the intent and meaning of the law,' which also applied to debts contracted by the states since the war's end.[45] But misreadings of the act abounded. In a November circular, the Secretary wrote, 'An idea is entertained that a state may become a *subscriber* for a portion of that part of her separate debt which has been assumed, which is erroneous.'[46] Even trying to retain interpretive discipline among his own employees was a difficult task.

The interaction between the Funding Act and the older state laws relating to debt management only increased the complexity of the Treasury's undertaking. The commissioners understood from the beginning that the state legislatures would have to be called upon to make

[45] Treasury Department Circular to the Commissioners of Loans, October 13 1790, *PAH* 7:110.
[46] Treasury Department Circular to the Commissioners of Loans, November 1 1790, *PAH* 7:134-135.

or change laws in order to allow them to do their work. William Skinner of North Carolina noted that 'the Legislature of this State don't meet untill the first day of November, at which time, shall make application, for a resolve' to gain access to the necessary papers. This would unfortunately 'retard the business of my Office for some time.'[47]

When Nathaniel Appleton accepted his appointment as commissioner for Massachusetts in September 1790, he immediately suggested to Hamilton that, due to the intricacies of the state's previous modes of debt management, it would be better for him to hand over one of his main duties to the state treasurer, who was better qualified for the task.

> I would. . . suggest for your consideration the propriety of having all the State paper, proposed to be loaned, first pass through the hands of the Treasurer as he can best determine the purpose for which the Notes were issued, and wither they are genuine.

This, he added, 'will take off a great burthen from the Commissioners.' Appleton knew that, for this plan to take effect, 'an Act or resolve of this Legislature [may] be necessary,' but 'doubtless they would pass a Resolve agreeably to the above.'[48]

Whether Hamilton agreed to Appleton's suggestion is unknown, but the Secretary was evidently aware of the considerable role played by state assemblies and bureaucracies in managing the assumption process. One of the most difficult parts of the Funding Act was section 18, which dealt with a peculiar subcategory of the state debt, that is, *federal* debt which had been assumed by the *states* after the Revolutionary War. The Act ordered that state certificates which had been given to the holders in exchange for federal debt in the 1780s must be '*re-exchanged* or *redeemed*' or '*surrendered* to the United States.' 'The payment of Interest' on this debt 'must otherwise be suspended.' This part of the Act had apparently not been executed, as, in June 1791, Hamilton composed a circular to the state governors to draw particular attention

[47] William Skinner to Alexander Hamilton, October 19 1790, *PAH* 7:120.
[48] Nathaniel Appleton to Alexander Hamilton, September 9 1790, *PAH* 7:28.

to section 18. Within a week of Hamilton's circular, John Nicholson, Comptroller General of Pennsylvania, informed Governor Thomas Mifflin that he did not think there would be a problem: 'As the regulations and provisions of this state enable. . . creditors to repossess themselves of the Continental Certificates received for them by the state I apprehend that the case of such creditors of penna. is fully provided for.' Nicholson added that the governor could let the Secretary know that assumption was running smoothly in Pennsylvania, providing precise figures for the certificates so far exchanged.[49]

The federal assumption of state debts was not an independent act of the federal government. State officials were asked to marshal their resources, and state legislators to make and alter laws, to allow for assumption to happen – and, in spite of the increasingly furious party rhetoric, they would do just that. In this case, at least, both federal and state officials shared the belief that the state governments were also to some extent responsible for the implementation of national policy objectives.

The Bank

Like the Funding Act, the First Bank of the United States is most famous for generating explosive political controversy at the highest levels of government. In the final session of the First Federal Congress, lawmakers engaged in heated debates as to whether the Constitution granted Congress the power to charter a bank. At the cabinet level, President George Washington was forced to mediate between Alexander Hamilton, who insisted on the necessity of the national bank, and Thomas Jefferson, who passionately opposed its creation.[50]

[49] John Nicholson to Thomas Mifflin [enclosed to Alexander Hamilton], July 2 1791, *PAH* 8:532.
[50] Jonathan Gienapp, *The Second Creation: Fixing the American Constitution in the Founding Era* (Cambridge, MA, 2018), 202-205; Elkins & McKitrick, *Age of Federalism*, 232-234.

What is discussed less frequently is that the nature of the national bank's operations was not only for federal congressmen and executive officers to decide. Because of the branch structure of the Bank of the United States, its operations were also subject to the control of the state legislatures. While many states eagerly encouraged the establishment of local branches of the Bank, others treated it with ambivalence and even hostility. The interactions of state legislatures with the First and Second Banks of the United States in this period generated three Supreme Court cases, one of which – *McCulloch* v. *Maryland* – was taken by Chief Justice John Marshall as an opportunity to assert the supremacy of federal law in the face of challenges from the states.

The Bank was a private corporation controlled by a board of directors and owned by shareholders. It was not, technically speaking, part of the U.S. government. The Bank nonetheless merits discussion here due to its entangled relationship with the Treasury Department. The Secretary of the Treasury planned and lobbied for the chartering of the Bank, then insisted that the federal government purchase 5,000 shares of bank stock – at $400 apiece, an investment of $2 million, or a 20 percent interest. Hamilton argued that the dividends could be used to pay down the principal on the national debt.[51] The Bank played a central role in Hamilton's plans for the management of national finances.

As individuals at the state and federal levels debated the utility of a branch system from 1791 onwards, they used the language of federalism to discuss the problem. The Bank of the United States, like the federal government itself, was forced to negotiate an existing landscape of state laws as it tried to develop a national network of offices.

Just as the federal government had been superimposed, in 1789, on a pre-existing system of state and local governments, the Bank of the United States, in 1791, entered a world in which merchants and capitalists had already set to work on building a state and local banking

[51] Carl Lane, 'For a "Positive Profit": The Federal Investment in the First Bank of the United States, 1792-1802,' *WMQ* 54/3 (July 1997), 601-604.

infrastructure. The national bank had its earlier counterpart in the Bank of North America, sponsored by Superintendent of Finance Robert Morris and chartered by the Confederation Congress in 1781, but there were also several banks that had been chartered by state governments since independence.[52]

The chartering of the national bank raised new questions about the role of these state banks going forward. For some, the answer was simple enough: since several of the states and major cities already had their own banks, there was no point in establishing local branches of the Bank of the United States. Some financiers were opposed to establishing two banks in one place, as they incorrectly believed, in David Cowen's words, 'that one bank would drain the specie of the other.'[53] Others had political reasons for favouring the maintenance of a separate local banking infrastructure. Hearing of plans to establish a branch in Virginia, Secretary of State Thomas Jefferson and Governor Henry Lee both endorsed plans to establish what James Wettereau termed a 'counter-bank' in their home state, one which would be friendlier to the farming interest, and which would make a branch of the national bank unnecessary.[54] A twenty-seven-year-old James Kent wrote to fellow New Yorker Theodorus Bailey in early 1791, 'It is required to have a State Bank to control the influence of a National Bank as a State government to control the influence of the general government.'[55]

On the other hand, financially-minded elites in a number of cities developed piecemeal plans to integrate their existing banks with the Bank of the U.S. The Massachusetts Bank, for example, purchased $100,000 in shares in the Bank of the United States, while the Bank of New York offered the national bank $150,000 in its own shares in order to facilitate a merger. The

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[52] James Wettereau, 'The Branches of the First Bank of the United States,' *Journal of Economic History* 2 (December 1942), 67-68.
[53] David Cowen, *The Origins and Economic Impact of the First Bank of the United States, 1791-1797* (New York, 2000), 51.
[54] Wettereau, 'The Branches of the First Bank of the United States,' 76.
[55] James Kent to Theodorus Bailey, February 27 1791 in *The Memoirs and Letters of James Kent, LL.D.*, ed. William Kent, (Boston, 1898), 41-42.

directors of the national bank declined the New Yorkers' offer of shares, declaring such a practice forbidden under its charter, and the government of Massachusetts forced the state bank to sell up its shares in the Bank of the United States through an act of March 1792. Offers from other state and local banks to become branches of the national bank likewise met with a cool reception from the directors.[56]

Although the merger scheme failed, some state governments considered another method of controlling the national bank, and profiting from it in the process. Like Secretary Hamilton and the national government, they debated purchasing shares in the Bank. On June 6 1791, the Massachusetts House of Representatives appointed a committee 'to consider the expediency of the Commonwealth's subscribing to the National Bank.' A week later, the committee reported 'that there will be a sufficient sum in specie to enable this State to subscribe one hundred & sixty thousand dollars, which will be four-hundred shares in the stock of the said Bank.' They submitted a resolve that the state purchase these shares, but the resolution was resoundingly defeated at a vote.[57]

The New Englanders' neighbour to the south made a different choice. On March 24 1791, the state legislature of New York passed an act 'directing the Treasurer of this State, to subscribe to the Bank of the United States.' Under this act, he was to purchase in his own name 'one hundred and ninety shares.'[58] Some of these would later be sold off, but the state held onto its interest in the bank for many years: the treasurer's accounts for 1808 show that New York owned '152 shares of the capital stock of the bank of the United States,' worth $60,800, from which they received dividends of $4,864 in that year. The reasoning behind the purchase was partly financial and partly political, as the 1791 act shows. Under its second article,

[56] Wettereau, 'The Branches of the First Bank of the United States,' 75.
[57] MSA, SC1/series 532, House Journal 12th Session (1791-1792), 68, 101-103.
[58] Thomas Greenleaf, *Laws of the State of New-York . . . from the First to the Twentieth Session, Inclusive* (3 vols., New York, 1792-1797), 2:374.

> the treasurer of this state . . . shall, from time to time, vote for directors of the said bank, and manage . . . the said shares, in the same manner, as any other stockholders in the said bank may do by law.[59]

In its small way, the purchase of shares in the Bank was a means for the state of New York to manage the activities of the national government beyond the usual political channels.

Early in 1792, meanwhile, the Bank of the U.S. determined to establish branches, independently of the state banks, at Boston, New York, Charleston, and Baltimore.[60] Three and a half years later, on Saturday 28 November 1795, the House of Delegates of the state of Virginia gave leave to a committee headed by John Marshall 'to bring in a bill, *Authorising one or more branches of the bank of the United States in this commonwealth*.' On Tuesday 8 December, the bill passed the House, 92 to 38, but as it turned out, the Bank would not begin operations in Virginia until 1800, when a branch would be opened in the port town of Norfolk.[61]

This episode has been a source of confusion to historians of the Bank, because, as David Cowen notes, 'With a federal charter that allowed nationwide banking privileges, the board [of directors] had the legal right to open a branch anywhere they desired.' Since the directors had resolved in July 1792 to establish a branch in Richmond, the seat of the state government, why did it take another eight years before a branch would in fact open, and in a different city altogether? Wettereau and Cowen have both speculated that the scale of political opposition to the Bank in Virginia was enough to give the directors eight years' worth of pause, particularly as the campaign for a Virginia branch was led by Secretary Hamilton himself.[62]

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[59] *Journal of the Assembly of the State of New-York: At Their Thirty-First Session*, 22-23.
[60] Wettereau, 'The Branches of the First Bank of the United States,' 75.
[61] *Journal of the House of Delegates of the Commonwealth of Virginia, Begun and Held . . . on Tuesday, the Tenth Day of November, 1795* (Richmond, 1796), 79; Wettereau, 'The Branches of the First Bank of the United States,' 78-79.
[62] Wettereau also argues that the Panic of 1792 may have set back the cause of the Bank in Virginia. Wettereau, 'The Branches of the First Bank of the United States,' 76-79; Cowen, *Origins and Economic Impact of the First Bank of the United States*, 56.

The directors' reluctance to establish the branch *after* the state had legislated in their favour is certainly hard to explain, but Wettereau's research suggested state laws were at the root of their failure to follow through on the 1792 resolution to open a Richmond branch. 'The Richmond bank project proved abortive,' he wrote, 'in all probability because of the Virginia laws limiting the rate of interest and declaring lands not to be liable to execution for debt.' When Alexander Hamilton resigned as Secretary of the Treasury in 1795, he advised the directors to resolve in favour of a Virginia branch 'on condition that a law be passed to remove the obstacles.'[63] In spite of the Bank's national charter, then, its operations were constrained by the realities of governing in a federal system. Hamilton was once more unable to execute his desired policy without negotiating with state governments and deferring to state law.

The Bank would again come up against state laws in a fiery confrontation with the state of Georgia during Thomas Jefferson's second presidential term. Georgians had welcomed the opening of the Savannah branch in August 1802, and, in Wettereau's words, 'rushed to obtain loans' which they soon found themselves struggling to pay off. The influence of the debtors in the state legislature was enough to produce, in 1805 and 1806, three separate laws imposing heavy taxes on the Bank. When the Bank refused to pay, state officials Peter Deveaux and Thomas Robertson went to the branch office and seized $2,000 in silver. The Bank filed a federal trespass action against Deveaux and Robertson, which was dismissed by the circuit court for the district of Georgia on jurisdictional grounds. An appeal to the Supreme Court (*Bank of the United States* v. *Deveaux et al.*, 1809) rendered an inconclusive decision.[64]

The questions raised by *Bank* v. *Deveaux* would not be resolved in any real sense until long after the charter for the First Bank had expired (1811) and Congress had chartered the Second Bank of the United States in 1816. In February 1818, the Maryland legislature passed

[63] Hamilton cited by Wettereau, 'The Branches of the First Bank of the United States,' 76, 78.
[64] Wettereau, 'The Branches of the First Bank of the United States,' 84; Currie, *The Constitution in the Supreme Court*, 85-89.

an act 'to impose a tax on all banks, or branches thereof, in the State of Maryland, not chartered by the legislature.' Any bank of this description issuing notes without purchasing stamped paper from the state would be subject to an annual tax of $15,000. The Second Bank of the United States, which had set up a branch in Baltimore in 1817, issued notes on its own paper but did not pay the tax, so the state of Maryland took James William McCulloch, cashier of the Baltimore branch, to state court, where he was subject to a penalty for failing to comply with the state law. In 1819, the Supreme Court unanimously reversed the Maryland court's decision. Chief Justice Marshall concluded that 'the Bank of the United States has, constitutionally, a right to establish its branches. . . within any state' and that 'the State within which such branch may be established cannot, without violating the Constitution, tax that branch.' The decision also affirmed the general supremacy of federal over state law.[65]

Although *McCulloch* established an essential constitutional principle, the decision did not immediately succeed in changing the behaviour of the state legislatures. Indeed, within five years, Marshall heard a nearly identical case in *Osborn* v. *Bank of the United States*, which revolved around the improbable $50,000 tax imposed by the state of Ohio on the Bank through an act of 1819. All the Court could do was 'review and confirm' its decision in *McCulloch*.[66] The Bank's repeated confrontations with the state legislatures demonstrate the shortcomings of judicial review as a means of mitigating the confusion of governance in a federal system.

## Federalism and the Embargo

In December 1807, Albert Gallatin found himself in an unenviable position. As Thomas Jefferson's Secretary of the Treasury, it would be his job for the foreseeable future to enforce a policy that would not only make him extremely unpopular, but would suffer miserable failure.

[65] *McCulloch* v. *Maryland* (1819) at 318, 320-322; Currie, *The Constitution in the Supreme Court*, 160.
[66] *Osborn* v. *Bank of the United States* (1824); Currie, *The Constitution in the Supreme Court*, 102.

The Embargo Act was a new solution to an old problem. Since the advent of revolution in France in 1789, the effects of European conflict had been radiating out into the North Atlantic, exposing American merchant vessels to serious risk every time they took to the ocean. French privateers preyed on American shipping. The Royal Navy, ignoring repeated declarations of American neutrality, seized American vessels, while American sailors, unable to prove that they were not British citizens, were regularly captured at sea and pressed into service on British ships. The final straw, in November 1807, was the *Chesapeake-Leopard* affair, in which British sailors fired on and boarded an American vessel in the waters off Norfolk, Virginia, capturing four men.[67] President Jefferson seized the opportunity to press Congress for radical action, and they obliged, on December 22 1807, with 'an Act laying an Embargo on all ships and vessels in the ports and harbors of the United States.' The federal customs collectors and their teams were ordered that 'no clearance [was to] be furnished to any ship or vessel bound to [any] foreign port or place, except vessels under the immediate direction of the President of the United States.'[68] In other words, Gallatin and his Treasury staff were to close off foreign trade altogether for the foreseeable future.

Between the passage of the first Embargo Act and the abandonment of the Embargo in March 1809, four further laws were passed in the attempt to prevent American goods from reaching European markets. These efforts would be both controversial and unsuccessful. In his work on the custom houses, Rao has demonstrated that the Embargo was, in part, a casualty of the long-standing, inbuilt, and necessary decentralization within the Treasury Department, which allowed the customs officers to exercise 'discretion' and determine which enforcement measures would work best in their respective districts in order to maintain good relationships with local merchants and thereby increase revenue. This departmental culture, while essential to curbing tax avoidance under normal conditions, was counterproductive when it came to

[67] Rao, *National Duties*, 134, 138.
[68] 2 Stat. 451.

enforcing the Embargo.[69] What Rao does not explore is the extent to which the federal structure of the United States also contributed to the failure of the Embargo, as both the president and the Treasury officials on the ground sought the help of state governments in enforcing their policies, but found it wanting.

The Embargo came as such a shock to the system for the Treasury Department at least in part because it had to contend with the resolute non-cooperation of state officials in the enforcement of federal policy. The Treasury had seen plenty of popular resistance to its policies, especially in the cases of the Whiskey Rebellion and Fries's Rebellion; but in both of those instances, the population had been 'restored to order' with the active participation of state governors and militias.[70] Now, as Gallatin would learn, the distribution of power within the federal system had the potential to work against the federal executive in important ways. State courts and officials helped merchants to recover property seized by federal customs officers under suspicion of violating the embargo. State legislators debated amending the federal constitution to ban embargoes. State governors issued certificates to merchants permitting them to leave port with large cargoes of goods, thereby pulling the rug out from under Jefferson and his Treasury in dramatic fashion.

Jefferson's Embargo was a disaster for the United States in two main senses. First, it failed in its principal foreign policy objective: teaching European powers a lesson about their treatment of American merchant shipping by depriving them completely of American exports. Smugglers were able to transport over twelve million pounds of cotton, among other American-produced goods, to Great Britain in 1808 and 1809, minimizing price rises as a result of the Embargo. At

[69] Rao, *National Duties*, 141-144.
[70] On the role of state governors in putting down the Whiskey Rebellion, see Thomas Slaughter, *The Whiskey Rebellion: Frontier Epilogue to the American Revolution* (New York, 1986), 196-198. On Fries's Rebellion, see Paul Douglas Newman, *Fries's Rebellion: The Enduring Struggle for the American Revolution* (Philadelphia, 2004), 143-149.

home, the policy halved the federal government's income, with customs revenue plummeting from $16.3 million in 1807 to $7.7 million in 1809, the worst year in a decade, in which the government incurred a deficit of roughly $2.5 million.[71] The result was to place the federal government in an extremely vulnerable position, damaging its fiscal health and compromising its popularity, especially in the commercial northeast.

As popular discontent with the Embargo mounted from the beginning of 1808, federal officials working within the states began to wonder if their government salaries were worth the trouble of bearing the brunt of the public's anger.[72] Gallatin's letters to Jefferson became a roster of vacancies and resignations as collectors laid down their lucrative appointments for fear of popular retaliation against their efforts to enforce the law.[73] The collectors' fears were well-justified. Not only would customs officials be taken to court by disgruntled merchants over the course of the Embargo, but they would also be threatened, beaten, and even murdered as they tried to take on the violent smugglers who plied their trade from New Orleans to Nova Scotia.[74]

It quickly became clear that the justice system was also going to pose a problem when it came to detaining and prosecuting merchants who broke the law. In North Carolina, although Jefferson made 'several appointments of [U.S.] marshal,' all of the appointees 'refused to accept,' meaning 'we. . . cannot even arrest the infractors of the embargo.'[75] Secretary Gallatin would later find himself completely unable to contact the federal district attorney in

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[71] Rao, *National Duties*, 139-141.
[72] Rao summarizes merchants' anger with the Embargo in *National Duties*, 139.
[73] Albert Gallatin to Thomas Jefferson, April 1 1808, *WAG* 1:381 – vacancy at Bridgetown, New Jersey; Albert Gallatin to Thomas Jefferson, May 16 1808, *WAG* 1:387 – the resignation of one Sacket, collector of Sacketts Harbor in northern New York, who would not be replaced until September: see Albert Gallatin to Thomas Jefferson, September 2 1808, *WAG* 1:413; Albert Gallatin to Thomas Jefferson, May 28 1808, *WAG* 1:393 – the resignation of E. Mounger, collector of Savannah, Georgia.
[74] Rao, *National Duties*, 154-156.
[75] Albert Gallatin to Thomas Jefferson, April 1 1808, *WAG* 1:381.

Massachusetts, a Mr Blake, who was 'often absent' and 'has not even answered a single one of the many letters which I have written to him in relation to the embargo.'[76]

When it came to the administration of justice, the federal executive had enough problems handling its own employees, but it also came to blows with officials at the state level.[77] One of the customs collectors' most unpopular duties was to seize vessels and cargoes suspected of violating the Embargo, and it was here that they most often got into trouble with state courts, as Gallatin wrote to Senator William Branch Giles of Virginia in November 1808. 'Attempts have in several instances been made to wrest from the collectors, by writs of replevin issued by State courts or officers, property detained or seized by said collectors,' he noted. State officials were aiding merchants in using common-law mechanisms to disrupt the operation of federal policy. Gallatin insisted that the states' actions were illegal – 'that whenever property is, by virtue of a law of the United States, in possession of a collector, marshal, or any other of their officers, no process. . . which will take the property away. . . can be legally issued by a State authority.'[78] This was only one of many methods by which state power would be used to subvert the enforcement of the Embargo.

The summer before President Jefferson signed the first Embargo Act, he had written to James Sullivan in joyful tones. We first met Sullivan above as a Massachusetts state legislator in the early years of the Washington administration, but in the gubernatorial race of 1807, after several years as attorney general of Massachusetts, he had been elected to the highest office in the Commonwealth. Jefferson was thrilled by the 'happy event of the election of a republican

[76] Albert Gallatin to Thomas Jefferson, September 2 1808, *WAG* 1:413; Gallatin to Jefferson, November 8 1808, *WAG* 1:427.
[77] For an extended discussion of the use of the courts to resist the Embargo, see Douglas Lamar Jones, '"The Caprice of Juries": The Enforcement of the Jeffersonian Embargo in Massachusetts,' *American Journal of Legal History* 24/4 (October 1980), 307-330, and Rao, *National Duties*, 144-145, 152.
[78] Albert Gallatin to William Branch Giles, November 24 1808, *WAG* 1:428.

Executive' to this troublesome hub of Federalism, telling Sullivan, 'I consider, with you, the federalists as compleately vanquished, and never more to take the field under their own banners.'[79]

Perhaps as a result of his increased confidence in the political reliability of the state governments, and out of concern that local resistance to the embargo was being exacerbated by genuine hardship caused by the slowing of maritime trade, Jefferson took a crucial step in May of 1808. Recognizing that several states did not have sufficient domestic resources to support themselves without importing staple foodstuffs by sea, he delegated 'to the governors of the flour-importing States' the power to issue certificates to merchants which would allow them to import necessary foodstuffs into the state by sea.[80] In other words, Jefferson offered the governors a loophole in the Embargo.

On first hearing of Jefferson's plan, Gallatin suggested some alterations. Perhaps, he wrote, 'the governors should merely state from time to time the quantity of flour which may be wanted, directing such certificate to the Treasury.' That way, everything could be centrally managed. But if Jefferson was going to go ahead with his scheme, Gallatin recommended that he give even more governors the power to organize the importation of essential goods, noting that Georgia, New Hampshire, Rhode Island, and Connecticut would all benefit from the proposal.[81]

Within a few days of the implementation of this policy, however, Gallatin realised that the administration had made a mistake. The secretary was convinced that certain governors could not be trusted not to abuse the authority to circumvent the embargo, especially in states with Federalist leanings. 'Knowing Governors Sullivan and Charles Pinckney [of South

[79] Thomas Jefferson to James Sullivan, June 19 1807, *WTJ* 10:420.
[80] See Albert Gallatin to Thomas Jefferson, May 5 1808, *WAG* 1:384; Thomas Jefferson to Albert Gallatin, May 6 1808, *WAG* 1:385; Thomas Jefferson to Albert Gallatin, May 16 1808, *WAG* 1:389-390.
[81] Albert Gallatin to Thomas Jefferson, May 5 1808, *WAG* 1:384.

Carolina, a Federalist] as we do, we can have no confidence in the last, and must rest assured that the other will refuse no certificates. They begin already to arrive, and for large quantities.'[82] Five days later, and armed with better information, Gallatin confirmed his suspicions. 'Governor Sullivan dares not refuse flour certificates. One mail alone brought me permits for eleven thousand barrels, exclusively of corn and rye meal; as we must let those go at all events and without restriction, there is really more danger from that quarter than from any other.'[83] The implication of this information was that Sullivan was granting certificates almost indiscriminately to merchants who hoped to circumvent federal commercial restrictions and carry on their maritime trade.

As the summer months progressed, the scale of the Massachusetts problem became fully apparent to Treasury officials continuing in their dogged attempts to rescue the Embargo from failure. Between early May and mid-July, Governor Sullivan had apparently issued certificates allowing for the importation of '49,800 barrels of flour, 99,400 bushels of corn, 560 tierces of rice, and 2000 bushels of rye; and in addition thereto he has given certificates giving permission for *either* 7450 barrels of flour *or* 30,000 bushels of corn; so that the whole quantity of flour may be 57,250 barrels, or the whole quantity of corn may be 129,400 bushels.' Meanwhile, New Hampshire's Governor John Langdon had given out only 'four certificates for so many cargoes of flour, say 4000 barrels, and two certificates each for a cargo of rice. No certificates have been transmitted by the other governors.'[84] There was now no doubt at all that the president's faith in James Sullivan had been very much misplaced.

In August 1808, Jefferson wrote Sullivan a cool letter indicating that there could be no real reason for the governor to issue more certificates unless 'a part [of the goods] has been carried to foreign markets.' He would consider the issuing of certificates 'as discontinued' from

[82] Albert Gallatin to Thomas Jefferson, May 23 1808, *WAG* 1:390.
[83] Albert Gallatin to Thomas Jefferson, May 28 1808, *WAG* 1:383.
[84] Albert Gallatin to Thomas Jefferson, July 15 1808, *WAG* 1:394.

the coming autumn onwards, he added, noting that other governors had made 'little use. . . of the permission to issue certificates.'[85]

The receipt of such a humiliating letter from the president, however, did little to deter the Massachusetts governor. In September, Gallatin told Jefferson, 'I am compelled to address you on the subject of Governor Sullivan's certificates, which he continues, as I am informed from several quarters, pertinaciously to issue. Whether he still sends duplicates to the Treasury I do not know, but [I]. . . rather think he does not.' The Secretary added that 'the provisions imported into Massachusetts in large quantities are intended for exportation, and are the foundation of the violations of the embargo there. . . . I think it really necessary that some efficient measure should be adopted to put an end to his certificates.'[86]

In November, Jefferson wrote to Massachusetts Lieutenant Governor Levi Lincoln, Sr., to let him know that an illegal market in Sullivan certificates had sprung up as far away as Washington, D.C., and Alexandria, Virginia.[87] And in December 1808, Governor James Sullivan, the great hope of Jeffersonian Massachusetts, died at the age of 64, ending his brief but successful career as a thorn in Albert Gallatin's side.

After Sullivan's death, Massachusetts officials continued their work of attempting to disrupt or discontinue the Embargo. In June 1809, the legislature passed a resolution calling for an amendment to the U.S. Constitution that 'no law shall be enacted for laying an embargo, or for prohibiting or suspending commerce' for a period longer than one session and one recess of Congress. Other state legislatures roundly rejected the resolutions and encouraged their representatives and senators in Washington to do the same.[88] Though the amendment effort came to nothing, however, Sullivan's subversion of the Embargo had already taken its effect,

[85] Thomas Jefferson to James Sullivan, August 12 1808, *WTJ* 11:46.
[86] Albert Gallatin to Thomas Jefferson, September 16 1808, *WAG* 1:418.
[87] Thomas Jefferson to Levi Lincoln, November 13 1808, *WTJ* 11:73.
[88] *Resolves of Massachusetts, May 1806-March 1810*, 356-357; *Journal of the Assembly of the State of New-York: at their Thirty-Third Session* (Albany, 1810), 21-22.

contributing to the non-enforcement of the Embargo and its overall failure as a foreign relations strategy.

## Conclusion

The state governments were intimately involved in the implementation, and in the obstruction, of Treasury policy from the First Federal Congress onwards. The Treasury's capabilities in this period were shaped by the continuing existence of state laws, some of which conflicted with or contradicted the new acts of Congress which enacted Treasury policy. This presented a problem that state governments could solve in one of two ways. They could either maintain their old laws, thereby insisting on their own supremacy, or move to make and change laws to accommodate the actions of the federal government within their jurisdictions. In general, they chose the latter course of action, but this could sometimes involve a drawn-out and tangled process of negotiation, as the above case studies demonstrate. The states appear in many cases to have acted independently to change their laws in response to the implementation of federal policy programmes, albeit sometimes rather slowly. Occasionally, the cajoling of Treasury officials was necessary to press state governments for action. Rarely, but importantly, the state legislatures voted to protest against federal law, and to make arguments about the constitutionality of acts of Congress, as in the case of Virginia's resolution on the Funding Act in 1790, and the constitutional amendment proposed by Massachusetts in 1809.

Beyond the overt and public actions of legislatures, however, there was another layer to state involvement in the execution of the Hamiltonian programme. State bureaucracies were quietly pulled into action to manage the complex process of federal assumption of the state debts. This is but one example of the many ways the expertise and local knowledge of state officials became essential to the design and enforcement of federal policies across this period. The reality of state involvement with the implementation of the Funding Act is particularly

striking given Hamilton's intense unwillingness to involve the states in matters of federal responsibility.

The Hamiltonian years thereby showcase two important features of the implementation of the Constitution immediately after 1789. First, they demonstrate that the actions of the federal government were constrained not only by the Constitution itself, but also by existing frameworks of state law and custom, by which states claimed an implicit right to use their own legislation to consent to the operation of federal law within their jurisdictions. The case of the lighthouses is an especially clear example of this, and it may also help to explain the actions of the First Bank of the United States vis-à-vis the Virginia branch. The federal government also found itself deferring to the superior information and expertise of state officials when it came to executing its policies at the state level.

Second, moments like the Virginia resolution of 1790 highlight an essential but overlooked feature of early federalism: the growth of a consciousness of, and willingness to grapple with, the U.S. Constitution on the part of state officials. This was not always the result of a desire for conflict on the part of the states, reading the Constitution perversely in order to protest and obstruct federal policies. Instead, as new situations arose at the state and local levels, in a time of limited communications technology, state officials – like Henry Lee facing the yellow fever epidemic – were forced to engage with the Constitution independently, and imagine for themselves what the correct distribution of power would look like. Lee's imagining of the role of the customs officials in preventing an epidemic is conspicuous in that it envisaged a larger role for the federal government than federal officials were themselves willing to contemplate at that time.

Conflict and confusion over the respective roles of the federal and state governments in the enforcement of federal law did not resolve themselves quickly. The case study of Jefferson's Embargo shows, however, that the boundaries of state and federal authority were

still very much subject to negotiation nearly twenty years after the Constitution had gone into effect.

In spite of Jefferson's single-minded commitment to the enforcement of the Embargo, which, Gallatin believed, could most easily be achieved through centralization, the president nonetheless decided to delegate responsibility to the state governors, rather than simply request information from them, as Gallatin had suggested. Jefferson's continued deference to a model of federated governance turned out to be a significant error in this case, as Governor Sullivan, pressured by his Federalist and mercantile constituents, turned Massachusetts into a hub of Embargo violation.

The saga of the national bank demonstrates that the right of the state legislatures to make laws that constrained federal operations was not seriously challenged by the federal government until after the end of the period under consideration here. The Bank's attempts to use the federal court system to sanction those state governments which refused to co-operate were initially fruitless, and even the landmark decision in *McCulloch* failed materially to end state challenges to the Bank. The limited impact of judicial review on the behaviour of state governments reinforces the conclusion that it was voluntary co-operation – slippery, contingent, and negotiated – that allowed for the operation of federal government within the states in this period.

Forts, Firearms, and Federalism:
Military Preparedness in the Early United States

## Introduction

In the founding era, national defence was a matter in which state governments were constantly implicated. Though the preamble to the U.S. Constitution claimed that the new federal settlement was intended to 'provide for the common defence,' in fact, state and local governments continued to be heavily involved in the management of manpower, weaponry, and defensive fortification throughout the period between Washington's inauguration and the War of 1812. As far as national security was concerned, this was not a fruitful state of affairs. Between confusion over the relative authority of the state and federal governments and the spectacular insufficiency of the state militias as a first line of defence for the new nation, the attempt to divide sovereignty between the states and the federal government put the young United States at risk, both of constitutional controversy and of military defeat.

As Anglo-American theorists of the period saw it, governments had two options for organizing their defence. They could build a professional army with rigid discipline, officered by career soldiers and kept in long-term service. Alternatively, they could rely on the traditional model of a citizen militia, which would come into service only when national security demanded it. Although the Constitution's framers recognized the practical advantages of a professional army, particularly after facing the British Regulars during the Revolutionary War, their interest in maintaining federalism, republicanism, and a minimal military budget encouraged American leaders at the dawn of the new nation to seek a middle way. The framers envisioned maintaining a small professional force, primarily for frontier defence, alongside a series of constitutional and legislative provisions allowing the federal government to call the pre-existing state militias into national service under certain circumstances.

The militia system of Britain's eighteenth-century Atlantic empire was analogous to the twentieth-century example of the Home Guard. In the late 1790s, tens of thousands of men in the British Isles were called up for the defence of the nation against the imminent threat of a French invasion.[1] Alongside its strategic purpose in moments of international conflict, the militia performed a regular function as a catch-all local emergency service. A 1796 excerpt from the London papers published in the *Gazette of the United States*, for example, described the role of a local militia company in putting out carriage fires in rural Ireland.[2]

While they were capable of working as the servants of the state and enforcers of law and social order, however, the political attachments of the different militia companies could also make them a volatile resource. At a Devonshire market in the spring of 1795, the *Gazette of the United States* reported, the local people turned out to protest the excessive prices charged for beef, mutton, wheat, and butter. 'The Staffordshire militia was called out,' the reporter noted, 'when they all, to a man, joined the people, and, after taking possession of the whole market, sold off the whole' at the lower prices demanded by the locals. Governing authorities had attempted to ensure hostility between market-goers and militia by calling out soldiers from a far-off county, but this strategy had backfired badly.[3] The episode encapsulated a key difficulty with relying on the militia in either a policing or a military context. Militiamen could often not be relied upon, either to support the government against the people, or to maintain discipline in battle.

American governments would experience these problems again and again throughout the decades after the Revolution. As Gregory Ablavsky and Saul Cornell have separately shown, the 1780s saw considerable obstruction of state laws by local governments, corporations, and militias, which often acted as enforcers of the popular will in the locality, in defiance of the state

[1] Linda Colley, *Britons: Forging the Nation, 1707-1837*, revised edn (New Haven, 2005), 287-293.
[2] 'From a London paper,' *Gazette of the United States* (June 8 1796), p. 3, col. c.
[3] 'London, May 17,' *Gazette of the United States* (July 15 1795), p. 2, col. d.

legislatures. Although Anti-Federalists and anti-administration figures in the 1790s spoke of the militia as a state organization, this was a very optimistic perspective. Whether or not the militia was under state control at a particular moment was generally contingent on the political views of its individual members.[4]

The creation of a federal administration superimposed on the states only made militia management more confused. In order to make effective use of the militia, the federal executive would have to ensure the co-operation of both the state governments and the militiamen themselves. This would often prove entirely impossible. Although, in 1794, the president secured the governors' assistance in raising an 'army of the Constitution' to put down the Whiskey Rebellion, whole communities of qualified male citizens refused to serve in the federal cause, to the great embarrassment of their state leadership. On the other hand, the governors – most famously in New England during the War of 1812 – also left the federal administration in the lurch on important occasions. Although federal officials insisted that the president had a constitutional right to call up the militia without the governors' consent, in practice, it was totally unfeasible for him to exercise it, thanks to the ineffectual legislation passed by Congress in 1792 as a weak gesture at federal militia organization.

The multiple functions of the militia – as a local social organization, a police force, and a military body – complicated the already tricky constitutional questions around the boundaries of state and federal authority in this period. The militia, as understood in the context of late-eighteenth-century Anglo-American society, constituted the arm of the state's police powers, alongside the shrievalty and the *posse comitatus*. At the same time, classical republican theory defined for them a role as a 'citizen army,' whose purpose was to defend against not only internal, but also external threats. In the unitary British state, there was nothing contradictory about one body taking on this multiplicity of roles. But by attempting to divide sovereignty

[4] Ablavsky, 'Empire States,' 1796, 1810-1815; Saul Cornell, *A Well-Regulated Militia: The Founding Fathers and the Origins of Gun Control in America* (Oxford, 2006), 13, 31-32.

between the state and federal governments, the framers of the Constitution awkwardly pulled these functions apart, creating a crisis of identity for the militia and an ongoing constitutional controversy over who should control it.

This chapter explores how state and federal officials negotiated this constitutional tension through a succession of internal and external crises between the frontier expeditions of the Washington administration and the War of 1812. It demonstrates that in practice, the federal government's reliance on the militia in this period produced a two-level check on its military and law enforcement capabilities across the union. One of these was 'militia nullification' – when militias refused to muster, thereby preventing the enforcement of state or federal law. The other was the refusal of state officials to call the militia into service at the request of the federal government, a possibility which fuelled considerable controversy, particularly during the fraught wartime administration of James Madison.

Manpower was not the only resource at stake in the battle for control of internal and external security policy. Throughout this period, important decisions had to be made about arms and fortifications as the United States built its defensive capabilities very nearly from scratch amidst the burgeoning global conflict between revolutionary France and her European enemies. Federal officials in the Washington, Adams, and Jefferson administrations met with varying success as they attempted to persuade Congress and the state governments to arm the militias effectively and uniformly across the nation. Between 1794 and 1812, meanwhile, the rights of the federal government, the states, municipal governments, and private individuals were all at issue in the construction of coastal fortifications along the eastern seaboard. The complex question of responsibility for coastal defences – specifically who should man them – became a direct cause of the most dramatic crisis of federalism in this period: the Hartford Convention and the threat of New England secession during the War of 1812.

The Militia in North America

In the Revolutionary and Napoleonic-era British Atlantic, the militia was a multi-purpose civil-military organisation of essential importance to the lives of able-bodied white male citizens and the social worlds they inhabited. According to the laws of England and most of Britain's North American colonies, such citizens had a legal right, and a legal obligation, to come together for the defence of their communities against foreign invasion and domestic insurrection.[5]

In his *Commentaries*, William Blackstone sketched the origins of this arrangement, noting, 'It is universally agreed by all historians, that king Alfred first settled a national militia in this kingdom, and by his prudent discipline made all the subjects of his dominion soldiers.' By the late 1760s, when Blackstone was writing, the militia of England was governed by an updated 'scheme. . . which is to discipline a certain number of the inhabitants of every county, chosen by lot for three years, and officered by the lord lieutenant, the deputy lieutenants, and other principal landholders, under a commission from the crown.' A crucial feature of the militia was that they constituted a *local* force, and were therefore 'not compellable to march out of their counties, unless in case of invasion or actual rebellion, nor in any case compellable to march out of the kingdom.'[6]

While most of the North American colonies established militias on a similar model soon after their foundation, by the mid-eighteenth century, the idea of these militias as effective citizen armies was little more than a myth. As the British colonies found themselves in high-stakes military confrontations with Indigenous nations and foreign empires from the late seventeenth century onwards, the colonial legislatures discovered that they needed soldiers who would travel far from home and fight in difficult circumstances for long periods of time. The

[5] Cornell, *A Well-Regulated Militia*, 13-17.
[6] William Blackstone, *Commentaries on the Laws of England* (4 vols.; Oxford, 1765-1769), 1:399.

militias, by their very nature, would not suffice in these engagements. By the time of the Stamp Act Crisis, the colonies had become reliant on professional soldiers to meet their military needs.

This professional force was distinguished from the militia not only by its terms of service, but also by its social composition. Where Blackstone's militia was supposed to be composed of citizens and officered by leading landed gentry, the military regulations produced by the colonial legislatures allowed wealthy colonists to buy themselves out of service for a fee. The regulations were designed to attract the poor, the indebted, the disenfranchised, and the imprisoned to military service, offering bounties, pensions, immunity, and pardons to those willing to volunteer. As the Revolution gathered steam and colonial activists turned to classical republicanism to justify their accusations of imperial degeneracy and tyranny, they were protesting not only against the British use of regular troops to keep order in the mutinous seaports, but also against the corruption and luxury of their own citizens, who now allowed criminals and debtors to bear the weight of the common defence.[7]

In the Revolutionary era, therefore, the militia experienced a resurgence as the ideal means of communal defence in a free republic. Some revolutionary leaders imagined a Patriot army that, like the minutemen of Lexington and Concord, would truly embody the spirit of republicanism and abandon the model of European military professionalism entirely. One of these men was Major General Charles Lee, who proposed an army of citizen militiamen who would rotate into service for two months only in every year, and would be educated in basic battlefield discipline and tactics through weekly training sessions organized at a local level.[8]

Lee's plans were jeopardized when George Washington became commander-in-chief on June 15 1775. Washington had little patience with Lee's exalted visions. To win this fight, and thereby guarantee a republican future for the United States, he needed long-serving and

[7] Lawrence Delbert Cress, *Citizens in Arms: The Army and the Militia in American Society to the War of 1812* (Chapel Hill, 1982), 4-14, 42-43.
[8] Middlekauff, *The Glorious Cause*, 274-275; Cress, *Citizens in Arms*, 55-56.

well-disciplined troops. Such could only be obtained by providing enlistment bounties and a decent wage, and by separating soldiers from their civilian lives in a way totally incompatible with the militia model. Washington's point was proven by the militia's dire battlefield performance in the aftermath of Lexington and Concord. Long before independence was formally declared in July 1776, it had become clear to many in Congress that Washington's instincts in favour of a professional standing army would give the Patriots the best chance of victory.[9]

Not only did the Continental Congress abandon the militia model, but the states soon followed its lead. After a failed attempt to build their armies from virtuous citizen volunteers, they quickly returned to the colonial method of relying on financial incentives to coax service from the lower echelons of society. Despite Revolutionary rhetoric, the American war effort became heavily reliant on professional armies, while the militia remained essentially defunct as an effective armed force.[10] This reality would complicate ensuing debates about how to construct a national military establishment under the Constitution.

## The Convention

By the time the Federal Convention met in Philadelphia in May of 1787, the institutional reputation of the state militias had sunk to even greater depths than during the war. Over the preceding winter, western Massachusetts had been rocked by a tax revolt known as Shays's Rebellion, which began when overtaxed citizens had turned out in force to shut down local courts, preventing legal proceedings for debt collection from going ahead. As the rebellion spread, Governor James Bowdoin had called out the militia to reopen the courts and disperse the protesters, but many of the militiamen had refused to muster, and hundreds had openly

[9] Cress, *Citizens in Arms*, 57-58.
[10] ibid., 58-59.

deserted their comrades and gone over to the rebels. The militia useless, the revolt was only quelled when the embattled state government sent a privately-funded army against the Shaysites, cutting the rebels off as they marched to take over the federal arsenal at Springfield.[11]

The rebellion, and the disobedience of the Massachusetts militia, signalled to some Convention delegates that a general crisis of governmental authority was approaching in the American states. Nonetheless, as the delegates debated the means by which a strengthened federal government might enforce its laws under a revised constitution, their fear of a professional standing army, respect for the republican ideal of the citizen soldier, and concern to create a plan that would withstand the scrutiny of the states, encouraged them to make room for the militia in their new frame of government.

The first person to suggest national control over the militia at the Convention was Alexander Hamilton, who, on June 18, submitted for the approval of his fellow delegates a plan so radically nationalist that it sank, almost immediately, without trace amid the ongoing debates. Under the eleventh article of his soon-forgotten plan, Washington's former aide-de-camp included a provision that 'the Militia of all the States. . . be under the sole and exclusive direction of the United States, the officers of which to be appointed and commissioned by them.'[12]

The question of the militia's role arose again on July 20, when Virginia delegate James McClurg asked a crucial question about how the proposed new government would work in practice. What were 'the means by which the Executive is to carry laws into effect, and to resist combinations ag[ain]st them'? 'Is he to have a military force for that purpose, or to have command of the Militia, the only existing force that can be applied to that use?'[13]

McClurg's question about the militia was answered on August 18, when George Mason proposed that the new government be given the power 'of regulating the militia.' By handing

[11] Cornell, *A Well-Regulated Militia*, 31-33.
[12] Madison's Notes, June 18, Farrand 1:293.
[13] Madison's Notes, July 20, Farrand 2:69.

the national government the power to call up the militia, or at least part of it, the states could ensure that there would be 'no standing army in time of peace, unless it might be for a few garrisons' on the frontier.[14]

Mason's proposal met with a positive reception from Southern delegates. Charles Cotesworth Pinckney of South Carolina agreed that 'uniformity was essential' and 'the States would never keep up a proper discipline of their militia,' and his colleague Pierce Butler 'urged the necessity of submitting the whole Militia to the general Authority, which had the care of the general defence.' Young Charles Pinckney had only one reservation – 'he had. . . but a scanty faith in Militia. There must be also a real military force.' Gouverneur Morris, the rakish one-legged New Yorker serving as a delegate from Pennsylvania, had shrewdly identified the reason for the Southerners' enthusiastic nationalism in an earlier speech. A new Constitution would force 'the Northern States. . . to bind themselves to march their militia for the defence of the S. States; for their defence ag[ain]st those very slaves of whom they complain.'[15] The might of all the states would be secured for the suppression of slave rebellions.

The New England delegates were far more hesitant than the Carolinians about national control over the state militias. Oliver Ellsworth of Connecticut warned, 'The whole authority over the militia ought by no means to be taken away from the States whose consequence would pine away to nothing after such a sacrifice of power.' He also thought the provision would be ineffectual – 'the Gen[era]l Authority could not sufficiently pervade the Union for such a purpose' and 'it must be vain to ask the States to give the Militia out of their hands.' Elbridge Gerry of Massachusetts concurred, remarking ominously that if this point 'be agreed to by the Convention, the plan will have as black a mark as was set on Cain.'[16]

[14] Madison's Notes, August 18, Farrand 2:326.
[15] ibid., 2:330-332; Madison's Notes, August 8, Farrand 2:222.
[16] Madison's Notes, August 18, Farrand 2:332.

Debating the Constitutional Settlement

When the signatories set their names to the Constitution on September 17 1787, its provisions for the militia seemed to favour the Carolinians over the New Englanders. Not only did it give Congress the power to raise an army and a navy, but it also provided for 'calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions' and for 'organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States.' Article II, meanwhile, made the president 'Commander in Chief. . . of the Militia of the several States, when called into the actual Service of the United States.' The only small concession offered was to leave to the states the power to appoint officers.[17]

As a result, the arrangements for the militia and for defence more generally were of considerable concern to the Anti-Federalists who soon took to the floors of their state ratifying conventions and the pages of their local newspapers to criticize the proposed Constitution. In December 1787, some of the delegates who had unsuccessfully opposed ratification in Pennsylvania published their 'Address and Reasons of Dissent' in the *Pennsylvania Packet and Daily Advertiser*. In the list of amendments they proposed to the Constitution, they demanded 'That the power of organizing, arming and disciplining the militia. . . remain with the individual states, and that Congress shall not have authority to call or march any of the militia out of their own state, without the consent of such state.' Their reasoning was simple: the new government would never need to raise standing armies in peacetime or to control the militia unless it lacked 'the confidence of the people,' in which case 'the government must be executed by force.'[18]

[17] U.S. Const. art. I, §8; U.S. Const. art. II, §2.
[18] 'The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania To Their Constituents,' *The Anti-Federalist: Writings by the Opponents of the Constitution*, ed. Herbert Storing & Murray Dry (Chicago, 1985), 208, 219-220.

The problem of the militia occupied the Pennsylvania Minority at length. They catastrophized about a possible future in which the federal government would exercise martial law over all male citizens 'probably from sixteen to sixty years of age,' and march 'the militia of Pennsylvania to New England or Virginia to quell an insurrection occasioned by the most galling oppression.' Through these apocalyptic visions, the Pennsylvanians drew out the internal contradictions of any plan to use the militia – a local force made up of ordinary citizens – as the first line of defence for the national government.[19]

Shortly after the 'Address' appeared in the *Pennsylvania Packet*, Alexander Hamilton responded to such criticisms in a series of *Federalist* essays devoted to the problem of defence. Hamilton mocked Anti-Federalist concerns, insisting that the militia was positively useless in its enormous ill-discipline. Worse than useless, however, the militia was economically inefficient. Paraphrasing Adam Smith's theory of the division of labour, Hamilton argued that a small peacetime army would be necessary because using the militia for long-term defensive projects, like the garrisoning of the western frontier against Indigenous nations, would take farmers and artisans away from their work, massively disrupting economic growth.[20]

Though he had attempted to smooth over the problem of the militia by essentially dismissing it from consideration, however, Hamilton was also forced to reckon with the role it played in the text of the Constitution. In *Federalist* XXIX, he posed a well-organized militia as the necessary counterpoint to a large standing army in peacetime. 'If a well regulated militia be the most natural defence of a free country,' he wrote, 'it ought certainly to be under the regulation and at the disposal of that body which is constituted the guardian of the national

[19] 'Address of the Minority,' *The Anti-Federalist*, 220-221.
[20] Alexander Hamilton, *Federalist* XXIX, 134; Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, ed. Edwin Cannan (2 vols., London, 1904), 1:7-10; Cress, *Citizens in Arms*, 44-56.

security.' He considered it 'a matter of the utmost importance that a well digested plan should as soon as possible be adopted for the proper establishment of the militia.'[21]

Henry Knox was waiting in the wings to provide such a plan. Since the Confederation period, Knox had been pondering ways of squaring Americans' republican fear of a standing army with the necessity of developing an efficient system of national defence for the young republic. By 1789, the newly appointed Secretary of War was ready to put his plan into effect. Through sweeping reforms, Knox hoped to make peacetime armies unnecessary in the new republic, replacing them with a fully nationalized, well-trained, and well-organized militia. 'If I am not acting under a delusion as sure as we exist as a republic, we must have a strong institution of the sort, or we shall have a standing Army, which I should exceedingly dislike,' he joked to Benjamin Lincoln, 'unless I commanded it.'[22]

As admirably republican as this sentiment was, Knox's plan was liable to the same criticisms as the militia provisions of the Constitution itself. Though it might do away with standing armies in peacetime, if it succeeded, it also threatened to destroy the very features that made the militia a republican institution: local organization, local affection, local accountability. This would form the substance of congressional opposition to the plan, with representatives from different states repeatedly asking how these universalizing provisions could be effectively enacted across communities so diverse in religion, economic structure, and cultural tradition as could be found in the United States. Moreover, Knox also planned to class the militia by age, and to require the youngest members – aged between 18 and 21 – to provide the bulk of military service. Despite the apparent advantages of training the nation's young men in the martial arts,

[21] Hamilton, *Federalist* XXIX, 132.
[22] MHS, P-40: Benjamin Lincoln Papers 1635-1964 (Microfilm Edition), reel 9, Henry Knox to Benjamin Lincoln, January 31 1790.

and placing the burden of service on those most physically suited to it, this provision also aroused considerable indignation among the representatives. [23]

The First Congress failed to pass any legislation to regulate the state militias, leaving the Second Congress to shred Knox's militia plan and pass, instead, an irredeemably weak Militia Uniformity Act in May 1792. In the meantime, however, the federal government faced British incursions into U.S. territory along the northern border, and conflict with Indigenous nations in the Ohio Valley. With only the scattered remains of the Continental Army still at its disposal, for more than two years the government remained heavily reliant on the state militia system. Knox and Washington were therefore drawn into difficult negotiations with Congress and with the state governments in the attempt to establish a command structure and pull together the manpower needed to address these threats.

## The Northern Border

In May 1790, Governor George Clinton of New York wrote to President Washington with a problem that threatened to embroil the state and the nation in a diplomatic crisis. A group of Canadian refugees had written to Clinton for help. These men had 'Personally servd in the American Army During the Late Unnatural War with Great Britain,' and been forced to flee their homes after the Revolution, settling just across the border at a place they called Point au Fer, 'on the West Banks of Lake Champlain.' The settlers were now being harassed and told to move on by British imperial officials. In their plaintive letter to Clinton, they claimed they had 'no Where to look for relief Should they be driven from their habitation but in the Indulgent Care of the Supreme Authority of this State.'[24]

[23] Cress, *Citizens in Arms*, 116-119; Richard Kohn, *Eagle and Sword: The Federalists and the Creation of the Military Establishment in America, 1783-1802* (New York, 1975), 129-134.
[24] George Clinton to George Washington, May 21 1790, *PGW* 5:411-414.

Although the border settlers had asked only for the attention of the governor, Clinton forwarded their complaint to the president. Almost a year later, in March 1791, Secretary of State Thomas Jefferson wrote to Washington that similar 'acts of force' had taken place in the District of Maine. Jefferson was unsure how the president should respond to such acts: 'The impossibility of bringing the court of London to any adjustment of any difference whatever, renders our situation perplexing.' He added that if the British hassled any other border settlers, the president might advise the states 'to repel force by force, & ask aid of the neighboring militia to do this and no more.'[25] Jefferson believed this matter could be addressed most effectively at the local level, at least for the time being.

In September 1791, the president received another letter from Governor Clinton. The situation on the border had not improved, and the governor was furious. 'The repeated Insults which our Citizens have experienced from the British; both before, and since my last Communications to your Excellency on this Subject have been extreamly mortifying,' he wrote. 'I was induced to ascribe this Conduct to the unauthorized Insolence of Inferior Officers at their advanced Posts and flattered myself that it would soon have ceased,' but he had since learned that 'the present meditated Incroachment is sanctioned by the Orders of the British Government.' The British had violated the Treaty of Paris by refusing to give up their military posts to the south of the established border, and New York had 'abundant Reason to complain of [their] Conduct.' Clinton informed the president that he knew he would be

> justified in issuing Orders to the Militia to repel the Invasion; but as this might be attended with Consequences which would probably terminate in an Interruption of the Peace of the Union; I have thought it most adviseable to submit the Matter to your Excellency's Consideration previous to my giving any Directions on the Subject.[26]

[25] Thomas Jefferson to George Washington, March 27 1791, *PGW* 8:12-13.
[26] George Clinton to George Washington, September 7 1791, *PGW* 8:501-502.

Here, Clinton posed a tricky question about his own powers under the Constitution. Article I, §10 reminded the states that they were not authorized to go to war 'without the Consent of Congress' – unless, of course, they were 'actually invaded, or in such imminent Danger as will not admit of delay.'[27] With the military personnel of a foreign power in fact breaching the border and threatening the inhabitants of the United States, Clinton's letter suggested that he would have good grounds for making use of this constitutional exception and calling up the militia. It was a show of consideration for the union, and of deference to the president, that he had refrained from doing so, especially since Secretary Jefferson had recently advised the president to allow the militias to handle any further incursions on the northern border.

Washington's reply made it clear that he did not agree with Jefferson's view. Though the president insisted that he felt 'a due concern for any injury, inconvenience or dissatisfaction which may have arisen . . . in respect to the state of New York,' he did not express agreement with Clinton's position that he would have been justified in responding to the British encroachments with armed force. 'In a point of such vast magnitude as that of the preservation of the peace of the union,' he wrote, 'the public welfare and safety evidently enjoin a conduct of circumspection, moderation and forbearance.' It was essential that any action against the British 'should be the result of a deliberate plan – not of an accidental and hasty collision.' For the sake of clarity, Washington added, 'It is my desire, that no hostile measure be in the first instance attempted.'[28]

Washington's response to Clinton laid down his own interpretation of the Constitution's provisions on the military chain of command in the federal system. Though the document might appear to grant New York the right to respond to the invasion by force, in practice, the governor must consult the president before taking action. Washington informed

[27] U.S. Const. art. I §10.
[28] George Washington to George Clinton, September 14 1791, *PGW* 8:527-529.

Clinton that he would send an agent to Lake Champlain 'to ascertain and report to me whatever may take place.'[29] The federal government was now in control of the situation.

The problem of the Lake Champlain settlements reveals an underacknowledged aspect of the politics of federalism in the immediate post-ratification period. Ratification did not automatically shift the focus of popular political attention from the state governments to the federal government, even though the Constitution had materially altered the relative jurisdictions of the two. Some citizens either did not know or did not care that the federal government was now responsible for matters that had previously been the preserve of the states. As a result of their Revolutionary War service, the settlers thought themselves 'Intitled to the Attention of the State,' and committed themselves to 'the Indulgent Care of the Supreme Authority of this State' in the face of foreign military harassment.[30]

This situation continued in New York for a number of years, as Governor Clinton reported to his legislators in January 1794. 'Important posts on our northern and western frontiers,' he told them, 'are still possessed by foreign troops.' Carefully, he added, 'I am aware, that a notice of this aggression is more immediately within the province of the Federal Government . . . but certain complaints have been made directly to me, by persons holding lands under grants from this state, and also by others whose property has been taken from them, within our territory, under authority derived from the British Government.' Although this was now technically the responsibility of the federal government, these circumstances 'forbid my observing a silence on this head.'[31] For their part, Washington and his administration were now making a concerted attempt to help. John Jay's negotiations in London would extract

[29] George Washington to George Clinton, September 14 1791, *PGW* 8:527-529.
[30] George Clinton to George Washington, May 21 1790, *PGW* 5:411-414.
[31] *Journal of the Senate, of the State of New-York, at their Seventeenth Session*, 4.

from the British government a promise to abide by the terms of the Treaty of Paris and remove its troops from military posts to the south of the border.[32]

War on the Frontier, 1790-1792

As the new government struggled to its feet over the summer of 1789, the president was flooded with letters from the West, where settlers in Virginia's Kentucky District and in the Northwest Territory found themselves involved in armed confrontations with members of local Indigenous nations. Arthur St. Clair, governor of the Territory, asked permission to call out militia units on the frontier, and Henry Knox began to investigate the possibility of an organized retaliatory mission against the Northwest Indians.[33]

From the beginning it was clear that the expedition would be reliant on militia support. As things stood, what remained of the U.S. Army was dispersed throughout the backcountry, hardly in a fit state to take on a powerful confederacy of Indigenous nations. Knox and Washington lobbied Congress for regular troops and fortifications to create a buffer between the frontiersmen and the Indians, but the representatives and senators were hesitant, troubled by the expense for a government whose taxation apparatus was in its infancy, and the suspicion that the regiment Washington had requested might germinate into a full-blown standing army. When the national legislature authorized a mere battalion of four hundred men for the expedition, Governor St. Clair requested 1,000 militiamen from Kentucky, and 500 from Pennsylvania.[34]

In the autumn of 1790, General Josiah Harmar led an expeditionary force composed of a few hundred regulars and 1,500 frontier militiamen against the Northwest Confederacy. Their

[32] James Roger Sharp, *American Politics in the Early Republic: The New Nation in Crisis* (New Haven, 1993), 117.
[33] Kohn, *Eagle and Sword*, 92-98.
[34] ibid., 99-102.

mission was, generally speaking, a disaster. In December, Henry Knox forwarded a letter from Harmar to President Washington. Harmar wrote that while '100, or 120 Warriors were slain,' his own force had sustained a loss of 'about 180,' including two federal officers 'and a number of valuable militia officers.' Washington had anticipated bad news for some time, and was ready to blame Harmar, writing to Knox in November, 'I expected *little* from the moment I heard he was *a drunkard*.'[35]

Before too long, however, it became clear to Secretary Knox that it had been the state militiamen, not their leader, who had disgraced the United States and secured certain defeat. Lieutenant Ebenezer Denny of the U.S. Army arrived in Philadelphia from the West on December 14 1790. He carried with him Harmar's General Orders, which captured the almost comical disorder of the militia's performance in the field. On October 20, an enraged Harmar described 'the shameful cowardly conduct of the militia who ran away and threw down their arms without firing scarsely a single gun.' On the march back to Fort Washington, Harmar threatened, 'if any officer or men shall presume to quit their ranks . . . the general will most assuredly order the artillery to fire on them.' In their first engagement under the new government, the state militiamen had displayed the pattern of behaviour that would broadly characterize their performance in battle up to and including the War of 1812: poor discipline, insubordination, and desertion, almost to the point of mutiny.[36]

As the administration prepared for another assault on the Northwest Indians the following year, however, they realised they would have to turn yet again to the militia to fill out their forces. In September 1791, Governor Arthur St. Clair once again found himself negotiating with Kentucky's county lieutenants 'for the purpose of obtaining such number of

[35] Henry Knox to George Washington, December 14 1790, *PGW* 7:70; George Washington to Henry Knox, November 19 1790, *PGW* 6:668-670.
[36] Henry Knox to George Washington, December 14 1790, Enclosure: General Orders of Josiah Harmar, October 20 1790, *PGW* 7:74; Kohn, *Eagle and Sword*, 107-108.

militia as . . . would be necessary to enable the Army to accomplish the objects which had been directed.'[37]

In his discussions with local militia leaders, St. Clair encountered a question that would engage the attention of both state and federal leaders repeatedly over the decades to come. When, where, and according to what laws could the militia be called out by the federal government? Although the Constitution authorized federal command of the state militias under certain circumstances, Congress was still dragging its feet in crafting the legislation that would put this power into effect.

Acknowledging the role of the governor as commander-in-chief of the state militia, Secretary Knox had written to Virginia's governor, Beverley Randolph, on St. Clair's behalf in July 1791. Knox had informed Randolph that St. Clair had been authorized by the president to call out a part of the Kentucky militia, and asked him to take any measures 'which would add efficiency to the call of the General.'[38] Randolph had consulted his executive council, who had advised that the brigadier general in command of the Kentucky militia be instructed to co-operate with St. Clair's requests.[39]

Despite these preparations, when St. Clair met with the county lieutenants in Lexington on September 3 1791, they told him there were still obstacles to the call-up. Their principal objection was that 'there was no General Law by which recusants could be punished.' The failure of Congress to pass militia regulations, they claimed, meant the federal government had no coercive power over militiamen who refused to muster. Because the men were being called out by the federal government rather than the governor of Virginia, the state militia law would also be useless in bringing them to heel, 'for that law warranted a draught under the authority

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[37] Henry Knox to George Washington, October 1 1791, PGW 9:37-40; Kohn, *Eagle and Sword*, 109-110.
[38] Henry Knox to the Governor of Virginia, July 15 1791, *Calendar of Virginia State Papers*, ed. William Palmer et al. (Richmond, 1875-93), 5:342-343, cited in *PGW* 9:12-14.
[39] *Journals of the Council of State of Virginia*, ed. Henry McIlwaine et al. (5 vols., Richmond, 1931 –), 5:309, cited in *PGW* 9:12-14.

of the executive of the State Government only and that authority was wanting.' If the militiamen could not legally be coerced by either the state or the federal government, the lieutenants would have a very difficult time getting them to muster at all.[40]

Ultimately, St. Clair convinced the Kentuckians to put away their legal quibbles, and they agreed to a militia draft, reassuring him that they acknowledged the authority of the federal government in this sphere.[41] True to their previous form, the militiamen then fled in the midst of battle without firing a shot. A group of sixty later deserted *en masse*.[42] 'St. Clair's Defeat' was the military fiasco of the decade, an ambush in which a smaller force led by Little Turtle (Miami) and Blue Jacket (Shawnee) killed well over half of the Americans in the field, and wounded many of those remaining.[43] The militia had once again proved a disappointment.

Washington and Knox attempted to make the best of the Northwest disaster by pressing for further congressional action on military preparedness, emphasizing in particular the need for regular troops, as opposed to militiamen, in frontier conflicts. In March 1792, Washington signed into law 'An Act making further and more effectual provision for the protection of the Frontiers,' which gave him five regiments of 960 men each on three-year enlistments.[44]

Though Knox and Washington seemed finally to have given up on the idea of the militia as an effective means of national defence, St. Clair's Defeat also forced Congress into action on a national militia bill. In May 1792, more than two years after Secretary Knox had submitted his plan for militia reorganization, the national legislature finally passed 'An Act more effectually to provide for the National Defence by establishing an Uniform Militia throughout the United States.'[45]

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[40] Arthur St. Clair to Henry Knox, September 4 1791, quoted in *PGW* 9:37-40.
[41] ibid.
[42] Kohn, *Eagle and Sword*, 114-115.
[43] Nichols, *Red Gentlemen & White Savages*, 137-140.
[44] 1 Stat. 241; Kohn, *Eagle and Sword*, 123; Nichols, *Red Gentlemen & White Savages*, 140.
[45] 1 Stat. 271.

Historians to date have generally considered this title to be a misnomer, and with good reason. Even at the time, it seemed unlikely that the act could 'more effectually provide for the National Defence,' since the legislative process had stripped Knox's original plan of its most effective components. Every interest group in the union seemed opposed to one or other of Knox's provisions. Representatives from urban and commercial areas rejected classing by age, as it would distress craftsmen and mechanics by stealing away their young apprentices into service. Southern congressmen feared that uniform organization would threaten the particular arrangements of their mounted slave patrols by limiting the number of cavalry units available to them. Pennsylvania Quakers harboured concerns about the rights of conscientious objectors in a federalized militia. Hovering in the ideological background, meanwhile, were the militia's origins as a local organization, whose identity might be lost through nationalization.[46]

Under the 1792 act, each militiaman was to provide 'himself with the arms, ammunition and accoutrements required' – proposals to establish a national standard even for musket bores had been nixed during the debates. The militias were to be 'arranged into divisions, brigades, regiments,' et cetera, 'as the legislature of each state shall direct.' No uniform training schedule was arranged, and the federal executive was given no power to fine or otherwise punish militiamen who refused to muster. Most significantly, the House of Representatives refused to grant the president, in this act, the power to call out the militia on his own authority.[47] Although Congress would attempt to rectify this omission in an act of 1795, the 1792 act created a lasting precedent according to which the president would request the permission of the state governors before calling out their militias. The Uniform Militia Act of 1792 set the stage for decades of negotiation between the state and federal governments over when and where the militia could be used for national defence, and who could command it.

[46] Cress, *Citizens in Arms*, 120; Kohn, *Eagle and Sword*, 133-134.
[47] 1 Stat. 271-272.

State Reforms

In early June 1792, Governor John Hancock laid before his Massachusetts legislators the 'Act for regulating the Militia of the States,' recently sent down from Congress. Hancock commented that the act 'appears to me to be quite consonant to the Constitution of the General Government,' assuring the representatives, 'I shall, as commander in Chief of the Militia of this State take every measure within my power to render the Militia respectable under it.'[48]

The legislators were less enthusiastic about militia reform. After submitting the act to the General Court, Hancock waited eight months for some sign of action before he decided to send a reminder. The governor suggested 'a revision of the Laws respecting the Militia of this Commonwealth. By turning your attention to this important object perhaps you may discover such defects as will be expedient to remedy.'[49] While Massachusetts dawdled, the Virginia and Georgia legislatures had already passed militia reform acts in December 1792. Both had explicitly acknowledged the need 'to adapt' their militia laws 'to comply as nearly as may be convenient with the act of Congress of the United States.'[50]

By the time Massachusetts at last passed 'an act for regulating and governing the militia of the Commonwealth' at the end of June 1793, the state statute books revealed how completely Henry Knox's dream of uniformity had been thwarted. Admittedly, the states' militia reforms did have some things in common. All three states imposed service on white male citizens aged eighteen to forty-five, per the act of Congress; they created regiments, battalions, and companies along county lines, and required enrolled militiamen to attend training days and inspections four to six times a year. All of them imposed fines of varying amounts on officers and men for failure to attend musters, lack of appropriate accoutrements, and unmilitary behaviour on parade,

[48] *Acts and Resolves of Massachusetts, 1792-1793*, 683.
[49] ibid., 698.
[50] Watkins & Watkins, *Digest of the Laws of the State of Georgia*, 458; Hening 13:340.

giving them – technically, at least – the coercive power over their militiamen that the federal government still lacked.[51]

Despite these similarities, however, the organization, management, and civic purpose of the militia still varied considerably across the different states. The institution of slavery was a key determinant. Both Virginia and Georgia levied significant fines on men who failed to turn out for slave patrols. In Virginia, each offence would cost an ordinary private three dollars, while failure to turn out for a regular muster set him back only fifty cents. In Georgia, militia officers who failed to organize or attend patrols 'shall be subject to a fine not exceeding fifty dollars or be cashiered, at the option of a court martial.' The Virginia law laid out in grisly detail the object of the monthly patrols: to 'visit all negro quarters and other places suspected of entertaining unlawful assemblies of slaves . . . or any others strolling about from one plantation to another, without a pass from his or her master, mistress, or owner.' The patrols would 'carry them before the next justice of the peace, who, if he shall see cause, is hereby required' to subject offenders to 'any number of lashes, not exceeding twenty, on his or her bare back.'[52] The governments of the slave states were clear in their legislation that the principal role of the militia was the violent enforcement of racial hierarchy.

All three states had different modes of choosing officers, which often meant significant decentralization and delegation of authority from state to local governments, or even to the people. While Virginia's adjutant general, major-generals, and brigadiers were chosen 'by joint ballot of both houses' of the General Assembly, almost all her other officers were to be commissioned by the governor on the basis of recommendations from 'the courts of the several counties and corporations.'[53] In Georgia, company officers were to 'be nominated by election of the citizens liable to bear arms in each company district,' and the lieutenant colonels and

[51] Hening 13:340-355; Watkins & Watkins, *Digest of the Laws of the State of Georgia*, 458-467; *Acts and Resolves of Massachusetts, 1792-1793*, 380-403.
[52] Hening 13:351, 354-355; Watkins & Watkins, *Digest of the Laws of the State of Georgia*, 463-464.
[53] Hening 13:342.

major commandants were in turn to be elected by the 'captains and subalterns of companies.'[54] Not only did the federal government not have clear control over the militias under the new laws, but neither did the states themselves.

A highly significant difference between these three states lay in how they proposed to equip and provision their militias, whether for a muster or for actual service. Massachusetts was by some distance the best organized of the three. The June 1793 legislation included the office of Quartermaster General, who was to supply the artillery companies with their heavy guns and ordnance. The act also aimed to impose a uniform standard for firearms across the entire state militia. 'Five years from the passing of this Act, all Musquets for arming the Militia as herein required shall be of bores sufficient for balls of the eighteenth part of a pound,' the act ordered.[55]

Most of the Massachusetts measures relied on the New England institution of town government to keep the troops in working order. If the town selectmen judged any local militia member 'unable to Arm and equip himself . . . they shall at the expence of the Town provide for and furnish' the necessary arms and accoutrements. These weapons and equipment were to be considered the property of the town, not of the individual militiaman. If the militia should be called into actual service, the men were to bring with them 'three days provision,' after which the town governments were to 'cause carriages to attend them with further supplies of provision and Camp Utensils,' sending the bill to the state. Towns which failed to supply provisions would be subject to 'a fine not exceeding fifty pounds.'[56]

These measures may seem haphazard, but they were thoughtful and detailed by comparison with the other states' plans for provisioning their troops. Neither Virginia nor Georgia created any kind of uniform standard for weapons, nor did either of them provide for the arming of men too poor to arm themselves, though they did – like the act of Congress –

[54] Watkins & Watkins, *Digest of the Laws of the State of Georgia*, 459.
[55] *Acts and Resolves of Massachusetts, 1792-1793*, 389-390.
[56] ibid., 390, 399.

exempt 'all arms, ammunition, and equipments of the militia' from 'executions and distresses,' meaning such items could not be taken from their owners as payment for debt. Advance plans for provisioning the troops were almost non-existent in both states. Under the Virginia law, the governor 'may appoint . . . quarter-masters, commissaries, and other staff' and 'take . . . measures for procuring, transporting, and issuing all stores which may be necessary' whenever the militia was called into actual service. In those circumstances, the commanding officers of regiments were also authorized to provide 'by impressment or otherwise . . . for each company, a waggon, team, and driver, six axes, and six camp-kettles' to be returned after their tour was over.[57] All provisioning was to be arranged at the very last minute.

The state militia laws were slapdash on paper, and even more so in practice. How far they were actively enforced is a difficult question to answer across the union, but the evidence suggests that the different states generally paid little attention to their forces both before and after the passage of the reforms. The very same December day that the Virginia General Assembly passed its new militia law, for example, it also passed an act remitting all militia fines imposed since the last time they had passed an act remitting militia fines.[58] These laws may have given the state governments formal coercive powers over their militiamen, but the extent to which they in fact exercised those powers appears to have been limited.

## The Whiskey Rebellion

The extent of the ill-discipline prevailing among the state militias became clear to the Washington administration in the autumn of 1794 as it prepared to resolve a backcountry crisis by force. In attempting to use the state militias to put down the Whiskey Rebellion, the federal

[57] Hening 13:349, 355.
[58] Hening 13:527.

government was forced to deal with both the deficiencies of the 1792 Militia Act and the states' lax approach to militia discipline.

In 1792, Secretary of the Treasury Alexander Hamilton encouraged Congress to pass an excise tax on domestically-produced spirituous liquors.[59] The act prompted massive resistance in the trans-Appalachian West, notably in Pennsylvania, where excise collectors were threatened, attacked, and forced to flee back to Philadelphia in the summer of 1794. Although local judges claimed they could cope with the insurgency alone, Secretary Hamilton successfully insisted that the president mount an armed federal campaign against the rebels.[60]

Focusing principally on the politics of the rebellion either at the federal level or among the people, existing accounts usually note, but rarely stress the essential involvement of multiple state governments in the preparations for quashing the insurgency. Obliged by the inadequacies of the 1792 Militia Act to ask the state governors for permission to call out their militias, the Washington administration had little difficulty in securing the co-operation of the governors of Pennsylvania, Virginia, Maryland, and New Jersey in putting down the rebellion. While the federal government found that it could count on the states to support its efforts, however, the question remained whether the state governments could count on their own militias.

As Washington's cabinet first contemplated a military response to the rebellion at their meeting of August 2 1794, Pennsylvania state officials in attendance insisted that the state judiciary would be able to quell the disorder through its usual procedures. But after weeks of attempted negotiation with the rebels, the governors of the surrounding states were prepared to admit that a peaceful solution was no longer possible. Governor Thomas Mifflin of Pennsylvania had hoped that the conflict could be resolved at the local level, and had told Washington that he worried his militia might not comply with a call to arms against the rebels. By September 12, however, even Mifflin was ready to 'assure' Washington 'that I shall comply

[59] 1 Stat. 267.
[60] Slaughter, *The Whiskey Rebellion*, 3, 96-105.

with the utmost dispatch and alacrity' with the request for militia mobilization.[61] Alexander Hamilton, performing the duties of the absent Secretary of War, told Governor Henry Lee that the president 'counts implicitly on the efficacious and affectionate support of the Government and People of Virginia.'[62]

While federal officials were making ready to lead the militiamen against the insurgents, and to arm them with weapons 'from the magazines of the United States,' the governors struggled to meet the militia quotas imposed on them by the president. Part of this was a matter of personnel. Numerous militiamen across the states fundamentally disagreed with the decision to put down the Whiskey Rebellion by force, and they showed their displeasure by refusing to turn out. Indeed, some officers and men actively discouraged their fellows from mobilizing. A Federalist newspaper columnist later accused U.S. Senator Stevens Thomson Mason of such conduct, claiming Mason had told Virginia militiamen under his command 'that the excise law is an odious one' in the midst of the crisis. Militiamen in western Maryland were reported to have gone over wholesale to the rebels, and in the backcountry regions of several neighbouring states, commanders requested special escorts and guards to prevent unruly locals from seizing stores of weapons intended for the federal army.[63]

The problem was not just that western militiamen were politically unreliable and generally apt to side with the rebels. The state militia laws were also broadly useless, in terms both of coercing service from qualified men and of facilitating the efficient provisioning of the troops. In Virginia, it quickly became clear that the fines provided for in the 1792 militia reforms would do almost nothing to deter men who were unwilling to serve. Such recusants would either pay their fines or simply absent themselves without leave. Militia officers were largely

[61] Thomas Mifflin to George Washington, September 12 1794, *PGW* 16:673; Cornell, *A Well-Regulated Militia*, 81-83; Slaughter, *The Whiskey Rebellion*, 198.
[62] Alexander Hamilton to Henry Lee, August 21 1794, *PAH* 17:121.
[63] 'From the Columbian Mirror, Printed at Alexandria, Virginia.', *Gazette of the United States* (August 4 1795), p. 2, col. b &c; Cress, *Citizens in Arms*, 124.

powerless to stop them. Maryland's law included no measures for provisioning troops called into national service, which prevented the state from filling its quota in a timely fashion. As Governor Thomas Sim Lee complained to Hamilton on September 30 1794, 'The marked Inadequacy of our Militia Law has placed obstacles in my way which it has been impracticable wholly to surmount.'[64]

Once the suppression of the rebellion was complete, however, President Washington expressed gratitude to 'the army of the Constitution' which had 'marched . . . 300 miles over rugged mountains' to suppress the insurgency. He also acknowledged 'the efficacious and patriotic cooperation, which I have experienced from the chief magistrates of the states, to which my requisitions have been addressed.' For some of the governors, indeed, co-operation had involved considerable sacrifice. After Henry Lee accepted overall command of the federal forces in western Pennsylvania, the legislature of Virginia removed him as governor as punishment for this overt show of support for the national government. Washington ended his speech not with gratitude, but with a renewed appeal to the national legislature to 'carr[y] to its fullest energy the power of organizing, arming, and disciplining the militia; and thus provid[e], in the language of the Constitution, for calling them forth to execute the laws of the Union, suppress insurrections, and repel invasions.'[65]

Just a few months after the suppression of the Whiskey Rebellion, in February 1795, Congress did pass a new act, which would be used to justify all future calls upon the state militias. It made no further moves toward building a truly uniform federalized militia, as Washington had asked, but it did give the president the power to call out the militia whenever there was 'imminent danger of invasion from any foreign nation or Indian tribe.' Most

[64] Thomas Sim Lee to Alexander Hamilton, September 30 1794, *PAH* 17:294-295; Cress, *Citizens in Arms*, 124.
[65] George Washington to the United States Senate and House of Representatives, November 19 1794, *PGW* 17:181-190; Cress, *Citizens in Arms*, 126; Beeman, *The Old Dominion & The New Nation*, 135-136.

significantly, it did not include any requirement for the order to go through the governor, allowing the president 'to issue his orders . . . to such officer or officers of the militia, as he shall think proper.'[66] This provision did not change much in the period under consideration here. The precedent had already been set that militia mobilization was a matter for the governors as much as for the federal executive. Federal use of the militia continued to be subject to negotiation between the federal and state governments.

Defending the Maritime Frontier

During Washington's first term in office, the military leadership of the republic was principally concerned with the problem of warfare in the West, but even before the U.S. Army defeated the Northwest Indian Confederacy at the Battle of Fallen Timbers in August 1794, Secretary Knox was forced to turn his attention back to the seacoast. As France and Britain attempted to impose economic sanctions on each other and on neutral nations, American merchants were caught – literally and figuratively – in the crossfire, and Washington's cabinet knew that war in North America could result.[67] Knox therefore pressed for an overhaul of coastal defences, driving an effort to rebuild mouldering colonial and Revolutionary forts from Portland to the St Marys River.

In 1794, George Washington put his name to the Naval Act, creating a permanent American navy to ward off the maritime threat. The same year, the War Department hired a troop of French engineers to repair, or build from scratch, defensive works at critical points along the eastern seaboard. But as Arthur Wade has shown in his extensive research into the history of American coastal defences, federalism would make the design, placement, construction, and manning of these forts an immensely complicated exercise. Several state

[66] 1 Stat. 424.
[67] Rao, *National Duties*, 103.

governments refused or failed to cede the land requested by Congress for fortification efforts, while others decided to build their own fortifications. Meanwhile, the task of manning the seacoast forts remained divided between the artillerists of the U.S. Army and the local militias.

After gaining funds for the building programme through a congressional appropriations act of March 1794, the federal government now pressed the states to cede the necessary land at crucial points along the coast. These were the harbours of the great cities and smaller trading ports, and strategic locations like Ocracoke Inlet in North Carolina's Outer Banks and the mouth of the St Marys River, which divided Georgia from Spanish Florida. The French engineers Knox recruited to build the forts were forced to negotiate with private individuals, municipal authorities, and state governors as they attempted to complete their task.[68]

In Salem, Marblehead, and Gloucester, Massachusetts, it was the town selectmen who played the greatest role in organizing land cessions and deciding, with engineer Stephen Rochefontaine, where exactly their respective forts were to be placed. The Maryland state government had been making preparations to cede land for a federal fort at Whetstone Point in Baltimore since 1793. These works on the Patapsco River would achieve lasting fame as Fort McHenry, where the star-spangled banner flew during the War of 1812. Governor Mifflin of Pennsylvania ceded the fort on Mud Island, in the Delaware River below Philadelphia, to the federal government in 1795.[69]

At other sites, however, the particular wishes of state governments and private landholders made the engineers' jobs more difficult. In Boston Harbour, the Massachusetts state government refused to cede either Castle William, a well-placed colonial fort now used as a prison, or Governor's Island, where Congress had hoped to mount twelve guns. The War Department handed over $2,000 of federal money for repairs to the Castle and left the defence

[68] Arthur Wade, 'Artillerists and Engineers: The Beginnings of American Seacoast Fortifications, 1794-1815,' (PhD thesis, Kansas State University, 1977), 9-10, 13-15.
[69] Wade, 'Artillerists and Engineers,' 17, 19-20.

of Boston to the state and local governments for the time being. The government of South Carolina likewise refused to cede any suitable land in Charleston, and instead used federal money to undertake their own repairs. Federal engineer Nicholas Martinon rebuilt Fort Johnston on the right bank of the Cape Fear River in North Carolina in 1795, even though it was still uncertain whether the federal government had title to the land.[70]

In New York Harbour, matters were even more complicated. As Governor Clinton's message to his legislators in January 1794 revealed, it was not at all clear to him who bore the responsibility for managing the defence of the city. 'It might be imputed to me as a want of duty,' he said, 'were I to omit reminding you of the naked and exposed condition of our principal sea-port, and urging the necessity of immediately providing for its defence.' But the governor did not know whether the state or federal government should act to remedy the situation. 'If it shall be thought,' he added, 'that this appertains exclusively to the general government, you will excuse me for mentioning it.' If the federal government should take over exclusive responsibility for the fortifications, the governor hoped only that 'you will cheerfully co-operate in such as may be judged necessary . . . to provide for our defence.'[71]

As it turned out, the legislators were not prepared simply to cooperate. Disagreeing with the federal government over the best place to build the defences, they decided to construct their own, state-funded forts while allowing the federal government to place its guns in a different part of the harbour. The state of New York claimed it would use the opportunity of building fortifications to pay off its debt to the federal government. In the end, then, the War Department began building works in the inner harbour – the Battery and Governors Island – while the state, on the advice of Baron Steuben, chose to focus on the Narrows, planning

[70] Wade, 'Artillerists and Engineers,' 17-19, 21.
[71] *Journal of the Senate, of the State of New-York, at their Seventeenth Session*, 4.

fortifications in Brooklyn and Staten Island. Construction continued on both sets of fortifications, at vast expense, for well over a decade.[72]

From the earliest years of the fortification project, the New York assembly began to realize that such an ambitious project was probably beyond its means. In 1794, state treasurer Gerard Bancker recorded that the government had spent £60,000 – over half of its total expenditure for the year – on its military and defensive projects, of which £30,000 was laid out exclusively on the fortifications for New York Harbour.[73] This was still far from enough, as Governor Clinton pointed out in his address to the legislature at the beginning of 1795: 'Although the appropriations for fortifications were in the first instance incompetent . . . the advanced price of labour and provisions has since increased the inadequacy.'[74] The costs were so enormous that the legislature began to question the responsibility of state governments for coastal defence, passing a resolution in April 1795 that 'the United States ought to be at [i.e., responsible for] all expenses that any State in the Union have or may be at in erecting or repairing fortifications for the security of commerce and defence of their harbours.'[75]

In November 1796, Governor John Jay pointed out to the legislature that 'the fortifications that were begun are still unfinished,' and wondered if the lawmakers might consider designing a new tax regime to support the state's defensive projects.[76] In October 1798, the state legislature appropriated $150,000 to be spent on both the federal defensive structures in the inner harbour and the state project at the Narrows.[77]

By 1806, the New York works were still grinding on, unfinished. Secretary of War Henry Dearborn reported to Congress that the state had hired its own engineers to survey the harbour and decide on the best means of fortifying it, but the plans they had come up with were

[72] Wade, 'Artillerists and Engineers,' 18-19.
[73] *Journal of the Assembly, of the State of New-York. At their Eighteenth Session* (New York, 1795), 24.
[74] ibid., 4.
[75] ibid., 84.
[76] *Journal of the Senate of the State of New-York; At their Twentieth Session* (Albany, [1797]), 5.
[77] Wade, 'Artillerists and Engineers,' 92.

prohibitively expensive and had been abandoned. In the midst of the Napoleonic Wars, with international conflict already threatening the United States, this significant commercial port remained without complete or reliable coastal defences. On 20 March 1807, the state legislature passed a resolution calling for further congressional funding for the defence of the city, though there was still division over which site – the inner harbour or the Narrows – should be the principal focus of construction efforts. In January 1808, as the commercial states came to grips with Jefferson's Embargo, Governor Daniel Tompkins reported, 'The appeal to the general government for an efficient and permanent fortification in the city of New York, has not failed to excite their serious attention to that subject.' What exactly the results of that appeal had been remained as yet unclear.[78]

By the time James Madison delivered his first annual message to Congress in November 1809, the defences of New York were still not completed, as the president told the assembled legislators. Only at the end of 1810 did the state government indicate that it would consider ceding land in Brooklyn and Staten Island for the construction of federal defences at the Narrows. The negotiations for this cession were not completed until after war had been declared on Great Britain in 1812.[79]

The de facto shared responsibility of the state and federal governments for the early fortification of the eastern seaboard slowed and complicated the progress of this important engineering project. Despite initially demanding primary responsibility for the construction of defences in New York Harbour, New York's state legislature quickly discovered that it would have to rely on considerable federal financial support if its plans were ever to come to fruition. Once the cost of the undertaking became clear, state officials began to insist that the federal government should bear ultimate responsibility for the city's defence.

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[78] *Journal of the Assembly of the State of New-York: At their Thirty-First Session*, 6.
[79] Wade, 'Artillerists and Engineers,' 181-182, 200, 249-250.

Arming the Militia

After the Uniform Militia Act of 1792 failed to provide for the arming of the state militias by the federal government, several of the states – as we have seen above – realized they would themselves have to act if their militiamen were to have guns in their hands when called into national service.

The states faced two problems in the sphere of arms and accoutrements. First, many of their citizens were much too poor to purchase their own, as required by the act of Congress. In the very earliest congressional debates on the Militia Bill, back in 1790, Josiah Parker of Virginia called this to the attention of his colleagues: '[I]t must be well known that there are many persons who are so poor that it is impossible they should comply with the law.' At the time, a decent gun was worth about two weeks' wages for a labourer, making it prohibitively expensive.[80] Massachusetts attempted to remedy this problem in 1793 by providing for the town governments to supply arms to militiamen unable to purchase weapons themselves. In New York, as Governor John Jay reminded his legislators in 1796, the state constitution 'direct[ed] that "a proper magazine of warlike stores, proportionate to the number of inhabitants, be forever, at the expence of this State . . . maintained and continued in every county."' At various points before 1812, New Jersey, Pennsylvania, and Virginia also gave out state-owned muskets to militiamen in active service, while others required citizens to buy their own arms.[81]

Though they might be willing to arm their poorest militiamen, however, the states faced a second problem that was harder for them to solve independently: the scarcity of useable firearms in the United States. As Lindsay Schakenbach Regele points out in her work on founding-era weapons manufacturing, in the 1790s 'the nation's arsenals, half-filled with old

[80] Annals of Congress, 1st Congress, 3rd Session, 1851.
[81] *Acts and Resolves of Massachusetts, 1792-1793*, 380-403; *Journal of the Senate of the State of New-York, at their Nineteenth Session*, 5; Lindsay Schakenbach Regele, *Manufacturing Advantage: War, the State, and the Origins of American Industry, 1776-1848* (Baltimore, 2019), 62.

European models in need of repair, did not meet American military needs.' Nor could traditional, small-scale domestic gunsmithing compensate for this deficiency, which left the American military establishment, such as it was, dependent on imported firearms. Schakenbach Regele adds that, in any case, 'cash-strapped state governments found it difficult to afford contracts with private manufacturers.'[82]

Recognizing that, in the midst of ongoing trade difficulties with warring European nations, the United States should not remain reliant on imported weapons, Congress in 1794 passed a bill creating two federal armouries, one at Springfield in the Connecticut Valley of western Massachusetts, and the other on the Potomac at Harpers Ferry, Virginia. In 1795, production began at Springfield, where workers repaired old weapons and began producing a standard American firearm based on the French Charleville musket. For the remainder of the decade, the going was slow, and Springfield produced fewer than 1,000 muskets per year. The War Department shopped around for private contractors to remedy the deficiency, meeting with varying success in filling its orders thanks to the limited development of industrial manufacturing in the early United States.[83]

This federal effort bore little fruit for the militias, however, because the federal government still claimed no statutory responsibility for supplying them with arms. Southern states, in particular, wanted for guns to arm their slave patrols, but – as one congressman noted in 1798 – there were no large gun-makers in the region from whom to purchase new weapons. Some states did not have enough guns to arm even a quarter of their militiamen. Worse still, as the federal government attempted to fill its own arsenals, it consumed most of the available manufacturing resources in the nation, so that states were made to compete with a considerably better-funded rival for private weapons contracts. Rep. James Bayard of Delaware told the House of Representatives how his state legislature had appropriated funds for the purchase of

[82] Schakenbach Regele, *Manufacturing Advantage*, 29, 48, 51.
[83] ibid., 49-55.

arms and had sent the governor to Philadelphia 'to make a contract for these terms, but he found all were engaged for the government of the United States.'[84]

Bayard's remarks came in debates on a 1798 bill allowing the federal government to sell arms to the states. As finally enacted on July 6, the legislation provided for an appropriation of $400,000 to pay for the production of 30,000 stands of arms for this purpose. Any that remained unsold might be 'delivered to the militia, when called into the service of the United States,' if no other weapons could be found for them.[85] Members from major slaveholding states were enthusiastic about the new law – since 'they contain[ed] within their own bosom a dangerous enemy,' and had in many cases hitherto been unable to supply themselves with sufficient weapons for the purpose of oppressing their enslaved populations, they were glad that guns were finally available to be bought.[86]

The 1798 act, while an improvement on the haphazard arrangements of the previous decade, certainly did not provide a comprehensive solution to the problem of equipping the militia, as Thomas Jefferson realised after assuming the presidency in 1801. In line with his Republican principles, Jefferson and his administration aimed to strip back the national military establishment constructed by Washington and Adams to its barest, cheapest bones, and to return the United States to a primary reliance on the militia.[87] The major drawback to this plan was that it would require the militia to be put in full working order – an unenviable task.

In 1802, Jefferson called for a review of the militia system, and Congress acquiesced by passing a law requiring the state adjutants general to submit annual returns of troops and equipment. This was technically required under the Uniform Militia Act of 1792, but appears to have fallen off completely in the intervening decade.[88]

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[84] Annals of Congress, 5th Congress, 2nd Session, 1927-1928, 1931; Schakenbach Regele, *Manufacturing Advantage*, 48.
[85] 1 Stat. 576.
[86] Annals of Congress, 5th Congress, 2nd Session, 1928.
[87] Cress, *Citizens in Arms,* 153.
[88] 1 Stat. 271; 2 Stat. 207; Cress, *Citizens in Arms*, 153.

What the returns revealed was not encouraging. By January 1803, ten states out of sixteen had failed to provide any returns at all. Many of those which did arrive in Washington were 'defective,' Secretary of War Henry Dearborn noted, because individual regiments had failed to file with their state governments, and some states had lumped all of their forces together 'in the column headed "Infantry,"' rather than differentiating between grenadiers, light infantry, riflemen, and so on.[89] In other words, the War Department still had no idea how many troops were available for service or what their particular competencies might be.

In 1803, Secretary Dearborn informed the president that Governor John Mercer had been troubling him for new muskets for the Maryland militia. It seemed that Maryland had given part of its store of arms to the militia of neighbouring Virginia, and was now asking for the federal government to make up the difference. The Secretary of War was indignant, noting that the governor had 'furnish[ed] no evidence of an ingagement on the part of the U.S.' to supply new weapons. Jefferson was more pensive, scribbling on the bottom of Dearborn's memo that the whole matter 'depends on the general question whether a state is bound to furnish arms, ammunition &c. as well as men?' 'on the whole,' Jefferson observed, 'it seems to me more convenient & equal that the US. should furnish arms to all. and that it is advantageous to encourage the states to lend us in distress, by a ready replacement of what they lend.'[90]

Dearborn's reply to Mercer denied federal responsibility for replacing the arms and equipment he had claimed, but noted that a question of 'considerable importance' was at stake, and suggested that the matter be taken up with Congress. Years later, the Jeffersonians' major victory in militia organization would be the 'Act making provision for arming and equipping the whole body of the Militia of the United States,' signed into law on April 23 1808. The act

[89] Thomas Jefferson to the House of Representatives, January 5 1803, and enclosures, *PTJ* 39:271.
[90] Memorandum from Henry Dearborn, with Jefferson's Notes, [on or before 28 May 1803], *PTJ* 40:441-442.

provided an annual appropriation of $200,000 to allow the federal government to supply the militia, by manufacture or purchase, with 14-15,000 muskets a year.[91]

As far as transforming the militia into a serviceable first line of defence, the 1808 act was the most useful piece of legislation passed by Congress up to that point. The pressing problem of turning the militia into a reliable national military force, however, had still not been solved.

Enforcing the Embargo

The previous chapter explored how Thomas Jefferson jeopardized the success of his own Embargo by displaying unwarranted confidence in the state governors and their commitment to supporting federal policies. While the unforced error of granting governors the right to circumvent the commercial restrictions was certainly embarrassing, an even bigger problem for Jefferson was the epidemic of violent popular resistance that sprang up in the ports of the United States during the Embargo, especially in the commercial northeast. Here, Jefferson and Treasury Secretary Gallatin found themselves reliant on the governors and their militias to secure the federal custom houses against mob action. Though allowing the state authorities to bear the responsibility for the ugly spectacle of government repression could be politically useful, federal reliance on state forces also backfired when governors refused to come to the aid of embattled customs officials.

In August 1808, Secretary Gallatin went to New York and met with Governor Daniel Tompkins, who told him that 'an insurrection' had broken out in the town of Oswego, on the shores of Lake Ontario. When Gallatin wrote to Jefferson, he assured the president that these reports were exaggerated. 'There is no more insurrection than has been on Lake Champlain or

[91] 2 Stat. 490; Cress, *Citizens in Arms*, 169; Regele, *Manufacturing Advantage*, 62.

Passamaquoddy,' he wrote, 'but certainly a forcible violation of the embargo by such combination as prevents the execution of the law and would justify the calling of militia.'[92]

This represented a political problem for the Jefferson administration. For Jefferson to declare Oswego 'in a state of insurrection' would commit him to federal action to end the rioting, and would only increase popular animosity towards the Embargo. Fortunately for Gallatin and Jefferson, however, the federal system worked in their favour here. Governor Tompkins remained the commander-in-chief of the New York state militia, and as such had perfect authority to call up forces to keep the peace. Gallatin suggested to Jefferson that he ask Tompkins to summon the militia 'on his own authority,' while quietly assuring the governor that 'the expense would be defrayed by the United States.' Tompkins, Gallatin reported, 'felt the force of the observation,' and said that he would travel upstate to oversee the militia action himself.[93]

This was a moment in which the federal executive experienced the positive side of state power. Thanks to Tompkins's acquiescence, the Embargo would be enforced without the appearance of oppressive federal action. But the federal leadership was well aware that the governors could not, generally speaking, be relied upon to co-operate freely with the administration at all times. It would be necessary to give the president the means to enforce the law on his own terms. To that end, on January 9 1809, Congress passed a fifth and final law in support of the Embargo, known as the Enforcement Act. Per §11 of the Act, 'it shall be lawful for the President of the United States, or such other person as he shall have empowered for that purpose, to employ such part of the land or naval forces or militia of the United States' for several purposes, including preventing vessels from leaving port, detaining those suspected to be in violation of the embargo, 'and also for the purpose of preventing and suppressing any

[92] Albert Gallatin to Thomas Jefferson, August 9 1808, *WAG* 1:403.
[93] ibid., 1:402; Albert Gallatin to Thomas Jefferson, August 17 1808, *WAG* 1:405; Albert Gallatin to Thomas Jefferson, August 23 1808, *WAG* 1:409.

armed or riotous assemblage of persons, resisting the custom-house officers in the exercise of their duties.'[94]

The day after the act was passed, Gallatin encouraged Jefferson to ensure that the collectors knew their rights, and to authorize them, in times of trouble, 'to call either on [the] military force of [the] United States, if any [be] within his district, or on such part of the militia as he may himself select.' There was just one hitch: Gallatin could not recall 'whether, at any time, militia has been called without first applying to the governor; and how far it may be eligible, if it has never been done, to do it in this instance.' He wondered 'what was the mode pursued under the Act of 1794?', though he was in fact referring to the law of February 1795, which, in the aftermath of the Whiskey Rebellion, enacted 'that whenever the laws of the United States shall be opposed, or the execution thereof obstructed, in any state. . . it shall be lawful for the President of the United States, to call forth the militia of such state. . . and to cause the laws to be duly executed.'[95] In spite of this explicit statutory power, Gallatin knew it was customary that the president would not call up the militia independently of the state governor.

Thus, Secretary of War Henry Dearborn took up his pen on January 17 1809 to request the governors' co-operation in keeping order during the Embargo. 'To put an end to this scandalous insubordination to the laws,' he requested, on behalf of the President, that the governors 'appoint some officer of the militia, of known respect for the laws, in or near each port of entry within your State. . . with orders, when applied to by the collector of the district, to assemble immediately a sufficient force of his militia, and to employ them efficaciously to maintain the authority of the laws respecting the embargo.' The governors were also asked to tell the collectors which local militia officers they should apply to for help.[96]

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[94] 2 Stat. 506.
[95] Albert Gallatin to Thomas Jefferson, January 10 1809, *WAG* 1:449; 1 Stat. 424.
[96] Circular Letter from the Secretary of War to the Governors, January 17 1809, *WTJ* 11:87.

In New England, however, the governors could not be relied upon to turn their law-enforcement capabilities to helping the federal executive. Jeremiah Olney had occupied the collectorship of Providence, Rhode Island since the First Federal Congress, and had gained the trust of the local mercantile population such that he was able to maintain their goodwill even in the dark days of 1808. On January 23 1809, however, this happy period came to an end when two or three hundred citizens raided his custom house and took back a vessel that had been seized by his officers. Olney wrote to the governor of Rhode Island, a Republican named James Fenner, for assistance, but was told that the state would not be sending the militia to enforce the Embargo. In fear for his life amidst the violence, Olney resigned his office after almost 20 years at his post.[97]

Repeated attempts to give the president and federal officials the legal right to call out the militia without securing the permission of the governor had now failed between 1789 and 1808. The laws of Congress could not stand up to the force of custom, under which the federal government obtained the services of the militia only by going through the state leadership. The consequences of this development became frighteningly clear as the United States prepared to go to war against a major European power for the first time since independence.

1812

In the spring and summer of 1812, President James Madison made ready to call out the militia of the several states. In April, Congress gave the president permission to call out 100,000 militia for a period of six months, and on June 18, Madison signed a declaration of war against Great Britain, catapulting the nation into conflict.[98]

[97] Rao, *National Duties*, 155-156.
[98] Gordon Wood, *Empire of Liberty: A History of the Early American Republic, 1789-1815* (New York, 2009), 672-674.

New Englanders were outraged by the declaration, with many Federalists convinced, as Mark Peterson has written, 'that Madison had allied the United States with France by drumming up war against Britain on false pretences.' After years of trade restrictions, war might be the final nail in the coffin of New England's mercantile economy and – just as importantly – would tear thousands of men from their families, jobs, and communities, drawing them into the harshly disciplined yet immoral and blasphemous world of soldiery. Such were the concerns voiced by Yankee pamphleteers, editors, and clergymen through the summer of 1812.[99]

As the federal government readied itself for a possible invasion attempt by the Royal Navy, Madison's Secretary of War, William Eustis, was aware that American military preparedness was not all that it could have been. There was little in the way of a general staff; the officer corps was miserably depleted, with only twenty-nine field-grade officers (colonels and majors); and the entire regular army of the United States numbered 6,744 men.[100]

Then there was the perplexing matter of the seacoast defences. Since 1794, private, state, and federal funds had been used to repair and rebuild a number of significant forts up and down the eastern seaboard. Several of these forts were still the official responsibility of the state governments in June 1812. In Charleston, while two federal defensive works stood in the harbour, Fort Mechanic, in the city itself, had been repaired and was now manned exclusively by the state militia. Though the federal government had finally, in 1808, purchased suitable land on Governor's Island in Boston Harbour for the construction of defensive works, the arrangements to purchase from the state government the critical plots in Brooklyn and Staten Island which would allow for the construction of proper defences for New York Harbour remained incomplete by the summer of 1812.[101]

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[99] Mark Peterson, *The City-State of Boston: The Rise and Fall of an Atlantic Power, 1630-1865* (Princeton, 2019), 430-431; Lawrence Delbert Cress, '"Cool and Serious Reflection": Federalist Attitudes toward War in 1812,' *JER* 7/2 (Summer 1987), 124-126.
[100] Wade, 'Artillerists and Engineers,' 230; Wood, *Empire of Liberty*, 673-674.
[101] Wade, 'Artillerists and Engineers,' 218, 221, 239, 249-250.

Even forts owned and operated by the federal government were rarely fully garrisoned by the troops of the United States, because there simply were not enough. Adjutant General of the United States Abimael Youngs Nicoll reported to the Secretary of War on June 6 1812 that a total of 1,874 regular troops were currently manning the coastal defences. By his calculations, meanwhile, 3,000 men would be needed to man the defences of New York Harbour alone, and 750 more for the crucial works at Newport, Rhode Island.[102] The federal government would once again be reliant on the militia to fill the gaping holes in the American military establishment.

On April 15, Secretary Eustis dispatched a circular to the state governors, calling upon them 'to take effectual measures to organize, arm and equip, according to law, and hold in readiness to march at a moment's warning, their respective proportions of one hundred thousand militia.' Massachusetts was asked to produce 10,000 men, and to submit 'correct muster rolls and inspection returns' to the War Department as soon as possible.[103] The state's Republican governor, Elbridge Gerry, leapt into action. 'This day I have issued General Orders for compleating this Business,' he wrote to Madison on April 25, '& have given to Major Generals Varnum, Ulmer, & Willis, who are firm friends to the national Government, the command of the Divisions.' Aware of the widespread discontent within his state, Gerry had done his best to appoint only politically reliable officers to the most important commands, though he regretted 'that in the state of our political affairs it was found impracticable to supply all the places with such characters.'[104]

Gerry's efforts were all in vain. On June 5 1812, he was succeeded as governor by former U.S. senator and committed Federalist Caleb Strong. A week later, the Secretary of War wrote to Strong 'to request your excellency to order into the service of the United States, on

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[102] Wade, 'Artillerists and Engineers,' 239, 274-275.
[103] William Eustis to the Governor of Massachusetts, April 15 1812, printed in 'Correspondence.', *Virginia Argus* (November 19 1812), p. 1, col. a.
[104] Elbridge Gerry to James Madison, April 25 1812, *PJM* Presidential Series 4:349-350.

the requisition of Major General Dearborn,' who was now commanding general of the U.S. Army, 'such part of the quota of militia from the state of Massachusetts . . . as he may deem necessary for the defence of the sea coast.'[105]

And then, nothing. Dearborn himself wrote to Governor Strong on June 22 to reiterate his request for 'your excellency to order fourteen companies of artillery, and twenty seven companies of infantry, into the service of the United States, for the defence of the ports and harbours of this state, and the harbour of Newport.' Dearborn added that the urgency of the situation had increased now that war had officially been declared. He wrote again on June 26, noting that no action appeared to have been taken by the governor to order the requested detachments into service. 'A sense of duty compels me,' the general added, 'to solicit such information on the subject as the urgency of the case demands.'[106]

That same day, Governor Strong sent Dearborn a bewildering reply. He remarked only that 'governor Gerry, on the 25th of April last, ordered that ten thousand men should be detached from the militia of this state; but I am informed by the adjutant general, that the returns of those detachments have not come to hand, except in a very few instances.' The letter contained no assurances that Strong was taking steps to remedy the situation, or that the men would soon be on their way.[107]

A month later, on July 21, Secretary of War William Eustis followed up on Dearborn's enquiries with a panicked letter to Governor Strong. 'By the information received from major general Dearborne, it appears that the detachments from the militia of Massachusetts, for the defence of the maritime frontier . . . have not been marched to the several posts assigned to them.' Eustis explained to Strong that the militia detachments were needed at the seacoast forts so that the regular troops of the U.S. Army could be marched 'to the northern frontier.'

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[105] William Eustis to Caleb Strong, June 12 1812, printed in 'Correspondence,' p. 1, col. a.
[106] Henry Dearborn to Caleb Strong, June 22 and June 26 1812, printed in 'Correspondence,' p. 1, col. a & b.
[107] Caleb Strong to Henry Dearborn, June 26 1812, printed in 'Correspondence,' p. 1, col. b.

Moreover, 'the danger of invasion, which existed at the time of issuing the order of the president, increases.' He once again urged Strong to order 'the immediate march of the several detachments specified by general Dearborne, to their respective posts.'[108]

The same process was also playing out in other New England states, notably Connecticut, where Governor Roger Griswold had received similar letters from Eustis and Dearborn between April and June. When Dearborn's request for artillery and infantry to be sent to the coastal forts at New London and New Haven landed on Griswold's desk in late June, the governor called together his executive council and laid the letter before them. Together, the governor and council determined that Connecticut

> could not constitutionally comply with Maj. General Dearborn's requisition, on the grounds that none of the exigencies recognised by the constitution and laws of the U. States were shown to exist, and that the portion of militia for the post of New-London, viz. four companies, was called for *as companies*, without the proper field officer by law appointed to command them, and were called for expressly *to be placed under the command of an officer of the U. States commanding at that station*.[109]

Griswold asked his lieutenant governor to write to Secretary of War Eustis that the government of Connecticut would not be complying with the requisition. The Secretary responded with 'his surprise, that after a declaration of war against a nation having a powerful fleet, a part of which was on our coast,' Griswold could imagine that the United States was not 'in imminent danger of invasion,' adding that 'he was instructed by the President to say, that such danger did exist.' Eustis also noted that Dearborn's call for militia support 'clearly recognized the right of the State to appoint the officers of the militia,' though, 'according to the rules and articles of war,' they would be commanded by federal officers when in the actual service of the United States.[110]

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[108] William Eustis to Caleb Strong, July 21 1812, printed in 'Correspondence,' p. 1, col. b.
[109] 'Hartford, (Con.) August 10. Detached Militia.', *Alexandria Daily Gazette* (August 19 1812), p. 2, col. a.
[110] ibid., p. 2, col. a & b.

Dearborn, recognizing that the position of the federal government was threatened in this crisis, was inclined to negotiate with Connecticut to ensure that they would turn out troops for the defence of the coast. On July 17, he assured Governor Griswold that 'the companies destined for Fort Trumbull, may be commanded by one of the Majors, that shall have been detached with the State's quota.'[111]

But despite Dearborn's willingness to compromise, the federal government did not adequately answer the New Englanders' objections to the militia requisition, and on August 6 1812, Griswold issued a proclamation that 'a compliance with the requisition has been by me refused.' The governor claimed that he had been caught between his wish to serve the United States and his commitment to the state of Connecticut. 'It is the high and solemn duty of the chief magistrate, according to his oath of office,' he noted, 'to "maintain the lawful rights and privileges of this state, as a sovereign, free and independent state."' He regretted 'that any differences of opinion existed as to the cases in which the militia might be demanded,' but insisted, 'it became my duty to obey the constitution of my country.' Which constitution he was referring to was not clear.[112] Caleb Strong, meanwhile, requested an advisory opinion from the supreme court of Massachusetts, whose judges held that governors retained the authority to decide whether the militia should be called out in a particular state, and that the right of the president to call out the militia was dependent on the consent of the governors.[113]

The New England crisis dragged on far beyond these initial volleys. In 1814, the delegates to the Hartford Convention raised again the original objections to the militia requisition of 1812 as they contemplated New England's secession from the union. They expanded on

[111] 'Hartford, (Con.) August 10. Detached Militia.,' p. 2, col. b.
[112] 'By His Excellency Roger Griswold, Esq., *Governor and Commander in Chief in and over the State of Connecticut, in America.* A PROCLAMATION.', August 6 1812, printed in *Alexandria Daily Gazette*, August 19 1812, p. 2 col. d & p. 3 col. a.
[113] Cornell, *A Well-Regulated Militia*, 131.

Connecticut's claim that the federal government had no right to call the militia into service under the circumstances which existed in the summer of 1812. 'It will not be contended,' the delegates reported, 'that by the terms used in the constitutional compact, the power of the national government to call out the militia, is other than a power expressly limited to three cases' – that is, that 'the laws shall be opposed, or an insurrection shall exist, or an invasion shall be made.' The New England governors had determined that there was no legitimate threat of invasion, and found that there were therefore no constitutional grounds for the nationalization of the state militias.[114]

The other major objection to the federal government's behaviour vis-à-vis the New England militia was the matter of officers. The Hartford Convention, like the Connecticut government, argued that the attempt to place the militia under the leadership of high-ranking officers of the U.S. Army, often outside the boundaries of their state, represented 'a manifest evasion of that provision of the Constitution which expressly reserves to the States the appointment of the officers of the militia.'[115] What was the use of a state power to appoint officers, they asked, if they were not to be allowed to command their men?

These alleged abuses of federal power did not drive the New England states to secession in 1815, but Congress was nevertheless concerned by the threat of a fractured American union, and the Senate Committee on Military Affairs took it upon itself to investigate the causes of 'the serious differences of opinion . . . between the executive authority of the United States and the authorities of some of the individual states, respecting the relative powers of the general and state governments, over the militia.' To that end, committee chairman William Branch Giles

[114] *The Proceedings of a Convention of Delegates, from the States of Massachusetts, Connecticut, and Rhode-Island* (Hartford, CT, 1815), 8.
[115] *Proceedings of a Convention of Delegates*, 8.

of Virginia called upon Eustis's successor as Secretary of War, James Monroe, for a report just a few days after the conclusion of the Hartford Convention.[116]

'The governors of Massachusetts, Connecticut, and Rhode Island,' Monroe wrote,

> have objected to the requisitions . . . on the following grounds: 1st, That the president has no power to make a requisition for any proportion of the militia, for either of the purposes specified by the constitution, unless the executive of the state . . . admits that the case alledged exists, and approves the call. 2d, That when the militia of a state should be called into the service of the United States, no officer of the regular army had a right to command them, or other person, not an officer of the militia, except the President of the United States in person.[117]

Monroe proceeded to make some broad claims about the powers the federal executive had heretofore exercised over the state militias. He argued,

> The power which is . . . given to congress . . . to provide for calling forth the militia for the purposes specified in the constitution, is unconditional. It is a complete power, vested in the national government, extending to all these purposes. If it was dependent on the assent of the executives of the individual states, it might be entirely frustrated. The character of the government would undergo an entire and radical change.[118]

The Secretary of War went on to give an account of the Whiskey Rebellion which, he thought, proved his point. 'In the year 1795 [sic],' Monroe wrote, 'the President of the United States . . . called out the militia of several of the states, including the militia of Pennsylvania' to suppress the insurrection. 'In this instance the assent of the governor of Pennsylvania to the existence of an insurrection was not asked. General Washington . . . relied exclusively on the powers of the general government for the purpose.' Few historians would go so far, and nor, perhaps, would Washington himself, who had consulted with Mifflin and the other governors at length and

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[116] William Branch Giles to James Monroe, January 7 1815, printed in 'Report on the Militia. *In Senate of the United States*.', *Virginia Argus* (March 29 1815), p. 1, col. d.
[117] James Monroe to William Branch Giles, February 11 1815, printed in 'Report on the Militia.,' p. 1, col. e.
[118] ibid.

acknowledged his debt to them in his address to Congress after the rebellion had been suppressed. Monroe also insisted that 'by the law of 1796 [sic], the President is authorized to call forth the militia for the purposes mentioned in the constitution, by a direct application to the militia officers, without any communication with, or reference to, the Executives of the individual states.'[119]

## Conclusion

The New England crisis of 1812-15 captured many of the practical and constitutional ambiguities introduced by early attempts to build American military preparedness after ratification. James Monroe could well make the claim that the Constitution and federal statute – the supreme law of the land – granted to the president the power to call up the militia without recourse to the governors. At the same time, however, Monroe overlooked more than twenty years of precedent by which the governors had been consulted, as well as the practical matter that, for a federal government reliant on the state militias for defence, the governors were an essential part of the chain of command, both for intelligence and organizational purposes. The language of the requisition letters sent by federal officials to the states in 1812 confirms this arrangement: governors were *requested to order* their militias into federal service. While this is perhaps a semantic distinction, it reveals the inability or at least the great unwillingness of the federal executive to order the governors to act, even if they had a legitimate constitutional and statutory basis for doing so.

The situation of the seacoast defences had also contributed to the crisis. Despite Henry Knox's best intentions, in 1794, of assuming full federal responsibility for the coastal defences,

[119] James Monroe to William Branch Giles, February 11 1815, printed in 'Report on the Militia.,' p. 2, col. a.

lack of funds on the part of the federal government and a lack of conviction on the part of the states had left the coastal fortifications in a jurisdictional no-man's-land for the best part of the period between the original construction efforts and the War of 1812. In many cases, the states had retained responsibility for fortifying the coastline for much of that period, and even where the federal government had funded fortifications, it had not provided for a Corps of Artillery capable of garrisoning both the western frontier and the coastal forts. While the staunchest Federalists of the 1780s and 1790s had recognized that a long-term reliance on the militia for the garrisoning of the forts would be unworkable, and had advocated the construction of a small but effective standing army to fill this crucial role, the federal government found itself in 1812 in precisely the situation that Alexander Hamilton had warned against in 1788.

Monroe's statement of a 'complete' national power over the militia did not functionally resolve any of the ambiguities highlighted by the struggle over the New England requisition. High Federalists like Timothy Pickering, once Washington's Secretary of War and now serving as a congressman from Massachusetts, continued to insist vehemently that the power of the federal government over the militia was limited, and that the law of 1795, allowing the president to call out the militia when there was 'imminent danger of invasion,' was actually unconstitutional, since the text of the Constitution itself allowed Congress to call forth the militia to 'repel Invasion' only. Pickering further emphasized the importance of allowing room for gubernatorial discretion. 'It being the <u>right</u> & <u>duty</u> of the governor of a state,' he argued,

> to judge of the cause assigned by the President, whether it comes within the provisions of the constitution – the rule that he shall issue his orders only to the governor or commander in chief of the state, for whose militia the call is made, becomes indispensable.[120]

[120] MHS, P-93: Caleb Strong Papers, 1657-1818 (Microfilm Edition), reel 1, Timothy Pickering to Caleb Strong, January 19 1815; U.S. Const. art. I §8.

In Pickering's view, it was a crucial part of the governor's role to oversee the constitutionality of presidential action in moments of crisis like the recent war.

It was 1827 before the Supreme Court officially contradicted the New Englanders' arguments, ruling in the case of *Martin* v. *Mott*, 'the authority to decide whether the exigencies contemplated in the Constitution of the United States . . . have arisen is exclusively vested in the President, and his decision is conclusive upon all other persons.' But this case would not end presidential reliance on the state governors for military assistance, nor the union's uncomfortable dependence on the citizen militia as its first line of defence, which would continue until the Civil War.[121]

[121] *Martin* v. *Mott*, 25 U.S. 12 Wheat. 19 (1827) at 19; Stephen Engle, *Gathering to Save a Nation: Lincoln and the Union's War Governors* (Chapel Hill, 2016).

Indian Affairs in Intergovernmental Perspective:
State Subversion of Federal Indian Policy and the Dispossession of Indigenous People in the Founding Era

## Introduction

By the time of George Washington's inauguration in 1789, the question of who should have the final say in regulating contact between whites and Indigenous people had for some decades been a thorny one. Since the late colonial period, central authorities had made repeated attempts to take over control of Indian affairs from provincial governments and individual settlers in British North America. In 1755 the British government appointed two superintendents of Indian affairs – a system copied by the new American government after the Revolution – and in 1761 made the purchase of Indian land conditional upon the approval of the Board of Trade. 1763 brought the Royal Proclamation prohibiting British settlement beyond the Appalachians. The Continental Congress attempted to take up the imperial mantle amid widespread and bloody violence between whites and Indians in the revolutionary West. Like the British government before it, Congress failed throughout the 1780s to enforce meaningful restrictions on the appropriation of Indian lands by state governments or individual settlers.[1]

The arrival of the Constitution and the national government in the late 1780s is seen as a major turning point by some authorities on Indian affairs in the early republic. Stuart Banner writes that before 1787, 'repeated efforts to strengthen the hand of the central government in matters concerning the Indians were all unsuccessful,' but Stephen Rockwell concludes that 'the federal government managed to work effectively toward federal dominance' during the 1790s. The text of the Constitution and the federal statute book would seem to confirm this

[1] Deborah Rosen, *American Indians and State Law: Sovereignty, Race, and Citizenship, 1790-1880* (Lincoln, NE, 2007), 10-11; Alan Taylor, *American Revolutions: A Continental History, 1750-1804* (New York, 2016), 261; Stuart Banner, *How the Indians Lost Their Land: Law and Power on the Frontier* (Cambridge, MA, 2005), 118.

interpretation. Article I, section eight reserved to Congress the power 'To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes,' while section ten prescribed that 'No State shall enter into any Treaty, Alliance, or Confederation' or, 'without the Consent of Congress...engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.' The 1790 Trade and Intercourse Act made it illegal 'to carry on any trade or intercourse with the Indian tribes, without a license for that purpose under the hand and seal of the superintendent of the department, or of such other person as the President of the United States shall appoint for that purpose.' Moreover, the act declared 'That no sale of lands made by any Indians, or any nation or tribe of Indians [in] the United States, shall be valid to any person or persons, or to any state...unless the same shall be made and duly executed at some public treaty, held under the authority of the United States.' Rockwell shows that these powers allowed the federal government to prevent all-out war in the mid-1790s, and gave it reasonably effective control of the Indian trade.[2]

In a recent state-of-the-field article on early national state-building, Gautham Rao writes that the federal government proved itself to be 'contested but capable' in enforcing its Indian policy. Rockwell, too, argues that 'time and again, contentious relations between state and federal officials resolved themselves in favour of federal authority' in the sphere of Indian affairs. This interpretation ignores decades of conflict and multiple instances of illegal dispossession of Indigenous people by state governments. A view of Indian affairs that takes account only of federal records and the federal vision is a severely limited one. Looking at white interactions with Native nations from the perspective of state governments reveals serious constraints on federal control in this area. As Deborah Rosen has written, the several states never stopped regulating their own relationships with local Indian nations, in spite of federal attempts to assert total control over Indian affairs. Rosen argues for a renewed understanding

[2] U.S. Const. art. 1 §8, §10; 1 Stat. 137; Banner, *How the Indians Lost Their Land*, 119; Rockwell, *Indian Affairs and the Administrative State*, 55, 61.

of 'the decentralized nature of much of American Indian policy.' This chapter explores how state governments used law, diplomacy, and violence to stymie federal policies and transfer land from Indian to white ownership.[3]

Congress's order that 'no sale of lands made by any Indians . . . shall be valid to any person or persons, or to any state' unless made at a federal treaty negotiation was ignored by the states.[4] Their governments had long since created their own legal mechanisms for organizing and regulating the gradual transfer of Indian land to white owners, and they took little notice of the congressional injunction. In Massachusetts, guardianship and trusteeship schemes dating to the colonial period remained in use as a means of controlling Natives and their property, and the state legislature continued to oversee land sales. The New York state legislature set important precedents in attempting to extend its criminal jurisdiction over the Oneida and Seneca nations, and used legal trickery to obtain parcels of their land on a permanent basis.

New York also became a central site of illegal Indian diplomacy as it worked to extend white settlement and infrastructure development into the upstate region where DeWitt Clinton would later oversee the construction of the Erie Canal. Governors, legislators, and negotiators trampled the Constitution and the Trade and Intercourse Acts in their treaties with the Haudenosaunee until the vast majority of the remaining Natives scattered westward in acts of self-removal from their homelands. In the young state of Tennessee, meanwhile, Governor John Sevier did not hold his own illegal treaties with the Cherokee, but he did use diplomacy to manipulate the federal government into breaking its promises to the Indians. A case study on the enforcement of the Treaty of Holston in the late 1790s shows how state officials worked up and down federal chains of command in the attempt to sway Indian policy in their own

[3] Rao, 'The New Historiography of the Early Federal Government,' 117; Rockwell, *Indian Affairs and the Administrative State*, 55; Rosen, *American Indians and State Law*, ix-xi.
[4] 1 Stat. 137.

favour, and endeavoured to drive a wedge between Indian nations and the federal government which claimed to support Native interests.

In principle, the federal government was not opposed to using violence against Indigenous nations, as shown by its bloody campaign against the Northwest Indian Confederacy, which concluded in victory for Anthony Wayne's forces at the Battle of Fallen Timbers in 1794. A bigger concern even than gaining Indian lands, however, was keeping the military commitments of the United States to a manageable level in the new nation's vulnerable early years. The War Department scarcely had the resources to fight in the Ohio Valley, let alone on multiple fronts across the Trans-Appalachian West. This was the motivation behind the treaty policy pursued by the Federalists during the 1790s: to keep the peace until the federal government was strong enough to fight. State governments, however, did not share this commitment to peace, and expended their own resources to support violent action against Natives in fraught border regions. The state of Georgia, with its vast backcountry, became a flashpoint for violence between white settlers and Creek Indians in the 1790s. Against the express instructions of the federal government, Georgia officials pursued a policy of vengeance against Native settlements that brought them perilously close to war.[5]

This chapter explores the enforcement of federal Indian policy within the states in the early national period. The clear lines that federal legislators drew in their heads and in their laws – the divisions between white land and Indian land, and between state jurisdiction and federal jurisdiction – were often abandoned or ignored by state officials. Hierarchies and chains of command became muddled as politicians at the state level, dissatisfied with mere congressional representation, attempted to get their way by whatever means necessary. Federal officials were often either incapable of enforcing the laws of the United States, or unwilling to do so when the state governments stood in their way.

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[5] Nichols, *Red Gentlemen & White Savages*, 3-4, 137-140, 160; Rockwell, *Indian Affairs and the Administrative State*, 39.

Inventing Federal Indian Affairs

The original apparatus of federal Indian administration consisted of only a few individuals. At the top was the President, and below him, the Secretary of War, who oversaw Indian policy through the War Department, with the assistance of the Superintendent of Indian Trade after 1806. Only in 1824 were U.S.-Indigenous relations granted their own department, the Bureau of Indian Affairs. The federal government continued after 1789 to rely on a system established by a 1786 Ordinance for the Regulation of Indian Affairs: two districts – one to the north, and one to the south of the Ohio River – with one superintendent for each. The superintendents chose their own deputies, other agents with specific areas of responsibility. For individual treaties, the president appointed groups of commissioners on a case-by-case basis.[6]

In 1790, 1793, 1796, and 1799, the national legislature passed temporary Trade and Intercourse Acts, which expired at the end of each Congress and were replaced at the next meeting. The acts all had the same goal: to restrict trade and land transfers to licensed individuals, and to punish white violence against Indigenous people. Once Congress recognized that its injunctions were being ignored, the 1796 Act described in detail the course of the boundary line between American and Indian territory, and toughened penalties for trespassing, violence, and illegal land purchases. The same year, Congress also created a system of trading houses, known as factories, through which the federal government sought to consolidate its control of the Indian trade. By selling useful goods at subsidized rates, the government aimed to undercut exploitative white traders and reduce tensions in the borderlands. In 1802, rather than passing another temporary Trade and Intercourse Act, Congress passed a permanent one, which would provide the statutory baseline for U.S.-Indigenous relations until 1834. Like most of those that came before it, this act allowed 'trade or intercourse with Indians living on lands

[6] Rockwell, *Indian Affairs and the Administrative State*, 52, 73-74, 78.

. . . within the ordinary jurisdiction of any of the individual states,' but banned whites from living, trading, or surveying in Indian country without a license from the superintendent of their district.[7]

Once Congress had passed these laws, however, it did not follow automatically that they would be easy for the federal government to enforce. In November 1796, the newly-minted Superintendent of Indian Affairs south of the Ohio River, North Carolina planter Benjamin Hawkins, travelled to the Georgia frontier to take up his post, recording in his diary and correspondence his difficulties in balancing the interests of the federal government, the state governments, and the powerful Creek (Muskogee) nation.

As winter set in, travelling on horseback and on foot, Hawkins set off on a tour of Creek towns, making a detailed journal of his trip as he went, replete with environmental, agricultural, anthropological, and political detail. While his interests were many and varied, his priorities were clear. His job was to oversee the execution of the treaties agreed between the southern Indian nations and the United States, and of the 1796 Trade and Intercourse Act. This would entail, primarily, putting together commissions to run the boundary line between Indian country and the states – a task that involved bringing together representatives of Native nations, representatives of the individual states, federal agents, and usually an armed guard, provided by the federal government, for the protection of the several parties from one other. His new job would also involve bringing Indian trade in the region into line with the licensing system specified by the 1796 act. Finally, Hawkins – with the backing of the president and others in the government – hoped to begin a process of 'civilizing' the Indians into the system of plantation agriculture which he himself practised as an elite white North Carolinian.[8]

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[7] 1 Stat. 137-138, 329-332, 452-453, 469-474; 2 Stat. 139-146; Rockwell, *Indian Affairs and the Administrative State*, 61.

[8] Introduction, *CWBH*, vii-xix; Benjamin Hawkins to James McHenry, November 22 1796, *CWBH*, 13-14; Nichols, *Red Gentlemen & White Savages*, 177-178.

Hawkins soon found that knowledge and understanding of federal Indian policy in the region was minimal. Four months after the passage of the Trade and Intercourse Act by Congress, neither the members of the Creek nation nor the numerous white traders who lived among them had heard much about the federal government's initiatives. Hawkins met a Silesian trader named Christian Russell in the Upper Creek towns who was apparently unaware of federal policy. 'I inform him of the Law,' Hawkins wrote, 'and the penalties annexed to the violations, he said he was pleased with it and should conform to it and aid in its execution."[9]

Hawkins communicated the law in official meetings with leading figures in the nation, and also at private dinners or in casual conversation with the many women he met during his tour, whose male relatives were away hunting over the winter. In November 1796, Mrs Downing, with whom he was staying, told him she 'had heard the president's talk interpreted' and informed her relatives of 'the object of the government in sending [Hawkins] to them.' Men who had been away hunting were less informed. At the beginning of December, Hawkins met with The Terrapin, who asked him a series of questions about the law, and noted that while he had heard of the Trade and Intercourse Act already, he had not understood it 'so satisfactorily as now.' In January, Hawkins addressed a larger meeting of 'Micos and chiefs,' and explained the Federalists' desire 'to be at peace with all the world' and to introduce plantation agriculture. One leader laughed at Hawkins's insistence on the benefits of growing cotton, though others were more receptive to his plans.[10]

Hawkins worried that the decentralized political structure of the Creek nation would make enforcing federal policy even more difficult. In a letter to Secretary of War James McHenry, he noted that the presence of white traders in the region had done nothing to 'civilize' the Native people. As far as Hawkins could see, 'there is no law' within the nation. In fact, the

[9] Diary, November 29 1796, *CWBH*, 19.
[10] Diary, November 30 1796, *CWBH*, 20; Diary, December 4 1796, *CWBH*, 24; Diary, January 5 1797, *CWBH*, 55-56.

Creek system of justice relied on the taking of satisfaction by the victim's family from the perpetrator's family, rather than having punishment doled out by a central governing organization. This could make it difficult for leaders to control conflict with white settlers. Hawkins intended to impose a central government on the Creeks by setting up 'a national council, to meet once a year,' at the expense of the federal government.[11]

In attempting to regulate U.S. relations with the Creek nation and ensure the enforcement of the law, Hawkins had to fight for the co-operation of many other groups besides the Creeks themselves. In the Deep South, that meant dealing with the firm of Panton, Leslie & Co., a British-run trading concern operating out of Florida which dominated trade with the Creek nation. Accordingly, he wrote to William Panton in February 1797, confessing that he did not know exactly how he could 'be of service to you, but if you know wherein I can, and will do me the favour to call on me, I possess the decision, and will prove to you my readiness to assist you.'[12]

Even more important than Panton, Leslie & Co. was the state of Georgia, whose citizens represented the greatest threat to peace in the Creek nation. Hawkins found himself in the position of intermediary between the state and the Indians. Writing to an assistant agent in March 1797, he asked him to 'inform the Indians of the complaints sent in by the Governor [of Georgia] to the President,' and to tell them that any violent actions by any of their people against white Georgians could end in war. At the same time, Hawkins wrote to Governor Jared Irwin to impress upon him how the Creeks were working to 'prevent predatory parties from plundering and killing their neighbours.' A more difficult task than mere diplomacy, however, was the running of the boundary line between the state of Georgia and the Creek nation.

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[11] Benjamin Hawkins to James McHenry, January 6 1797, *CWBH*, 57; Claudio Saunt, *A New Order of Things: Property, Power, and the Transformation of the Creek Indians, 1733-1816* (Cambridge, 1999), 90-94.

[12] Benjamin Hawkins to William Panton, February 2 1797, *CWBH*, 69. The history of Panton, Leslie is sketched in John Devereux DeLacy to Thomas Jefferson, December 18 1801, *PTJ* 36:135-154.

Hawkins noted that the Creeks were afraid to send commissioners to mark the line 'unless I can give assurances that there will be a guard of regular troops, or be personally answerable for their safety.' To manufacture even the modicum of trust necessary for successful border enforcement was a monumental task given the years of violence that had thus far characterized the relationship between the Georgians and the Creeks.[13]

Hawkins's diaries from the Creek country capture some of the difficulties faced by federal officials in enforcing the laws Congress had made for the maintenance of peace in the West and the consolidation of U.S. power over Indian affairs. This chapter makes the case that the behaviour of state governments constituted a key barrier to the success of these policies in the early republic.

## State Law and Indian Land

Previous chapters have shown that the constitutional revolution at the federal level was slow to make itself visible in many parts of the early United States, as state legislators grappled with new questions and considered new reforms with every act of Congress they received. In the sphere of Indian affairs, however, the framers' vision of a new political hierarchy in which the federal government would govern Indian trade and treat with Indian leaders had almost no impact at all in certain areas. Carrying on the practices of the colonial and Confederation eras, states continued to observe old, and pass new, laws for the management of Native tribes and individuals within their borders.

While the federal government was appointing Indian agents and passing Trade and Intercourse Acts, state governments were also continuing to pass acts to regulate 'Indian affairs'

[13] Benjamin Hawkins to Colonel Gaither, February 15 1797, *CWBH*, 82-83; Benjamin Hawkins to Governor of Georgia, February 28 1797, *CWBH*, 90; Benjamin Hawkins to Timothy Barnard, March 7 1797, *CWBH*, 96.

within their borders. Most significantly, state legislatures were using statutes to maintain their accustomed position as gatekeepers of the private market in Indian lands. Although these were framed as measures for the protection of Native peoples from unscrupulous whites, such regulations did not inhibit the transfer of land from Indians to white settlers. Instead, they removed competition and drove down prices while facilitating dispossession.

After the turn of the nineteenth century, states increasingly moved to extend their criminal jurisdictions over Natives living within their borders, even those who lived on tribal lands. This premeditated attack on the foundations of Native sovereignty, which began in New York and migrated southward to Tennessee and Georgia, would ultimately become the pretext for the forced Removal of thousands of Eastern Woodland Indians from their homelands during the presidency of Andrew Jackson. The use of state statute law to control and dispossess Native peoples was a thread that stretched back more than a hundred and fifty years to the beginning of white settlement within the territory of the United States, a thread that remained unbroken by the advent of the new federal system and that connected directly to the violent acts of dispossession which characterized the American approach to Indian affairs in the nineteenth century.

From the 1630s onwards, most American colonies passed laws requiring potential purchasers to seek the permission of the colonial legislature before buying land from Native peoples. There were several purposes to these laws. They might help to improve security, preventing Anglo-Americans from settling areas beyond the colony's effective control. They were also framed as a way of protecting 'naïve' Indians from the fraudulent activities of frontiersmen. As settlement became increasingly entrenched, some legislatures also began to pursue a strategy of active control of Indians and their land, taking it upon themselves to put the property of Native peoples 'in trust' or 'under guardianship.' The concept of a fiduciary relationship between Native peoples and the U.S. government is a familiar one to historians of federal Indian affairs, but references to state guardianship schemes are much harder to find in

the literature. In Massachusetts, guardianship was already a longstanding practice by the time of the constitutional revolution, and it continued to operate into the nineteenth century much as it had during the reigns of George II and III.[14]

By a law of 1746, the General Court gave itself the power to appoint 'three proper persons . . . near to every Indian plantation in this province, guardians to the said Indians in their respective plantations.' These guardians were 'impowered to take into their hands the said Indians' lands, and allot to the several Indians of the several plantations such . . . lands and meadows as shall be sufficient for their particular improvement.' Any remaining lands 'shall be let out by the guardians of the said respective plantations to suitable persons.' The income from this rent scheme was to go to any inhabitants of the 'Indian plantations' who were unable to support themselves, and anything left over could be divided up among the families of the settlement 'at the discretion of their said guardians.' It was illegal for white settlers to trespass on Indian lands, and especially to steal resources like timber, but the act did allow for neighbouring whites to 'let creatures run upon the said Indians unimprov'd lands.' It was also illegal to sue any Native for payment of a debt greater than ten shillings in value, unless a justice of the peace gave their express permission.[15]

In the early American republic, the General Court's relationship to the Commonwealth's Indigenous population was framed in terms of paternalism and charity. Not only did they name the trustees of Indigenous lands 'guardians,' but they also paid out small sums to missionary organizations and to individual petitioners 'for the Relief of the Poor Indians,' as one resolve put it in March 1791.[16] The guardianship scheme itself had all the hallmarks of white paternalism. It encouraged the 'civilization' of Native landowners by forcing

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[14] Banner, *How the Indians Lost Their Land*, 27; Rosen, *American Indians and State Law*, 10; 'Note: Rethinking the Trust Doctrine in Federal Indian Law,' *Harvard Law Review* 98/2 (December 1984), 424-425.
[15] *The Acts and Resolves . . . of the Province of the Massachusetts Bay* (21 vols., Boston, 1869-1922), 3:306-307.
[16] *Acts and Resolves of Massachusetts, 1790-1791*, 213.

them to 'improve' their lands through agriculture, while apparently shielding them from whites who might steal their resources or pressure them to sell up. But like much other state regulation of Indian lands, in practice, the guardianship scheme failed to stem the steady trickle of land from Native to settler ownership. What the scheme did offer, however, was an opportunity for white men to gain financially from their position as trustees of Indian settlements.

In June 1790, the General Court passed a resolution 'on the Petition of David Kingman, Guardian to the Indians in the County of Plymouth.' Kingman had petitioned the legislature to pay the expenses he had incurred 'for supporting the said Indians.' The legislators found that, even though Indian landowners in the area had sold off lands worth a hundred and eleven pounds, four shillings, and sixpence to cover Kingman's expenses, he was still owed forty pounds, sixteen shillings, and seven pence. To cover the remainder, the General Court resolved 'that the said David Kingman be . . . empowered to make sale of the residue of the real estate belonging to the said Indians . . . and apply the proceeds of such sale towards the payment of the above said Balance.'[17] How much land the Indians of Plymouth sold to cover the expenses incurred by David Kingman in the name of their support is unclear, but evidently the scheme of using agriculture and leasing arrangements to cover costs had failed to prevent the loss of their property in this case.

Despite the guardianship arrangements, individual Indians regularly and successfully petitioned the General Court to sell their lands for the payment of debts and for other purposes. In 1792, James and Mary Thomas, 'two of the Grafton Indians,' petitioned the legislature to allow the auction of their tract, the proceeds of which were to be used to buy land elsewhere in the Commonwealth as the trustees 'shall judge best and most for the Interest of the said Petitioners.' Dorothy Wiser, also of Grafton, petitioned the Court in 1796 to allow the sale of twenty-two acres for the support of herself and her children after the death of her husband

[17] *Acts and Resolves of Massachusetts, 1790-1791*, 115-116.

Benjamin, and Joseph Aaron, also of Grafton, petitioned for the sale of eight acres to pay his debts, and 'for the Support of him and his Family.' In one case, Deborah Comocho, an Indian woman, petitioned the Court to request the sale of lands held by the estate of John Ephraim, who was also an Indian, so that his outstanding debts to her could be paid even now that he was dead.[18]

Despite the network of regulations constructed by the General Court since the early colonial period, land transfers also continued to take place without the permission of the legislature. In 1796, the trustees of the Grafton Indians informed the General Court that David Abraham, an Indigenous man, had devised (bequeathed) certain lands 'to Joseph Printice an English or White citizen of this Commonwealth.' Moreover, Fortunatus Burnee, a Black man, had had a son with an Indian woman, and upon his death, Burnee had also devised Indian land in his will, this time to a white man named Shelometh Stow. Printice and Stow had now taken possession of these lands, and the Court directed the Attorney General of the state to investigate what, if any, rights they had to the property. The Court hoped the case would be resolved in such a way as would be 'most for the benefit of the said Indians & to the Interest of the Commonwealth.'[19]

Other states, too, created systems that allowed white citizens to obtain Indian lands without federal oversight. The legislature of New York engineered legal chaos in the early 1790s by permitting Indian nations, and individual Natives, to lease land to whites. The leasing system, predictably, led to disagreements among the inhabitants of reserved Indian lands, and between Native owners and white lessees. The legislature then used these disagreements as an excuse to arrange treaty negotiations, which were framed as a method of tamping down the discord over Indian lands. In 1795, for example, the legislature passed an act 'relative to Lands in

[18] *Acts and Resolves of Massachusetts, 1792-1793*, 167; *Acts and Resolves of Massachusetts, 1794-1795*, 238, 539, 548.
[19] *Acts and Resolves of Massachusetts, 1794-1795*, 527-528.

Brothertown' which appointed three state lawmakers as commissioners 'for settling and adjusting all differences which have arisen' between Natives and whites due to the indiscriminate leasing of reserved lands. In the course of such settling and adjusting, the commissioners were permitted to 'set off part of the said tract . . . for the use of the Indians now residing in Brothertown,' and to divide the rest among the white lessees.[20]

The land speculator Peter Smith was one of the white citizens who took advantage of New York's leasing system. In 1794, Smith arranged a lease with the Oneida – 'in virtue of a right allowed them by treaty,' as the state legislature noted – by which he gained control of a tract of 45,000 acres of land for a period of twenty-one years. Although the 1794 lease was obviously temporary, such an arrangement threatened irreversible consequences for Oneida control of the land, since Smith, in turn, leased parts of his tract to others, encouraging white settlement and 'improvement' in the region. The lease, which had been signed by the Oneida leader Skenandoah, was so unpopular among other members of the tribe that several warriors considered assassinating the surveyors who had come to lay out Smith's tract.[21]

The following year, New York made a new treaty with the Oneida, which allowed the state to purchase the land Smith had rented from them. In the legislation authorizing the treaty, the drafters remarked that the tendency of the Six Nations to lease 'part of the lands appropriated to their use, to the white inhabitants' and the fact that they 'permitted' whites to settle on their land without leases 'has occasioned controversy between themselves, and between them and such settlers.' The goal of the treaty, per the legislature, was therefore 'to prevent future controversy' and 'render [the land] more productive to the tribes respectively.' The treaty was certainly productive for Peter Smith. Although he had to buy back from the state

[20] Greenleaf, *Laws of the State of New-York*, 3: 207-208.
[21] *Journal of the Senate of the State of New-York: At their Twenty-Fourth Session* (Albany, [1800]), 45; Laurence Hauptman, *Conspiracy of Interests: Iroquois Dispossession and the Rise of New York State* (Syracuse, NY, 1999), 45, 83.

the land he had formerly leased, he ended up with fee-simple ownership of 22,300 acres – a considerable domain.[22]

In its use of statute law to oppress Native peoples, New York went much further than mere legal trickery. In its attempts to extend its criminal jurisdiction over the Indigenous population, the Empire State also set precedents that would later be followed by Georgia and Tennessee in the 1820s. This constituted a direct attack on the sovereignty of Native tribes within the state's borders, and was used for the same purpose in the years leading up to Removal in the South.

In 1803, the state of New York brought charges against a Seneca man known as Stiff-Armed George for the murder of a white man, John Hewitt, in July of the previous year. The Seneca refused to hand George over to state authorities, and the leading orator Red Jacket, or Sagoyewatha, refuted the state's claim to criminal jurisdiction over the tribe. Nonetheless, George was convicted of Hewitt's murder and sentenced to death by the state. Although the controversial nature of the case prompted the legislature to pardon him shortly after the trial, this was only the beginning of New York's attempt to nullify Native sovereignty in its territory. In 1821, the state tried again when a woman, Chaughquawtaugh, was found to have been executed for witchcraft by a Seneca leader named Soonongise, known in English as Tommy Jemmy. Though Jemmy showed that he had killed her on tribal land, and with the sanction of the tribal council, his case was brought to trial. The court did not issue a formal opinion, and Jemmy was also pardoned by the legislature. In Georgia in 1830, however, George Tassel, a Cherokee man similarly accused of murder, was not so lucky. Tassel was put to death by the state upon being convicted of the murder of another Cherokee on Cherokee land, even though the Supreme Court of the United States had already agreed to hear his appeal. Only in 1832 would the Supreme Court formally submit its opinion that states could not constitutionally

[22] Greenleaf, *Laws of the State of New-York*, 3: 236; Hauptman, *Conspiracy of Interests*, 45.

extend their criminal jurisdiction over Indians on their own lands. Even then, the Court's opinion was broadly ignored by President Jackson and by the states.[23]

It was even easier for states to overrule the sovereignty of tribes that did not have a treaty relationship with the federal government – that were not, in our phrase, 'federally recognized.' In New York in 1801, the state supreme court ruled that an accused murderer, a member of the Brothertown Indians, was subject to state jurisdiction even though his victim was also an Indian, because the federal government could have no jurisdiction over the tribe without a treaty.[24] Many other Natives in long-settled areas would be vulnerable to similar arguments.

The exact legality of the states' continued regulation of Indian land transfers within their borders after 1789 is ambiguous. The Trade and Intercourse Act of 1790 was emphatic that

> no sale of lands made by any Indians, or any nation or tribe of Indians . . . shall be valid to any person or persons, or to any state . . . unless the same shall be made and duly executed at some public treaty, held under the authority of the United States.[25]

Section eight of the act of 1793 repeated and expanded upon this prohibition, and section 12 of the act of 1796 explicitly forbade any 'purchase, grant, lease, or other conveyance of lands . . . unless the same be made by treaty, or convention, entered into pursuant to the constitution,' i.e., with the express involvement and authorization of the United States government.[26]

To complicate matters, however, Congress drew a distinction between trade and intercourse in Indian country, i.e., in areas not subject to state jurisdiction, and trade and intercourse in areas within the states that were heavily settled by whites. The act of 1790

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[23] Rosen, *American Indians and State Law*, 19-29; Banner, *How the Indians Lost Their Land*, 219; *Worcester* v. *Georgia* (1832) at 517, 519, 520.
[24] Deborah Rosen, 'Colonization Through Law: The Judicial Defense of State Indian Legislation, 1790-1880,' *American Journal of Legal History* 46/1 (January 2004), 31.
[25] 1 Stat. 138.
[26] 1 Stat. 330-331, 472.

included a proviso that the president could make special arrangements for 'tribes surrounded in their settlements by the citizens of the United States,' such that whites and Indians could buy and sell from each other outside of the licensing system. By 1793, this language had been strengthened further, and Congress enacted 'that nothing in this act shall be construed to prevent any trade or intercourse with Indians living on lands . . . within the jurisdiction of any of the individual states.'[27]

How far this extended to land transfers and guardianship schemes of the kind described here remains unclear. Deborah Rosen notes that the right of old and long-settled states to regulate Indigenous people within their borders 'met with no serious challenge' in the courts of the post-revolutionary United States. Whether or not the states acted constitutionally, it is clear that they continued to exercise considerable control over the lives and property of Indigenous people living on their own land long after the Constitution had gone into effect, and that this exercise of control resulted in the loss of Native-owned land to white buyers. [28]

More subtle, and perhaps more dangerous, the states were able to use their own laws to make inroads on the sovereignty of Indigenous nations in this period. By the time of Indian Removal, courts in other states were citing New York's earlier assertions of criminal jurisdiction over Indian nations within their borders to justify new incursions on Native sovereignty. In the late 1820s, the state of Georgia followed New York's actions to their logical conclusion: assigning Cherokee lands to individual counties, which, as Stuart Banner has written, 'had the effect of subjecting the Cherokees to state law' – state law that was designed to enforce a strict racial hierarchy and impose unbearable constraints upon the lives of people of colour. The extirpation of Georgia's Native population was the ultimate goal.[29] Across the early republic, state legislation was a key method for facilitating the dispossession of Indigenous people.

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[27] 1 Stat. 137, 331.
[28] Rosen, 'Colonization Through Law,' 26, 28, 39.
[29] Banner, *How the Indians Lost Their Land*, 200-201; Rosen, 'Colonization Through Law,' 32.

State Government and Treaty-Making

Despite the constitutional prohibition on state treaty-making and on the purchase of Indian lands without the explicit consent of a federal commissioner, state governments made repeated attempts to negotiate with Indigenous groups for the 'extinguishment of their claims' in the early decades of the republic. Through this diplomacy, vast tracts of land were appropriated by state governments without any meaningful oversight from the Indian agents of the United States.

Illegal treaty-making had boomed in the states during the Confederation period, and its results would hang over all federal attempts to exercise jurisdiction over Indian affairs in the 1790s and beyond. Georgia had made three treaties in the 1780s which remained unrecognized by the federal government, and which very nearly led to all-out war in the early 1790s. North Carolina had appropriated Indian lands within its borders by statute, and remonstrated against congressional attempts to treat with the Cherokee, Choctaw, and Chickasaw nations, calling the resulting federal treaties 'repugnant' to the constitution and laws of the state. The Georgia legislature had also declared federal Indian treaties to be 'null and void' within its borders.[30]

The Southerners were not even the worst offenders, despite the reputation they would achieve in the Removal era. After the Revolutionary War, the state of New York hoped to defeat neighbouring Massachusetts in the race to appropriate the lands of the Six Nations, or Haudenosaunee, and resorted to extreme measures to achieve its aims. Like North Carolina and Georgia, New York declared any federal treaties with resident Indians to be an infringement of the state's sovereignty, and tried to negotiate its own treaty with the Six Nations without federal consent. When this effort failed, Congress negotiated the Treaty of Fort Stanwix (1784), which gave to the United States some lands belonging to the Haudenosaunee in the Great Lakes, but

[30] Ablavsky, 'The Savage Constitution,' 1027-1030; Hauptman, *Conspiracy of Interests*, 66-67.

guaranteed that 'the Oneida and Tuscarora nations shall be secured in the possession of the lands on which they are settled.' During the negotiations, state 'observers' plied the participants with rum in an attempt to delay the discussion, and had to be removed by force, along with their liquor. The federal commissioners then set up a guard outside the treaty ground to prevent further interruptions from state officials.[31]

Even after the negotiations were successfully concluded, New York refused to acknowledge either congressional power over Indian affairs or the validity of the Treaty of Fort Stanwix. In 1785, as Gregory Ablavsky puts it, the state 'cajoled, threatened, and bribed' 300,000 acres out of the Oneida nation at Fort Herkimer, despite the congressional guarantee that their lands would be secured against further encroachment. As a result of Congress's failure to protect the New York Indians, the Treaty of Fort Stanwix became a dead letter, with the Council of the Six Nations refusing to ratify. In 1788, New York followed up with another state treaty at Fort Schuyler, where it acquired nearly 5 million acres of Oneida land.[32]

Ablavsky argues, and convincingly, that the Constitution's framers, especially Alexander Hamilton and James Madison, were motivated to create a stronger federal government at least in part by the hope of preventing the New Yorkers, Carolinians, and Georgians from continuing to flout federal treaties and unilaterally engineer the sale of Indian lands. While their vision would come to pass in the long term, the case of New York demonstrates that the ratification of the Constitution was not a turning point in all things, and that some states continued to go on just as they had before, despite the change in the paper arrangements.[33]

Laurence Hauptman has shown that the craze for internal improvement was the main driving factor behind the dispossession of the Oneida and Seneca nations between the 1780s

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[31] 'Treaty with the Six Nations,' *Documents of United States Indian Policy*, 3rd edn., ed. Francis Prucha (Lincoln, NE, 2000), 4-5; Ablavsky, 'The Savage Constitution,' 1021-1023; Hauptman, *Conspiracy of Interests*, 63-64.
[32] Ablavsky, 'The Savage Constitution,' 1023-1024.
[33] ibid., 1002-1008.

and the 1850s. The desire to make provision for future settlement and for trade with the Great Lakes region motivated land companies, turnpike companies, and canal companies in conjunction – or indeed conspiracy – with state officials to press for the massive purchase of land in the upstate. The building of the Genesee Turnpike and the Erie Canal motivated state officials to extinguish the Indian title to extensive tracts by 1825, when the canal was opened to traffic with the launching of a boat called the *Seneca Chief*.[34]

Early in 1794, following up on its Confederation-era gains, the New York legislature invited delegations of Cayuga, Onondaga, and Oneida diplomats to Albany in order to 'enquire of them whether they are disposed to sell and convey to the people of this state, any or all of their reserved lands, and upon what terms.' The negotiations appear to have been inconclusive at that point, but New York's untoward intentions were already clear. In making these arrangements for a new treaty, state officials at no point sought the approval of federal Indian agents for their plans.[35]

At the same time, the federal government was also renewing its overtures to the Haudenosaunee, culminating in the Treaty of Canandaigua, signed November 11 1794. The treaty promised friendship between the United States and the Six Nations, and guaranteed that the federal government would never encroach on the remaining lands of the Oneida, Onondaga, and Cayuga nations. The Seneca nation ceded part of their homeland, and the Haudenosaunee guaranteed 'free passage through their lands' to the people of the United States. Three weeks after Canandaigua, Indian agent Timothy Pickering signed another treaty with the Oneida, Tuscarora, and Stockbridge Indians, this time recognizing their service to the United States during the Revolutionary War and awarding compensation.[36]

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[34] Hauptman, *Conspiracy of Interests*, xv, 1, 7-8.
[35] *Journal of the Senate of the State of New-York, At their Seventeenth Session*, 32-33, 37, 44, 54; *Journal of the Senate of the State of New-York, At their Eighteenth Session*, 51.
[36] Treaty of Canandaigua, U.S.-Six Nations, November 11 1794, 7 Stat. 44-47; Treaty of Oneida, U.S.-Oneida, Tuscarora, Stockbridge Indians, December 2 1794, 7 Stat. 47-48; Hauptman, *Conspiracy of Interests*, 74.

These landmark treaties did not stop the state of New York from moving forward with its own plans to gain control of Haudenosaunee land. The state relied on the discord previously sowed by the leasing of Native land to white settlers to justify its pursuit of new cessions. After receiving legislative authorization in April, state commissioners, led by the land speculator, internal improvements enthusiast, soldier, and former U.S. senator Philip Schuyler, negotiated three separate treaties with the Six Nations across the summer and autumn of 1795. An agreement with the Cayuga nation was concluded on July 27, securing to New York important salt deposits, alongside lands Schuyler wanted for a canal-building concern in which he was involved, the Western Inland Lock Company. The following day, the New Yorkers made another treaty with the Onondaga by which the nation ceded more salt deposits, shrinking its lands – already much diminished by a state treaty of 1793 – almost to the point of extinguishment. Finally, on September 15, a group claiming to represent the Oneida nation signed a document by which they ceded a hundred thousand acres of land to the state for the sum of $2,952.[37]

In *Oneida County* v. *Oneida Indian Nation* (1985), the U.S. Supreme Court found that the conveyance of Oneida lands to the state of New York under the 'treaty' of 1795 had been an 'unlawful purchase' in contravention of the 1793 Trade and Intercourse Act.[38] Federal officials at the time of the conveyance had expressed a similar view. It was known to all of the Americans involved that New York was walking on thin constitutional ice.

On July 21 1795, Timothy Pickering wrote to President Washington to discuss the New Yorkers' plans. Pickering had, he explained, already been in communication with the state's new governor (and former Chief Justice of the United States) John Jay, about 'the intended negociations with the Onondagas, Cayugas & Oneidas for the purchase of their lands.' He had even asked the Attorney General of the United States, William Bradford, to draft an opinion

[37] Greenleaf, *Laws of the State of New-York*, 3: 236; Hauptman, *Conspiracy of Interests*, 76-80.
[38] *Oneida County* v. *Oneida Ind. Nation*, 470 U.S. 226 (1985) at 227.

explaining that any treaty between New York and the Six Nations 'could not lawfully be had without the intervention of the government of the United States.'[39]

In his letter to Washington, Pickering alluded to a strange aspect of New York's Indian policy. In treating with the Onondaga, Cayuga, and Oneida nations, Governor Jay had refused to arrange for a federal commissioner to attend the negotiations, arguing that he, as governor, was not permitted to do so either by the state's constitution or by the acts of the legislature which authorized the treaties. At the same time, however, Jay had requested the federal government's intervention in a forthcoming treaty with the Mohawk people of St Regis relative to their lands in northern New York.[40]

Beyond asking the Attorney General to explain to the New Yorkers why their proceedings were unconstitutional, the officers of the federal executive appeared unwilling to take any further measures to halt the state's illegal appropriation of Indian lands. Despite their actions with regard to the Onondaga, Oneida, and Cayuga nations, Pickering wrote to Washington, 'It would seem desirable to give *facility* to every measure of a state government which conforms to the regulations prescribed by the laws of the Union.' In other words, he supported New York's efforts to treat with the St Regis Mohawk people despite the state's behaviour towards other members of the Six Nations. Washington himself remarked on July 27 that, if Schuyler and the other state commissioners had already begun their work, 'further sentiment now on the unconstitutionality of the measure would be rec[eive]d too late.' The president approved federal participation in the treaty with the St Regis Indians, suggesting Jeremiah Wadsworth and Elias Boudinot as possible commissioners.[41]

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[39] Timothy Pickering to George Washington, July 21 1795, *PGW* 18:388-390; Hauptman, *Conspiracy of Interests*, 33, 74.
[40] Pickering to Washington, July 21 1795, *PGW* 18:388-390 – see especially note 1.
[41] Pickering to Washington, July 21 1795, *PGW* 18:388-390; George Washington to Timothy Pickering, July 27 1795, *PGW* 18:432-433.

Wadsworth, a Connecticuter, was appointed federal commissioner for the Mohawk treaty, and was involved in further treaty negotiations in New York. The most notable was the Treaty of Big Tree (1797), by which – despite the vocal opposition of the Seneca leader Red Jacket – the Seneca nation ceded the vast majority of its New York lands to the United States. As was the case with many other treaties, the assembled state and federal commissioners used alcohol and bribery to achieve their objects.[42]

New York made several more treaties with the Haudenosaunee over the course of the nineteenth century. As late as the 1820s, such agreements were being made without any federal oversight at all, in contravention of the Trade and Intercourse Acts. Most of the Oneida nation, whose lands had been explicitly guaranteed by the federal government in the 1784 Treaty of Fort Stanwix, removed to Wisconsin in the 1820s and 1830s, and to Ontario after 1839. Their homeland had been cut down to a tiny fraction of its former size by the activities of New York state officials, and in 1855, the state census recorded only 161 Oneida inhabitants. In 1857, the Seneca nation retained four reservations totalling around 65,000 acres out of the several million acres they had owned in the 1790s.[43]

New York was the primary villain in the dispossession of its Haudenosaunee inhabitants, but the federal government did not come away with clean hands. A mixture of indifference to the activities of the state government and incapacity to reverse New York's offences, alongside the damage done through the union's own treaty-making activities, made the national government complicit in the destruction of the Six Nations' homelands.

[42] Hauptman, *Conspiracy of Interests*, 89-92.
[43] ibid., 7, 27, 152.

Holston

Even where state governments were unable to make their own treaties with local Indian nations, they used every tool at their disposal to influence federal officials to negotiate in favour of their claims and interests. In the late 1790s, Tennessee governor John Sevier exerted relentless pressure on federal officials from President Adams down to the lowliest Army officer in his attempt to reverse the Treaty of Holston (1791), a federal treaty with the Cherokee nation. Although it took considerable time, Sevier ultimately succeeded in forcing the federal government to negotiate a new treaty with the Cherokee nation which expanded the area available for white settlement in the nation's youngest state. Indian diplomacy in the region, as elsewhere, was defined by what Cynthia Cumfer has described as a 'triangular relationship' in which Native peoples, state governments, and federal officials each played a key part.[44]

In May 1796, just weeks before Tennessee's admission to the union, Congress passed a new Trade and Intercourse Act, signalling a considerably firmer federal stance against white frontiersmen. Sentencing for crimes committed by American citizens against Indians was toughened up, and federal courts were given exclusive jurisdiction over the violation of the act of Congress. Most concerningly for Tennessee, the act described in exhaustive detail the exact course of the boundary line between Indian country and areas of white settlement across the whole of the early West. It stipulated that the U.S. Army was authorized to arrest and remove any whites found beyond the line without a passport.[45]

The new legislation led to the active enforcement of the Treaty of Holston, a federal treaty negotiated with the Cherokee in 1791. Under the treaty, the Cherokee nation accepted the United States as its sovereign and gave up 2.6 million acres of land in what is now East

[44] Cynthia Cumfer, 'Local Origins of National Indian Policy: Cherokee and Tennessean Ideas about Sovereignty and Nationhood, 1790-1811,' *JER* 23/1 (Spring 2003), 24.
[45] 1 Stat. 469-474; Nichols, *Red Gentlemen & White Savages*, 176.

Tennessee. Nonetheless, the treaty left some areas of white settlement beyond the Indian line, which the stricter provisions of the new Trade and Intercourse Act now threatened.[46] Within weeks of the passage of the Trade and Intercourse Act, settlers living beyond the line were already contacting the legislature about their fears of being moved on by federal troops.[47]

In response to these addresses, the legislature composed a remonstrance to Congress which attacked the legitimacy of both the Treaty of Holston and the Trade and Intercourse Act. The Tennesseans dismissed the Cherokee nation's right to their lands, writing that 'the Indians have no fee simple in the lands alluded to…. If the Indians have any kind of claim to the lands in question, it is believed to be the lowest kind of tenancy, namely that of tenants at will.' 'Being impressed with a sense of the injury and grievances sustained by the citizens in consequence of the line of the said treaty of Holston, and the act before mentioned,' they demanded 'that provision by law be made for extinguishing the Indian claim to said lands' and 'that the owners and grantees of said lands, may enter upon, occupy and possess the same in a full and ample manner.' Once these conditions had been met, and the lands handed over to the white settlers, the legislature assured Congress that 'the officers of government will be enabled to execute the constitutional laws of the United States with ease and convenience.'[48] Congress could hardly be deaf to the implicit threat of the obstruction of federal laws – especially those deemed by the legislature to be 'unconstitutional' – that the remonstrance carried.

Despite the efforts of the legislators, however, the federal government pressed on with its plans to enforce the law. In April 1797, the United States sent commissioners to mark the boundary established by the Treaty of Holston. By September, a U.S. Army officer, Lieutenant Colonel Butler, had arrived and ordered the illegal settlers to remove forthwith, or be removed

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[46] Treaty of Holston, U.S.-Cherokee Nation, July 2 1791, 7 Stat. 39-42; Nichols, *Red Gentlemen & White Savages*, 153.
[47] *Journal of the Senate of the State of Tennessee . . .1796*, 15-16.
[48] *Journal of the House of Representatives of the State of Tennessee . . .1796* (Knoxville, 1796; repr. Nashville, 1852), 20-22.

by the twelve hundred troops he had brought with him.[49] The state House of Representatives appointed a committee to call on Butler and ask him 'whether it is consistent with his orders . . . to protract the time of removal of those families, within the Indian line so as to give them a farther opportunity to secure their crops' before the winter. Butler replied within a few days that, though his orders could not be changed, he had written to the Secretary of War, 'requesting that he may be permitted to grant passports to the people for removing their crops at any period previous to the first of January, 1798.'[50]

The state, however, wanted more. First, they requested Governor Sevier 'to lay before the President of the United States, by the earliest opportunity, the true state and condition of those citizens, residing within the Indian boundary,' and to request that their removal be delayed until they had harvested their crops and found a new place to live.[51] Next, they decided to open direct negotiations with the Cherokee, in an attempt to force Congress's hand. On October 20, they recommended to the governor that he send 'a proper person' into the Cherokee nation to find out 'whether they will sell their claim to the lands on which white people have settled.' The legislature further resolved that it would call on Tennessee's senators in Philadelphia 'to use their efforts with the federal government for having the said lands immediately purchased.'[52]

Governor John Sevier considered himself well placed to make diplomatic overtures to the Cherokee. Sevier officially became governor on March 30 1796, and one of his first acts in office was to write 'to the Chiefs and Warriors of the Cherokee Nation.'[53] The regularity of his correspondence with the nation – a new letter every two months or so throughout 1796 and 1797 – indicates that, while the federal government claimed to have assumed responsibility for

[49] *Journals of the Senate and House of the Second General Assembly of the State of Tennessee* (Kingsport, TN, 1933), 18; Cumfer, 'Local Origins of National Indian Policy,' 40.
[50] *Journals of the Senate and House of the Second General Assembly of the State of Tennessee*, 29-36.
[51] ibid., 18.
[52] ibid., 80-81.
[53] Nashville, TSLA, Letters of the Tennessee Governors (hereinafter LTG), Box 1, Folder 2, John Sevier to the Chiefs and Warriors of the Cherokee Nation, April 2 1796.

treating with the Indians, Sevier also considered it a duty of his office to keep in contact with local Native leaders.

On October 20 1797, Sevier wrote to the assembly that Arthur Coody, 'a principal man' of the Cherokee nation 'and one of the interpreters of the United States,' had passed on to him a letter from the Cherokee chiefs. According to Sevier, the chiefs wished the illegal settlers beyond the boundary line to know 'that we don't wish them to remove, and that we are willing they shall remain until we return from hunting, and we will then talk further on the subject.' This constituted only a temporary reprieve, but nonetheless provided important ammunition for Tennessee officials as they prepared to negotiate with the federal executive. In a letter to Coody of November 2, Sevier indicated his belief that the federal government had misrepresented the Indians' true wishes. 'You well know that it has been constantly reported that the Indians was constantly complaining and requesting that the people should be removed. How true these reports have been, you are the best judge.' Together, Sevier and the legislature pursued a diplomatic strategy of sowing discord between the Cherokee and the federal government.[54]

Like the assembly, the governor also decided to raise the question of settler eviction directly with Army officers on the ground. Rather than going through the Secretary of War or the President, Sevier wrote in February 1797 to Captain Sparks and Captain Wade of the U.S. Army as they prepared 'to hold a conference with the inhabitants settled on what is called the Indian lands.' He solicited their 'paternal, benevolent and favourable indulgences towards those unfortunate people by granting unto them all the time and suitable opportunity adequate to a preparation for their removal; and in every other instance afford unto them such marks of your humanity and tenderness as the duties of your office and the nature of the case will permit.' The same day, Sevier addressed himself to the 'unfortunate people' themselves, assuring them

[54] *Journals of the Senate and House of the Second General Assembly of the State of Tennessee*, 88-89; TSLA, LTG, Box 1, Folder 4, John Sevier to Arthur Coody, November 2 1797.

'that the gentlemen officers who meets you on occasion is benevolent, humain, and compassionate, and I make no doubt will readily favour you every indulgence the circumstance and nature of the case will admit of.' Still playing the crafty diplomat, Sevier attempted to frame the settlers as unfortunate victims of a cruel and unnecessary federal policy.[55]

Like many state officials who interacted with the federal government in this period, Sevier emphasized that he would only comply with federal law insofar as it agreed with his purposes. He promised Secretary of War James McHenry that Tennessee would 'regard and observe all the treaties that are, or may be, sanctioned and ratified by the Federal Government, so far as they are not pernicious, odious nor iniquitous.' The right to decide the difference between a good treaty and an 'iniquitous' one, Sevier suggested, remained with the state. Throughout his correspondence with federal officials, Sevier refused to acknowledge the legitimacy of the boundary line, referring to it as 'the supposed line concluded on in the Holeson Treaty.' As Cynthia Cumfer has written, Sevier's arguments chime with early Tennesseans' broader conception of American federalism, under which the state could 'formulate its own policies toward its Indigenous neighbours and even . . . override the national government on matters pertaining to self-defence or to the protection of property.'[56]

Many of Sevier's methods cannot be accounted for by a top-down understanding of the federal system. Much of his diplomacy in this matter was done locally, attempting to convince local actors to participate in his efforts to defeat or alter federal objectives. At the same time, however, Sevier's papers convey an intense desire to keep the federal government on Tennessee's side. He was motivated by Tennessee's ongoing need for the military assistance and protection of the U.S. government. As he wrote to William Blount in October 1796, Sevier hoped that Tennessee would become wealthy and powerful, and for that, he needed to

[55] TSLA, LTG, Box 1, Folder 3, John Sevier to Captains Sparks and Wade, February 17 1797; Box 1, Folder 3, John Sevier to the inhabitants of Powells Valley, February 17 1797.
[56] TSLA, LTG, Box 1, Folder 2, John Sevier to James McHenry, July 20 1796; Cumfer, 'Local Origins of National Indian Policy,' 24, 39.

encourage immigration. In that regard, he shared the federal government's desire to maintain peace with the Indians. 'A war would flusterate the desirable object, because the emigration would of course be obstructed. A country ever so fertile is worth little without being sufficiently inhabited, and the latter is all we want to make us become oppulent and respected.'[57]

The striking feature of Sevier's correspondence with federal officials is that he rarely attempted to disguise his opposition to federal policy or even to cover up actions on his part which contravened federal law. Instead, his letters are characterized by a constant attempt to argue, persuade, and negotiate. In July 1796, Sevier wrote to the Secretary of War about the boundary dispute. At no point in the communication did he acknowledge that Indian policy should rightly lie within federal jurisdiction, instead attempting to persuade McHenry of his own particular aptitude for Indian diplomacy. Sevier wrote that he 'had an extensive acquaintance with several Indian tribes upwards of thirty years,' and made clear that he had no intention of abandoning Indian policy as a state matter. 'Beg leave to observe,' he wrote,

> that the Cherokee settlements are in our vacinity, and a great part of that nation is within our territorial limits, of course they frequently resort among our inhabitants and particularly at this place [Knoxville]. And notwithstanding the agents resident among them, we are constantly engaged, and much time taken up in the transaction of Indian business.

Thus, Sevier calmly asserted his right to continue managing Indian policy at the state level.[58]

All of the governor's arguments were bolstered by a consistent presentation of Indigenous people as irrational barbarians. Sevier presented himself as incredulous that federal officials would trust the Cherokee – 'Perfidy is a leading trait in the character of savages' – and

[57] TSLA, LTG, Box 1, Folder 2, John Sevier to William Blount, October 7 1796.
[58] TSLA, LTG, Box 1, Folder 2, John Sevier to James McHenry, July 20 1796.

begged the Secretary of War to consider 'the many unprovoked and wanton barbarities so often and recently exercised by the savage on the frontier citizens.'[59]

Significantly, however, the Tennessee governor also understood that his relationship with the federal government had to be a matter of give and take. In return for this stream of complaints and criticisms, Sevier constantly emphasized his loyalty to the government, and drew attention to the ways he had supported efforts to maintain peace between the Indians and white settlers, and to grant justice to the nations who lived nearby. In his first letter to the Secretary of War in July 1796, Sevier assured McHenry that he would do everything he could to break up intended settlements in Indian country. In his 1797 correspondence with Hawkins and Pickens he wrote that 'the executive of the state of Tennessee has been at much pains to promote and cultivate peace and good understanding with the neighbouring Indian tribes,' and that he would 'labor to prevent any wanton depredations being committed on the Indians.' He also forwarded some of his diplomatic correspondence with the Cherokee to the agents to show his good faith.[60]

Their continued efforts at negotiating the matter locally did not prevent either the general assembly or the governor from working to convince Congress to relieve the illegal settlers by changing the law. Both Sevier and the legislature sent repeated pleas and instructions to Tennessee's congressmen throughout the crisis. In February 1798, the governor wrote to Congressmen Andrew Jackson, Joseph Anderson, and William Claiborne to thank them for keeping him informed of recent developments in Philadelphia, and expressing his faith that their 'integrity, address and abilities' in bringing the matter to the attention of Congress would

[59] TSLA, LTG, Box 1, Folder 2, John Sevier to James McHenry, July 20 1796; TSLA, LTG, Box 1, Folder 3, John Sevier to Benjamin Hawkins and Andrew Pickens, April 19 1797.
[60] TSLA, LTG, Box 1, Folder 2, John Sevier to James McHenry, July 20 1796. Box 1, Folder 3, John Sevier to Benjamin Hawkins and Andrew Pickens, April 13 1797. Box 1, Folder 3, John Sevier to Benjamin Hawkins and Andrew Pickens, April 19 1797.

help to resolve the crisis. He had already written to Senators William Blount and William Cocke, asking them to lobby the president on Tennessee's behalf.[61]

Sevier would later write to the president himself when, early in 1798, federal officers made a fatal mistake in arresting a state judge, David Campbell, in his own home, and within the legal boundary of Tennessee. Sevier assured Adams that he knew the president could not have consented to 'a procedure so dispotic and inimical to the liberties of our citizens.' As in his communications with lesser federal officials, Sevier impressed on the president the depth of Tennessee's loyalty: 'no act hostile to the general government has been committed or attempted by the state of Tennessee, nor can any transaction of our government warrant the imputation of any thing of the kind.'[62]

After this relentless campaign, the Tennesseans won the day. In 1798, President Adams invited the Cherokees to negotiate a new treaty, and in October of that year, at the treaty ground near the Tellico Blockhouse, the nation ceded the land at issue – 1,540 square miles between the Holston and Clinch rivers – for $5,000 in cash and a $1,000 increase in their annuity under the Treaty of Holston.[63] As soon as Butler's federal troops withdrew from Tennessee after the First Treaty of Tellico, a chief later reported to the Secretary of War, white settlers killed two of the Cherokee.[64]

Shortly after Thomas Jefferson took office in the spring of 1801, Principal Chief Little Turkey sent a delegation to Washington to express his concerns to the new president and Secretary of War Henry Dearborn about continued white encroachment on Cherokee lands. The nation already knew that Tellico would not be the last land cession that would be asked of

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[61] TSLA, LTG, Box 1, Folder 5, John Sevier to Andrew Jackson, Joseph Anderson, and William Charles Cole Claiborne, February 5 1798. Box 1, Folder 3, John Sevier to William Blount and William Cocke, June 6 1797.
[62] TSLA, LTG, Box 1, Folder 5, John Sevier to John Adams, February 6 1798.
[63] Nichols, *Red Gentlemen, White Savages*, 184.
[64] Reply to a Cherokee Delegation Editorial Note, *PTJ* 34:505-508; Thomas Jefferson, 'Heads of Answer to Speech of The Glass,' 30 June-3 July 1801, *PTJ* 34:508-509.

them, but they still wanted proof of the legal boundary line, asking Dearborn for a map, promised to them at the treaty ground, which marked out the line. President Jefferson responded, 'The Whites have many people & little land. the Indians much land and few people.' He proposed a new treaty for the autumn of 1801, to discuss roads for settlers to pass through the Cherokee nation, but the murder of another Indian along the frontier later in the summer raised tensions, and the September meeting fell apart.[65]

John Sevier went on to serve six terms as governor, and continued to engage in direct diplomacy with the Cherokee nation, eschewing federal intervention as far as possible. In 1807, the Tennessee state government even arranged a new purchase of Cherokee lands, raising the funds themselves and writing to the federal government only to notify them of the state's plans. While the purchase did not ultimately go ahead, it demonstrates that the brazen actions of the Tennesseans had successfully reshaped their relationship to the federal government, which – as in the case of New York – continued to show itself to be an ineffectual barrier against encroachment.[66]

War

The major aim of United States Indian policy in the 1790s was to keep the peace between white frontiersmen and the Indigenous people whose lands they threatened. In the broadest sense, this policy was successful. Between the Northwest Indian War of the early 1790s and the Creek War that coincided with the War of 1812, the United States had minimal military engagement with Native peoples. No state succeeded in pulling the nation into an all-out Indian war. But in the state of Georgia, retaliatory violence between whites and Creek Indians threatened to spiral

[65] Reply to a Cherokee Delegation Editorial Note, *PTJ* 34:505-508; Thomas Jefferson, 'Heads of Answer to Speech of The Glass,' 30 June-3 July 1801, *PTJ* 34:508-509.
[66] Cumfer, 'Local Origins of National Indian Policy,' 42.

out of control, and the federal government struggled to maintain its grasp on the situation over the fraught summer of 1793.

At its northern border, Georgia nestled against the wealthy plantation society of South Carolina, but its vast southwestern territories blurred with those of the Spanish empire in Florida, and with the lands occupied by the powerful confederacy of Indians who called themselves the Muscogee, and were known to white contemporaries as the Creeks. But for a scattering of traders and transients, most of this territory was not settled by white people. These Western land claims represented wealth and promise for white elites in the postrevolutionary period, but they also held dangers – of the flight of enslaved people from Georgia plantations; of inter-imperial conflict; and of Indian war.

As a result of their vulnerable frontier position, white Georgians made no secret of their desire for federal help before, during, or after ratification. In a December 1789 address to President Washington, the Georgia legislature claimed the state had made many sacrifices during the Revolutionary War, and as such, 'the peace found the country a waste.' Though 'with many natural advantages we flattered ourselves with a speedy recovery,' no sooner had the war ended than 'we were attacked by the Indians.' Culpability for ongoing conflict with the Creeks was a matter of contestation, as the Georgians acknowledged – 'Removed at a distance from the centre our actions have been liable to misrepresentation' – but the fact of the matter was that Georgia was in trouble: 'the blood of our citizens has been spilled, our public resources greatly exhausted; and our frontiers still open to fresh ravages.' Recent federal attempts at a treaty with the Creeks had failed, which was

> proof of the late hostile dispositions of these People: but under the influence of the government and power of the Union, it is to be hoped and expected that a different conduct will on their part prevail: on our part, nothing shall be wanting to promote so desireable an establishment.[67]

[67] GHS, *House Journal of Georgia November-2-1789-June-11-1790*, 538-541.

The suggestion was that the Georgians would relinquish control over Indian affairs, as long as they were protected by the 'power of the Union.'

The president's response to the Georgians' pleas was polite and distant: 'It will not be expected I presume, on this occasion, that I should enter into the merits of the delicate subject to which you allude,' which is to say, warfare with Native Americans. He was sure 'that nothing will be wanting on your part to concur in the accomplishment of pacification,' and promised only 'that I shall make such use of the powers vested in me by the constitution as may appear to me best calculated to promote the public good.'[68]

Privately, Washington was well aware of worsening conditions on the southwestern frontier. In July 1789, Secretary of War Henry Knox sent Washington a report on the situation in Georgia, identifying the principal *dramatis personae* and the major issues at stake, and declaring that 'the State of Georgia is engaged in a serious war with the Creeks.' Georgia's situation was 'delicate' not only because of the potential for destruction and loss of life, but also because conflicts between settlers and Indians in the region constituted a problem poised at the intersection of trade, international diplomacy, and domestic affairs. Georgia's actions against the Creeks, even within their own borders, could have knock-on effects for international relations that the federal government might be unable to control.[69]

The Creeks themselves were a confederation of communities with different leaders and different interests, inhabiting the 'middle ground' between the Spanish Empire and the United States in what is now Georgia and Alabama. In their highly decentralized polity, different factions vied for leadership and control of land sales throughout the 1780s and early 1790s. Two key competing factions were those represented, respectively, by the 'Scots Indian' Alexander McGillivray, and by the Lower Creek leader Hoboithle Micco.

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[68] George Washington to the Georgia Legislature, March 18 1790, *PGW* 5:248.
[69] Henry Knox to George Washington, July 6 1789, *PGW* 3:123-129.

To whites, McGillivray seemed an attractive figure of an Indian leader. Charleston-educated on the insistence of his Scottish father, he was a pale-skinned, slaveholding planter who spoke the Muskogee language poorly and did not read as 'Indian' even to Second Lady Abigail Adams when she met him in New York. Beyond his apparent acculturation to white Southern society, Hoboithle Micco and his other opponents were also concerned about McGillivray's considerable personal ambition, which drew him into the paid service of both Spain and the United States in the 1780s and 1790s. While acting as an agent for two different empires, McGillivray was also a silent partner in the British trading house of Panton, Leslie & Co. McGillivray's entangled allegiances demonstrate the fragility and complexity of the international balance in the Creek country during the Washington administration. In dealing with the Creek nation, the United States was aware that this powerful and volatile confederacy could easily hand over its allegiance wholesale to Spain if its people were continually mistreated by American settlers.[70]

By 1789, the Georgians claimed to have negotiated three separate land cessions with the Creeks – Augusta (1783), Galphinton (1785), and Shoulderbone (1786). The treaties had been signed (under coercive circumstances) by Hoboithle Micco and Neha Micco, but McGillivray claimed they were invalid, representing the interests of only a small part of the Creek nation. Knox concluded his report on the Creek-Georgian conflict with two questions for Washington. Were the Creeks being unreasonable, or were the Georgians? And could the conflict be resolved 'other than by raising an Army?'[71]

In August 1789, Washington asked the Senate to appoint a group of three commissioners to mediate between the Creeks and the Georgians. Though he claimed to be concerned that the investigation 'be conducted with the highest impartiality,' he also noted 'that

[70] Saunt, *A New Order of Things*, 67, 71-73, 75-80.
[71] Henry Knox to George Washington, July 6 1789, *PGW* 3:123-129; Saunt, *A New Order of Things*, 79-80.

it would be highly embarrassing to Georgia to relinquish that part of the lands, stated to have been ceded by the Creeks,' since the state had already surveyed these lands and given them over to settlers, who had since been 'dispossessed by the Indians.' As a result, 'the Commissioners should be instructed to use their best endeavours to negotiate with the Creeks, a solemn conveyance of the said lands to Georgia.' Though Knox and Washington, along with other federal officials, were inclined to favour the claims of the southern Indians above those of the southern settlers, whom they saw as uncultivated and ruthless, on this occasion Washington chose the path of least resistance, and aimed to keep the Georgians happy, whatever the legal validity of their claims.[72]

When the federal commissioners failed to achieve their object, with Alexander McGillivray walking out of the council they had arranged, Washington enlisted the help of Revolutionary War veteran Marinus Willett and Benjamin Hawkins, then a U.S. senator from North Carolina, to make fresh overtures to the Creeks. McGillivray agreed to their new offer: he would negotiate directly with Washington and Knox in New York. Thus, in August 1790, Washington fulfilled his promise to the Georgians, producing a peace treaty between the Creeks and the United States 'which validated some, but not all, of the earlier cessions made to Georgia that McGillivray had so adamantly opposed,' as Francis Prucha has written.[73]

For some years afterwards, Washington concerned himself little with the Georgia frontier, but on the ground, matters were deteriorating. Like in Tennessee after the Treaty of Holston (1791), the expansion of Georgia's territory through the Treaty of New York (1790) did not prevent whites from crossing the new boundary line and settling in the Creek country. When these regular transgressions were combined with a series of atrocities committed by the Georgia

[72] George Washington to the U.S. Senate, August 22 1789, *PGW* 3:521-526; Nichols, *Red Gentlemen & White Savages*, 130-132.
[73] Francis Prucha, *American Indian Treaties: The History of a Political Anomaly* (Berkeley, 1994), 80-83.

militia in 1792 and 1793, Creek warriors were quick to retaliate against the Americans. Alexander McGillivray's power in the nation had broken down and there was conflict between different factions over whether to pursue peace or war with white settlers.[74]

Early in 1793, Creek efforts at retaliation against white settlers resulted in a concerning incident, as the federal Indian agent James Seagrove told former U.S. congressman and Georgia militia officer James Jackson at the end of March. Seagrove was accustomed to keep state officials informed of developments in Indian affairs, and there was very serious news to report. His letter to Jackson gave

> an account of a party of Indians plundering Robert Seagroves store, hitting Mr Fleming the Storekeeper & a Mr Moffat and taking off a prisoner (one Upton) to the Nation – it likewise informs of the Indians attacking a Waggon about six Miles from Coleraine...& killing three Men a Woman & child missing supposed to be taken off. [75]

Some weeks later, a letter from Governor Edward Telfair with details of the attack landed on George Washington's desk, and the president summoned his cabinet for help. They responded with four recommendations. First, that 'the Governor of Georgia be informed that from considerations relative to foreign powers, and the pending treaty with the Northern Indians, it is deemed adviseable for the present, to avoid offensive expeditions into the Indian Country.' Second, that the federal government should nonetheless 'increase the force to be kept up for defensive purposes,' authorizing one hundred cavalry and one hundred infantry to be added to the federal troops already stationed in Georgia. Third, they would also send 'arms and accoutrements' to the Georgians, and, fourth, an agent to the Creeks 'to adjust the surrender of those Indians who have lately committed murders on the citizens of Georgia.'[76]

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[74] Saunt, *A New Order of Things*, 87-88.
[75] GHS, MS 422: James Jackson Papers, Item 24 (Letter Book of James Jackson 1782-1796), James Jackson to Daniel Stewart, March 28 1793.
[76] Cabinet Opinion on Georgia and the Creek Indians, May 29 1793, *PGW* 12:640-642.

Washington and his cabinet had crafted a proportionate response that respected both the fears of the Georgians and the delicate diplomatic balancing act necessary in the imperial borderlands of the South. Unfortunately, it was already much too late for the federal government to rescue the situation. Weeks earlier, the militia officer James Jackson had already decided how he was going to address the crisis, and had begun to set a response in motion. 'I think the Murders committed so profess an intention of War,' he wrote to fellow militiaman Daniel Stewart,

> that should your scouts fall in with any armed party within our line, it is my opinion they should not hesitate to fire on them. I am sorry that I cannot give a positive order for so doing – but this letter may be shewn and the censure may fall on me if the friends of savage barbarity feel themselves disposed to censure – I hold it to be selfpreservation not commencing hostility – to be averting an intended sacrifice of your Women & Children not the wanton destroying of Indians in amity.[77]

By 'the friends of savage barbarity,' Jackson meant the federal government.

On May 2 1793, weeks before Washington's cabinet submitted their report on the Creek conflict, Jackson wrote to the commander of the Glynn County militia, 'If the Indians do any mischief tread hard on their heels and don't mind the line,' which is to say, the boundary line demarcating Indian territory. Jackson was advocating an invasion.[78] Conscious that his actions were in breach of both the letter and the spirit of the Constitution and of federal law, this former congressman permitted and encouraged fellow militiamen to make war on the Creeks. Nor was he alone among the Georgians in disregarding the laws of the United States and the wishes of the federal government.

Per the cabinet's advice, on May 30, word was sent to Governor Telfair advising him not to enter Creek territory by force of arms, but authorizing him to 'call into service in aid of

[77] GHS, MS 422: James Jackson Papers, Item 24 (Letter Book of James Jackson 1782-1796), James Jackson to Daniel Stewart, March 28 1793.
[78] GHS, MS 422: James Jackson Papers, Item 24 (Letter Book of James Jackson 1782-1796), James Jackson to Moses Burnet, May 2 1793.

the Continental Troops One hundred horse and one hundred foot of the Militia.' The federal executive also approached the governor of South Carolina, requesting that he 'afford aid to Georgia, in case that it should be seriously invaded by large bodies of Indians.' On top of all that, 'A Magazine of two thousand Arms and a proportionable quantity of Ammunition and some other military Stores' were given to the Georgians 'as a provisional measure in case the said State should be invaded.'[79]

Unfortunately, by the time the cabinet's instructions arrived, the attack had already 'excited a general alarm on the frontiers of Georgia,' and Governor Telfair had 'called into service considerable bodies of Militia, Horse, and Foot for the protection of the exposed inhabitants.' Then, on June 12, Telfair wrote to Philadelphia to inform the federal government that seven hundred volunteers were making an 'expedition into the Creek Country.' Six days later, he wrote again: the expedition had been a complete failure. Not to be dissuaded, the governor then 'convened a Council of General Officers' to discuss an attack on 'the five inimical Towns in the Creek Nation.' He passed these plans on to the federal government only on August 13.[80]

Washington and Knox were furious. Not only had the Georgians repeatedly disregarded federal law, but they had also blatantly and unapologetically ignored the express instructions of the President. In early September, Telfair was informed of the President's feelings on the matter, but the governor persisted, writing back in early October that two officers had 'commanded an expedition against a Creek Town. . .and killed Six Warriors and took eight Women and Children Prisoners.' According to James Seagrove, 'the people belonging to it were among the most friendly of the Creeks' and had done nothing to provoke the attack.[81]

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[79] Henry Knox to George Washington, December 13 1793, *PGW* 14:515-520.
[80] ibid.
[81] ibid.

The Georgians' actions put Seagrove in a very difficult position. Convinced that 'the main body of the Creek Nation are desirous remaining at peace with the United States,' before the Georgian expedition, he had made arrangements to go into the towns and negotiate for 'the punishment of the Banditti Indians who have committed the outrages aforesaid,' and to achieve his object of 'more closely attaching the Creeks to the United States.' The Georgians' violence had stymied Seagrove's efforts to treat with the Creeks: as Knox wrote, 'Some of these people appear to oppose every effort for peace and ardently desire a War.'[82]

Governor Telfair informed Seagrove in August 'that under the law of the United States as well as for the security of this state, the government of Georgia cannot recognize the establishment of peace without having Commissioners at the Treaty.' This was, as Knox noted with evident alarm, an outright rejection of the Constitution, under which 'all Treaties made. . .under the Authority of the United States, shall be the supreme Law of the Land.' To add insult to injury, the Georgians 'kept up considerable bodies of mounted Volunteers of the Militia,' whose wages 'will most probably be demanded of the United States,' in spite of the fact that their service was never authorized by the federal government.[83]

Subsequently, state and federal officials worked through the autumn of 1793 and into 1794 to heal relations between Georgia, the Creeks, and the federal government. In November 1793, James Seagrove brought expensive gifts and offers of peace to the Creeks, hoping to prove to them that the United States could offer them better terms than Spain, which was vying for their support in the region. Tensions were raised again by further settler attacks on Creek leaders, and by the establishment of General Elijah Clarke's breakaway Trans Oconee Republic on Creek lands in 1794, but the governor of Georgia, George Mathews, raised the militia to evict Clarke and his followers in September of 1794. Despite this peace offering from Mathews, federal Indian agents were still deeply distrustful of Georgia's intentions and moved to assert

[82] Henry Knox to George Washington, December 13 1793, *PGW* 14:515-520.
[83] ibid.

their own authority at the 1796 Treaty of Coleraine. Though state commissioners were allowed to attend the treaty ground, they were roundly humiliated by the federal commissioners and by the Creeks, both during the proceedings and in the terms laid down in the treaty.[84]

The episode is a reminder that the exercise of federal authority in this period remained contingent on the cooperation of the individual state governments, especially at the furthest edges of the union. Throughout the affair, limitations of communications technology governed the conversation between Philadelphia and Savannah. Knowing that it would be weeks or months before they would hear from the federal government, however swift their reporting, the Georgia government had plenty of leeway to put their own plans into effect before Philadelphia could intervene. Hundreds of miles away, Washington and his cabinet were always operating at a disadvantage. Moreover, even when Congress and the executive stated their intentions clearly and unambiguously, the Georgians were ready to contradict, negotiate, or simply ignore these laws and instructions.

## Conclusion

In the early republic, Indigenous people and their homelands east of the Mississippi were the casualties of a long negotiation to which they were not party. In attempting to accommodate the state governments and maintain a friendly and functioning union, federal officials repeatedly reneged on their stated obligation to take exclusive responsibility for Indian affairs and oversee all actions of the states vis-à-vis land transfer. They stood by while state governments appropriated lands and proved themselves generally incapable of useful action in the face of illegal assaults by white militiamen and settlers against Indigenous people. Any other policy would have required a willingness to address difficult questions of sovereignty that could have

[84] Nichols, *Red Gentlemen & White Savages*, 157, 170.

destabilized the union in the same way that slavery later would. As a result, they sacrificed Natives for the sake of maintaining relations with the states.

If the crimes of the state governments were cruelty and theft, the crimes of the federal government, in this period, were neglect and abandonment. John Bowes encapsulates this reality in his comments on Cherokee Removal:

> Andrew Jackson, for all that he has become the evil face of Indian removal, more often than not assigned the federal government the role of a passive actor . . . . In contrast to the vision of removal policy as a context within which the president abused his power, the national debate over Indian removal actually began with a statement of federal inaction by the chief executive.[85]

In April 1829, Jackson had his Secretary of War, John H. Eaton, address an opinion to a group of Cherokee leaders in which the idea of coercive federal intervention on the side of the Natives was treated as an absurdity. 'The sword might be looked to as the arbiter in such an interference,' he wrote. 'But this can never be done.'[86]

The Federalists have gained a reputation for activism in law enforcement through moments like the suppression of the Whiskey Rebellion, and faint echoes of that activism can be seen in the Adams administration's decision to send troops to the Tennessee frontier to remove illegal settlers in accordance with the 1796 Trade and Intercourse Act. The federal government did send agents to the nations, and, though they were proponents of cultural erasure and 'civilization,' these agents did in many cases work to prevent, at the very least, violent crime against Indigenous people at the border of white settlement. Benjamin Hawkins's encounter with the Creek country, however, captures some of the challenges these officials faced: lack of personnel, poor communications technology, and the self-righteous anger of white settlers and state governments that, more often than not, supported settler interests.

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[85] John Bowes, *Land Too Good for Indians: Northern Indian Removal* (Norman, OK, 2016), 11.
[86] Secretary of War Eaton on Cherokee Removal, April 18 1829, *Documents of United States Indian Policy*, 46.

Generally speaking, however, the hard limit for the federal government was violence against whites for the sake of defending Indians. Even in the case of Tennessee, the administration did not ultimately feel itself able to push through its settler removal policy, instead bowing to the state's demands and extracting further land cessions from the Cherokee. Timothy Pickering and George Washington looked on as New York illegally stole Oneida land, doing nothing. Forced into a corner by unruly frontiersmen and determined state governments, the federal government learned its place. The states, as Cynthia Cumfer has written, continued to abide by their own theory of federalism, in which the intervention of the national government in Indian affairs was treated as a violation of state sovereignty. Despite the repeated objections of the judiciary, this vision of state power became entrenched. As Eaton wrote to the Cherokee leaders, 'The arms of this country can never be employed, to stay any state of this Union from the exercise of those legitimate powers which attach, and belong to their sovereign character.'[87]

Historians of federal Indian affairs have treated the ratification of the Constitution as an important moment of change, but state governments were broadly able to do as they wished even after the 'new' federal Indian policy went into effect. Even where they communicated their intentions to the federal government, and even when those intentions contradicted federal policy, there was often little the federal government felt it was able to do to stop them. There were two reasons for this. The first was the military incapacity of the federal government per se in the founding era, when, in cases of extreme necessity, it usually relied on the states themselves to furnish their militiamen in its aid. The second was the unwillingness of the federal executive to articulate or endorse clear answers to the difficult questions surrounding the sovereignty of the different actors – the nation, the states, and Indigenous peoples themselves.

[87] Eaton on Cherokee Removal, April 18 1829, *Documents of United States Indian Policy*, 46; Cumfer, 'Local Origins of National Indian Policy,' 23-24, 35.

Slaves of the Union:
Slavery in American Intergovernmental Relations,
1789-1815

## Introduction

In view of what was to come, slavery as a policy problem was strikingly unproductive of disputes between the state and federal governments between the First Federal Congress and the advent of the Missouri Crisis. While federal initiatives in the other three policy areas discussed in this dissertation – trade and finance, military preparedness, and Indian affairs – met with considerable active resistance from certain states before and during the War of 1812, state legislatures and executives to the north and the south of the Mason-Dixon Line were generally cooperative in the enforcement of federal laws relating to slavery. Although tensions were set to rise thanks to the growing divergence of Northern and Southern legal regimes, and the problem of transforming the Louisiana Territory into a series of self-governing states, no major crises arose as a result of state resistance to federal slave laws in this period.

There were two main reasons for this. First, despite the rise of antislavery sentiment during the Age of Revolutions, and the beginnings of abolition in Northern states from the 1780s onward, slavery remained legal in a number of Northern states well into the nineteenth century, including in those states where gradual abolition was underway. While the advent of personal liberty laws and radical abolitionism would intensify Southern paranoia, both of these phenomena were still to come in the 1790s. Second, federal executive officials like George Washington and Thomas Jefferson displayed a marked interest in managing slavery's prospects, not as disinterested national leaders, but rather as Southerners keen to work in tandem with their state-level counterparts to solve the problems slaveholders faced in terms of the security of their property and of their white supremacist regimes. Foreshadowing the proslavery antebellum elites described by Matthew Karp, whose geopolitical visions were crucial to shaping

the foreign and military policy of the United States, state and federal leaders carried on private dinner meetings and lengthy correspondences in which they worked together to make their shared visions of slavery's future a reality.[1]

More than any other policy area discussed in this dissertation, the case study of slavery in the early national period shows state governors actively shaping federal policy agendas in direct conjunction with federal executive officials. As other chapters have shown, state governments had a variety of means at their disposal through which to influence how federal policy was made, and how it was implemented within their jurisdictions. The states could go through their congressional representatives to press for change. They could pass resolutions and compose addresses remonstrating against federal measures. They could, as we see here in the case of the federal slave trade ban, simply refuse to enforce certain aspects of a given law until Congress responded to their pressure. But Governor Edward Telfair's role in framing negotiations with Spain for the extradition of fugitives from Florida, and the extensive correspondence between President Thomas Jefferson and Governor James Monroe regarding a federal colonization programme after Gabriel's Rebellion, show a different kind of state power at work. Shutting out congressional oversight, presidents allowed state governments, and especially governors, access to the levers of federal foreign policy for the pursuit of their own particular interests.

After a discussion of the federal government's power to regulate slavery under the Constitution, and a brief exploration of the applicability of 'sectionalism' as a tool of analysis for this period of American history, this chapter considers the role of intergovernmental relations in the management of five key aspects of slavery as a policy area: domestic fugitivity, international fugitivity, slave trading, rebellion, and colonization.

[1] Matthew Karp, *This Vast Southern Empire: Slaveholders at the Helm of American Foreign Policy* (Cambridge, MA, 2016).

It is worth noting at the outset that the developments in the history of American slavery discussed in this chapter were all to some degree framed and influenced by two defining moments of transnational importance in the Age of Revolutions. The first of these was Lord Mansfield's 1772 decision in the case of *Somerset* v. *Stewart*, which laid out two key principles: that slavery in England could only be justified by positive law, that is, by the active intervention of the legislature in its favour; and that enslaved people who landed there could not be compelled to leave the country without their consent. The latter of these two principles introduced the possibility that enslaved people would, in effect, be able to free themselves simply by crossing into jurisdictions where slavery was illegal. It was this latter principle that would underlie the ensuing decades of conflict over how to manage the flight of enslaved people to 'free' jurisdictions both within and without the borders of the United States.[2]

The second event was the outbreak of a war, in 1791, on the French Caribbean island of Saint-Domingue. This war, which would culminate in the independence of Haiti from the French empire and its establishment as the first black republic, seized American imaginations with a powerful grip. Although white Americans had been afraid of slave rebellion long before the advent of the Haitian Revolution, this extraordinary episode of self-liberation by enslaved people in the Atlantic world would shape their attitudes and justify their actions towards free and enslaved black people repeatedly across the period under discussion here.[3]

[2] Paul Finkelman, *An Imperfect Union: Slavery, Federalism, and Comity* (Chapel Hill, 1981; repr. Clark, NJ, 2013), 16; Anne Twitty, *Before Dred Scott: Slavery and Legal Culture in the American Confluence, 1787-1857* (New York, 2016), 12.
[3] Kay Wright Lewis, *A Curse upon the Nation: Race, Freedom, and Extermination in America and the Atlantic World* (Athens, GA, 2017), 72-73; Fehrenbacher, *Slaveholding Republic*, 111-113.

Slavery's Constitution?

Historians have, in recent years, spilled much ink on the question whether the Constitution of the United States was a 'proslavery' document at the time of its framing and ratification. The Constitution was framed by fifty-five men in a parliamentary process that did much to dull the impact on the shape of the document of any individual's particular views, but there can be no doubt that the document as a whole reflected the generalized desire of its framers to maintain union within the thirteen states whose joint revolution had thrown off British rule a decade previously. Since, in 1787, it remained legal in a majority of those states for white citizens to hold black people as property, and since many of those slaveholding white citizens were among the nation's most socially and politically influential figures, it is hardly surprising that many of the provisions of the Constitution went to protect the peculiar institution. Furthermore, the actions of the new federal government from 1789 demonstrate the considerable proslavery potential of the instrument in the hands of men who either held slaves themselves, or were more or less comfortable with slavery's continued existence in the United States.[4]

In fact, the provisions of the constitutional text itself tilted the balance of national power in favour of whites who claimed property in other human beings. The three-fifths clause of article one, section two meant that whites who lived in states with large enslaved populations were overrepresented in the House of Representatives, and therefore also in the electoral college. Each state had two seats – two votes – in the Senate, regardless the size of its voting population, so again, whites who lived in slave states where they were a minority or a slim majority had more political influence per capita, one might say, than whites who lived in states with larger, whiter populations. Thanks to these arrangements, proslavery or pro-Southern laws

[4] While there has been much non-academic writing on this subject, the key academic texts to consider in this debate are David Waldstreicher, *Slavery's Constitution: From Revolution to Ratification* (New York, 2009) and Sean Wilentz, *No Property in Man: Slavery and Antislavery at the Nation's Founding* (Cambridge, MA, 2018).

were more likely to pass Congress, and proslavery or pro-Southern presidents were more likely to take office. The inequality of representation among white Americans was an essential cause of sectional discontent in a period when a majority of the non-slaveholding white population was broadly indifferent to the plight of enslaved African Americans.[5]

Besides gaming the democratic system in favour of slaveowners, the Constitution also provided more direct and obvious ways for the federal government to bolster the brutal but fragile plantation regimes of the South. The fugitive slave clause of article four, section two was designed to prevent runaways from gaining their freedom simply by entering the jurisdiction of a state in which slavery had been abolished. It was supposed to force the governments of such states to recognize the enslaved status of runaways, and thereby to guarantee to slaveowners the common-law right of recaption (the right to seize and carry off their property) even in abolitionist jurisdictions. By article four, section four, the Constitution also guaranteed to every state protection 'against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.' This clause obliged the federal government to send aid to states which requested it in cases of slave rebellion. The militias of non-slaveholding states could constitutionally be called into service by the federal government for the purpose of suppressing such uprisings. The Constitution of the United States was not only perfectly compatible with the continued existence of slavery, but it also gave the federal government the power to defend the institution where it existed after 1789.[6]

Despite the failings of the Constitution, antislavery advocates of the antebellum period argued that the seeds of an antislavery federal programme were present from 1787 in the form of the Northwest Ordinance. Article four of the Ordinance provided that, in the U.S. territory

[5] Waldstreicher, *Slavery's Constitution*, 4-5; Banner, *To the Hartford Convention*, 99-105, discusses how New Englanders' objections to the three-fifths clause were often disconnected from strong antislavery sentiments in the early republic.
[6] U.S. Const. art. IV §2 & §4; Thomas Morris, *Free Men All: The Personal Liberty Laws of the North, 1780-1861* (Baltimore, 1974), 3-4; Waldstreicher, *Slavery's Constitution*, 6, 9.

north of the river Ohio, 'there shall be neither slavery nor involuntary servitude' except as punishment for crime. This became the basis for several successful freedom suits on the part of black Americans who argued – on the grounds of the *Somerset* principle – that a period of residence in the states founded in the former territory entitled them to liberty. But the Ordinance was a fickle instrument of emancipation. Though it did in fact lay the groundwork for the creation of five free states north of the Ohio, its provisions did not immediately end slavery even in the regions to which it applied. Article six stipulated that its ban on slavery could not be construed to prevent the owners of fugitives from exercising their right of recaption in the territory. Moreover, the ban itself was subject to considerable resistance from lawmakers and ordinary whites in the territory and in the states that grew up from it. Slavery was already entrenched in the territory before the Ordinance was drafted, and inhabitants made repeated attempts over subsequent decades to amend or repeal the ban. After statehood, Indiana and Illinois continued to tolerate slavery and indentured servitude. The important salt works of Gallatin County, Illinois relied upon enslaved labour until at least the late 1820s. As Paul Finkelman has written, the 'ambiguous, internally inconsistent' nature of the Northwest Ordinance, as well as the difficulty of enforcing its provisions, hampered its effectiveness as a potential weapon of federal antislavery.[7]

Federal officials were heavily implicated in the 'original sin' of slavery in both a personal and a professional capacity. It is not merely of anecdotal interest that so many key figures in the early presidential administrations were themselves slaveholders. Three of the first four presidents were owners of sprawling Virginia plantations, and each had an overwhelming financial and social interest in slavery's survival. As Erica Armstrong Dunbar has shown, George Washington and his slaveholding colleagues strategized amongst themselves about how

[7] 'Northwest Ordinance; July 13, 1787,' art. VI, *The Avalon Project* at Yale Law School, https://avalon.law.yale.edu/18th_century/nworder.asp (October 22 2021); Paul Finkelman, 'Slavery and the Northwest Ordinance: A Study in Ambiguity,' *JER* 6/4 (Winter 1986), 343-346; Twitty, *Before Dred Scott*, 11-12, 15-16, 31-50.

to retain control of their slaves in the federal capital of Philadelphia, where, a decade after the passage of Pennsylvania's gradual abolition law, the institution's grip had been weakened and statutory routes to freedom were common knowledge among the city's small enslaved population. The Washingtons were scrupulous in their policy of removing their enslaved servants to Virginia at least once every six months to ensure that these paths to self-emancipation remained closed to them.[8]

Matters were simpler after 1800, when the federal government moved to Washington, D.C., where slavery remained legal. The District of Columbia was one of several regions in the United States – alongside the Southern territories – in which Congress itself oversaw a slave regime. Although the national legislature was constitutionally empowered to make its own laws for the District, it 'took the easy way out,' as Don Fehrenbacher noted, 'by directing that those of Maryland and Virginia should continue in force.' Roughly a quarter of the District's population in 1800 was enslaved, and though this proportion sank to fifteen percent in 1830 and to only four percent by 1860, the laws regulating their behaviour remained, for most of the antebellum period, startlingly inhumane by the standards of the Upper South. Both free and enslaved black residents of the city were generally accustomed to be treated as non-citizens by Congress, acting in its capacity as the District's legislative authority. The U.S. government was an active enforcer of slavery and racial hierarchy in the geographical sphere within which its influence was most direct.[9]

In terms of antislavery activities, the federal government focused principally on a single policy area: the closing of the international ports and borders of the United States to slave traders. The crowning achievement of this programme, 'An Act to prohibit the importation of Slaves,' became law on March 2 1807, and went into effect as early as was constitutionally

[8] Erica Armstrong Dunbar, *Never Caught: The Washingtons' Relentless Pursuit of their Runaway Slave, Ona Judge* (New York, 2017), 62-63, 66-67; Fehrenbacher, *Slaveholding Republic*, 59.
[9] Fehrenbacher, *Slaveholding Republic*, 60-65.

permissible, on New Year's Day 1808. At the turn of the nineteenth century, the policy of ending the international slave trade was understood by both its supporters and its detractors as one way of cutting slavery off at the source, and bringing about its gradual demise within the United States. But both the text of the abolition law and its enforcement left much to be desired where antislavery was concerned. Whereas in jurisdictions controlled by the United Kingdom – whose Parliament also passed a slave trade abolition law in 1807 – illegally traded Africans were emancipated upon the arrest of their smugglers, Congress's legislation provided only for public auctions through which these unfortunate people, on reaching American soil, would be offloaded into the nation's enslaved population. These auctions, the profits of which were divided among government officials and informants, were a principal cause of the corruption that infiltrated the federal anti-slave-trade administration from 1808.[10]

Beyond the slave trade ban, the Constitution gave the federal government the option of doing something further to balance out the manifest advantages afforded to slaveholders by the rest of its arrangements. It gave Congress the power to lay taxes on slaves, in the form of a ten-dollar import duty before 1808, and as a direct tax – a property tax apportioned among the states by population – on those already in the United States. The Revolutionary statesman and leading Antifederalist Patrick Henry was horrified by the direct tax provision, as he informed the Virginia ratifying convention at length. Congress might, Henry conjectured, 'lay such heavy taxes on slaves, as would amount to emancipation' – taxes so burdensome as to 'compel the Southern States to liberate their negroes.' The potential for forced emancipation through taxation was so troubling to Henry that he would not even be comforted by the fugitive slave clause. 'That a run-away negro could be taken up in Maryland or New-York,' he said, 'could not

[10] Obadele-Starks, *Freebooters and Smugglers*, 5, 12-13, 23-24; Walter Johnson, 'The Future Store' in Walter Johnson, ed., *The Chattel Principle: Internal Slave Trades in the Americas* (New Haven, 2005), 1-2.

prevent Congress from interfering with that property by laying a grievous and enormous tax on it.'[11]

Henry's fears were, of course, overblown. The disproportionate representation awarded to major slaveholding states by the Constitution would allow Southerners, in David Waldstreicher's words, 'to determine everyone's federal taxes, or whether there would ever be any at all.' As Robin Einhorn has shown, Congress largely avoided laying federal property taxes by generating more than ninety (and up to one hundred) percent of federal revenue from tariffs on international trade between 1789 and 1861. Moreover, both Federalists and Republicans eventually realised that, if apportioned direct taxes hurt Southern slaveholders, they also hurt Northern farmers. Northern Federalists, therefore, had even more reason to oppose federal property taxes, which could make the federal government unpopular among their constituents, than did Southern Republicans, who could make political gains by turning Northerners against the Federalist regime. As a result, the national legislature laid a direct tax on property, including slaves, only three times in this period, and only ever in moments of crisis: under John Adams in 1798, during the Quasi-War, and twice under Madison during the War of 1812.[12]

Congress never once levied the ten-dollar tax on imported slaves. The prospect of imposing the tax was first raised in the spring of 1789, not by a Northerner, but by a Virginian, Josiah Parker, who argued that Congress should do whatever it constitutionally could to discourage the international slave trade, even before 1808. James Madison came to his aid with the claim that the Constitution's framers had intended the ten-dollar tax as a means to express disapproval of the trade. The anti-trade Virginians were defeated, however, by a coalition of New Englanders and members from the Deep South. A few months later, Parker brought in a

[11] *The Documentary History of the Ratification of the Constitution*, ed. Merrill Jensen et al. (34 vols., Madison, WI, 1976 –), 10:1341; U.S. Const. art. I §8; Einhorn, *American Taxation, American Slavery*, 178.
[12] Waldstreicher, *Slavery's Constitution*, 4-5; Einhorn, *American Taxation, American Slavery*, 117, 157, 168, 184-191.

bill for the imposition of the tax, but it was postponed at a vote, and not taken up again. Congress would only consider the ten-dollar tax again in 1804, shortly after South Carolina reopened its African slave trade.[13]

With the exception of the international slave trade ban, the early presidents and Congresses interpreted the Constitution in such a way as to minimize its antislavery potential. As a result, there was little in the way of conflict between state and federal officials over the meaning of the Constitution's slavery provisions in this period.

A Note on Sectionalism

'Northerners' and 'Southerners' dominate historians' accounts of the early American republic from the Constitutional Convention to the Civil War, their geographic origin to the north or south of the Mason-Dixon line a ready shorthand for their beliefs and political behaviour. But while this chapter focuses especially on the Southern jurisdictions of Virginia and Georgia, it is essential to note that neither birth nor residence within the geographical boundaries of the Civil War North was enough, between 1789 and 1820, to ensure either non-ownership of slaves or even the most muted of antislavery tendencies in white Americans. Though Northern jurisdictions were the first to begin the slow and halting process of emancipating their enslaved residents, 'sectional' tensions in the North in this period were generated less by moral opposition to white supremacy and forced labour, and more by a sense that the imbalances in the constitutional system gave Southern whites an undemocratic and excessive influence over the federal policy agenda.

Sectional antipathies came to the fore when the balance of power within the union appeared to be threatened. As the chastened Federalists retreated into New England state

[13] Donald Robinson, *Slavery in the Structure of American Politics, 1765-1820* (New York, 1971), 299-301.

government after Jefferson's national victory in 1801, partisan and regional sympathies were linked up in the northeast. The Louisiana Purchase prompted some New Englanders to propose the repeal of the three-fifths clause as they considered with horror the migration of American plantation society into the vast new territories of the union, and the concurrent entrenchment of the 'slave power' (and Jeffersonianism) in national politics. A resolution proposing a constitutional amendment to that effect passed the Massachusetts legislature in 1804, but was rejected by every other state besides Connecticut and Delaware. Ten years later, the Report of the Hartford Convention enumerated the New Englanders' objections to the existing order, including the enactment of 'a deliberate and extensive system for effecting a combination among certain States . . . so as to secure to popular leaders in one section of the Union, the control of publick affairs, in perpetual succession.' This Southern dominance had been consolidated by 'the admission of new States into the Union, formed at pleasure in the western region,' which had 'destroyed the balance of power which existed among the original States.' It was these grievances which formed the substance of sectional feeling in the North in this early period.[14]

This is not to say that Southerners were not sensitive about slavery. Though some were apologetic in the company of non-slaveholding whites, others were quick to take offence at the merest hint of a federal threat to the institution. During debates in Congress early in 1795 on amendments to the Naturalization Act, William Branch Giles of Virginia and Samuel Dexter of Massachusetts came to (verbal) blows over Dexter's taunting suggestion that immigrants applying for citizenship be required to renounce any property in slaves before they could be admitted. With the approach of the Missouri Crisis, and with increased progress toward

[14] *Proceedings of a Convention of Delegates*, 14-15; Robinson, *Slavery in the Structure of American Politics*, 270-271; Matthew Mason, *Slavery and Politics in the Early American Republic* (Chapel Hill, 2006), 4-5, 43-44.

complete emancipation in many Northern states, white Northerners became less and less likely to keep quiet about slavery's iniquity, despite Southern defensiveness.[15]

When the First Congress met in 1789, however, much of this was still to come. White Northerners from Rhode Island to New Jersey still held thousands of black people in bondage. White Southerners, meanwhile, notably in Virginia, had turned against the slave trade, and had struggled without success through the Revolutionary years to reconcile the practice of enslavement with the dictum 'all men are created equal.' Manumission in Virginia exploded after 1782, when the assembly passed a law allowing masters to free their slaves without petitioning the legislature for a private bill. Amidst a rash of radical manumissions from 'enlightened' slaveholders, however, the symptoms of white backlash quickly presented themselves: violence against freedmen, attacks on their meagre property, and lawsuits brought against their former owners.[16]

There was, strikingly, one near-universal trend in the reform of state slave laws in the post-Revolutionary era, encompassing both the North and the South. Long before the federal slave trade ban of 1808, the vast majority of states across the union had individually attempted to end the importation of enslaved people into their jurisdictions. Both Northerners and Southerners tended to see a distinction between the barbarous practice of slave trading – the 'infernal trafic,' as George Mason called it at the Federal Convention – and mere slaveholding, which was seen as unpleasant but necessary. The major cause of anxiety about the slave trade, however, was not its threat to morality, but its threat to security. In his 1787 speech, Mason supported his argument for a federal power to ban the trade with examples from history, like 'the dangerous insurrections of the slaves in Greece and Sicily' in classical antiquity. As Walter Johnson remarks, the real concerns were 'the inflow of slaves to areas where they increasingly

[15] Robinson, *Slavery in the Structure of American Politics*, 254-255; Mason, *Slavery and Politics*, 1-2.
[16] David Brion Davis, *The Problem of Slavery in the Age of Revolution, 1770-1823* (Oxford University Press edition, New York, 1999), 312-314; Alan Taylor, *The Internal Enemy: Slavery and War in Virginia, 1772-1832* (New York, 2013), 36-42.

outnumbered whites by large margins and the outflow of specie from an economy overextended by speculation.' Mason pointed the finger at Northern slave traders who 'had from a lust of gain embarked on this nefarious traffic,' threatening the security of the South in pursuit of profit.[17]

As a result of these fears, which were sharpened by the war in Saint-Domingue from 1791, Adam Rothman notes that before 1820, 'legislators in every southern state enacted statutory or constitutional restrictions on the interstate slave trade.' By the time Mason gave his impassioned speech in Philadelphia, Virginia had long since legislated to prevent the importation of slaves into the state.[18] North Carolina closed its external trade in 1794, while Georgia ended importation from the West Indies in 1793, and from Africa in 1798. South Carolina's ban operated between 1787 and 1803, when the assembly voted to reopen the trade with Africa, a decision that proved deeply unpopular with its neighbouring states and with the federal government. Congress itself in 1804 introduced restrictions on importation into the Orleans Territory, despite the hunger of local whites for enslaved labour.[19]

On the other side of the Mason-Dixon line, it was illegal by 1789 to import enslaved people for the purpose of sale in Connecticut, Rhode Island, New York, New Jersey, and Delaware, though slavery itself continued legally in those states. Legal loopholes in some states allowed certain Northern ports to become hubs in the trading network through which such 'merchandise' could be re-exported to other jurisdictions, and, as in the South, some states exempted white immigrants seeking to settle in the state with their enslaved property.

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[17] Madison's Notes, August 22, Farrand 2:370; Johnson, 'The Future Store,' 4; Adam Rothman, 'The Domestication of the Slave Trade in the United States' in Johnson, ed., *The Chattel Principle*, 42.

[18] Davis, *The Problem of Slavery in the Age of Revolution*, 25.

[19] Rothman, 'The Domestication of the Slave Trade,' 33, 37-39; Davis, *The Problem of Slavery in the Age of Revolution*, 28. In 1804, Governor William C.C. Claiborne of the Orleans Territory told Secretary of State James Madison, '[T]he slave-trade seems to be a favourite object throughout the province,' and suggested that a desire to reopen the trade was driving the movement for statehood in the territory. See William C.C. Claiborne to James Madison, July 26 1804, *PJM* Secretary of State Series, 7:524-526.

Pennsylvania laid prohibitive duties on imported slaves. In the North, restrictions on interstate and international slave trading were only a part of a broader programme of reforms extending, in places, to the total abolition of slavery, though concluding more often with gradual abolition acts under which freedom remained a distant prospect for the majority of those enslaved.[20]

The ending of slavery in the North was an uneven process accomplished through different legal processes and at different times in the different states. In Massachusetts, the abolition for which enslaved petitioners had long been agitating began in earnest in the aftermath of a series of court cases fought in the early 1780s between a black man named Quok Walker and the white man, Nathaniel Jennison, who claimed to own him. Chief Justice William Cushing ultimately declared, in 1783, that slavery was repugnant to the Massachusetts Constitution of 1780, and though it was not universally abolished in the state at that moment, freedom suits and *de facto* self-emancipations resulted in what Thomas Morris terms the 'disintegration' of legal slaveholding in the Commonwealth by 1790. Vermont banned slavery through its 1777 Constitution, and though the New Hampshire Assembly would not pass legislation actually outlawing slavery until 1857, the institution slowly ended there after the Revolution in a similar manner to neighbouring Massachusetts – 'by effect,' as Joanne Pope Melish writes, rather than by positive law.[21]

If, as Ira Berlin put it, eighteenth-century North America was divided between 'slave societies' and 'societies with slaves,' the states of the post-Revolutionary North fell decidedly into the latter category. Though slaveholding in the North had a somewhat different set of social and economic purposes from slaveholding in the South, however, many Northern whites

[20] Robinson, *Slavery in the Structure of American Politics*, 295-299.
[21] Morris, *Free Men All*, 7; Joanne Pope Melish, *Disowning Slavery: Gradual Emancipation and 'Race' in New England, 1780-1860* (Ithaca, NY, 1998), 1; Arthur Zilversmit, *The First Emancipation: The Abolition of Slavery in the North* (Chicago & London, 1967), 110-117.

remained committed to the institution even after the soul-searching of the Revolutionary era.[22] In several states, gradual abolition acts were considered a productive compromise, signalling the beginning of the end for the troublesome and troubling institution while concurrently protecting slaveholders from drastic financial losses. Pennsylvania took this course in 1780, followed by Rhode Island and Connecticut in 1784. As David Menschel notes, under this 'protracted and idiosyncratic' process, Connecticut's last enslaved inhabitants were not freed until 1848.[23]

Two Northern states eschewed abolition altogether in the post-Revolutionary moment. New York and New Jersey not only failed to move away from slavery in any meaningful sense, but actually confirmed and consolidated the institution's legal basis within their respective jurisdictions during the 1780s. Despite the founding of the New York Manumission Society in 1785, and the wave of antislavery activity it initiated, the state assembly in 1788 passed a new slave code, the first in the state since 1730. While New Jersey legislated in 1786 to ban the importation of slaves into the state – like so many other states, North and South, in the same period – it also made legal provision for the relegation of free black residents to 'second-class citizenship,' as Arthur Zilversmit wrote, including restrictions on freedom of movement for formerly enslaved people and a ban on the in-migration of free African Americans from other states. New York would ultimately pass a gradual abolition law in 1799, finally banning slavery altogether in 1827. Despite pressure from antislavery activists throughout the 1790s, New Jersey's assemblymen held out until 1804, when they at last approved a gradual abolition bill with an almost unanimous vote. New Jersey technically abolished slavery altogether in 1846,

[22] Davis outlines the intellectual convulsions over slavery experienced by the Patriots in *The Problem of Slavery in the Age of Revolution*, 274-284.
[23] Ira Berlin, *Many Thousands Gone: The First Two Centuries of Slavery in North America* (Cambridge, MA, 1998), 8-10; David Menschel, 'Abolition without Deliverance: The Law of Connecticut Slavery, 1784-1848,' *YLJ* 111/1 (October 2001), 185-187; Zilversmit, *The First Emancipation*, 121-131.

though the terms of its abolition act allowed for the continued unfreedom of former slaves in the form of lifelong 'apprenticeship.'[24]

As the new national government began its operations in 1789, then, the Mason-Dixon line still did not mark a meaningful boundary between slavery and freedom. The first national census in 1790 recorded 21,324 slaves in New York. (For comparison, Georgia had 29,264.) 3,737 remained in Pennsylvania, 11,453 in New Jersey, and the only state to record 'none' was Massachusetts.[25] While the abolition movement of the 1780s achieved lacklustre results in many respects, however, these post-Revolutionary changes to Northern slave regimes opened the way for challenges to the enslaved status of individuals on a variety of legal grounds. They raised the possibility that enslaved people fleeing from masters in the South could achieve freedom in Northern jurisdictions where the legality of slavery was no longer recognized, or where there were, at least, some legal remedies available to the enslaved. It was this possibility that the Constitution's fugitive slave clause sought to address.

Despite their own halting efforts at abolition, Northern white elites were broadly supportive of a national solution to the problem of fugitive slaves. In its own 1780 Gradual Abolition Act, Pennsylvania explicitly protected the right of slaveholders from other jurisdictions to arrest fugitives belonging to them whom they found within the territory of the Commonwealth. The Northwest Ordinance guaranteed the same right, and at the Constitutional Convention, Pierce Butler's proposed fugitive slave clause was, in James Madison's words, 'agreed to nem: con:' – *nemine contradicente* ('with no one speaking against') or

[24] Zilversmit, *The First Emancipation*, 147-153, 180-200, 214-220.
[25] The census results are reprinted in Note 3, George Washington to the United States Senate and House of Representatives, October 27 1791, *PGW* 9:122-124.

unanimously. Richard Blackett adds that the federal fugitive slave law of 1793 passed both houses of Congress 'by substantial, intersectional majorities.'[26]

The concept of sectionalism proves a slippery one when applied to a post-Revolutionary union that was not yet 'half slave and half free.' Northerners and Southerners, Easterners and Westerners disagreed about key matters of policy across the early decades of the republic – but in early days, slavery was not always (was often not) the cause of their regional or sectional political disputes. As Northerners were faced, over the ensuing years, with working out the precise implications of those early, apparently easy concessions to a still staunchly slaveholding South, and as Southerners confronted the resentment generated by their undemocratic stranglehold over federal institutions, tensions began to rise.

A purely sectional analysis of state behaviour is also inadequate when considering intergovernmental relations and administration in this period. Southern states, for example, generally cooperated with the federal government in the enforcement of the slave trade ban, not least because they had been trying, largely unsuccessfully, to enforce such a ban for decades by the time Congress stepped up in 1808. By the same token, Northern states were for the most part unwilling to mount a direct challenge to federal arrangements for the capture of fugitive slaves in this period because many of them continued to protect the practice of slavery, albeit on a smaller scale, into the late 1820s and beyond.

## John, a Free Man, and the Making of the First Fugitive Slave Act

One of the central insights of this dissertation is that, insofar as federal government policies were effective within the states in the early national period, their effectiveness was in

[26] Madison's Notes, August 29, Farrand 2:453-454; R.J.M. Blackett, *The Captive's Quest for Freedom: Fugitive Slaves, the 1850 Fugitive Slave Law, and the Politics of Slavery* (New York, 2018), 286.

considerable part due to an integrated administrative strategy by which the state governments passed laws enabling the operation of federal statutes, and used their resources and personnel to support the practical implementation of federal policies. Every chapter discusses instances in which that system worked, and in which it fell it apart. But the most dramatic example of this system's failure would be the operation of the 1793 Fugitive Slave Law. Not only would some states not legislate to enable the operation of this law within their jurisdictions, but many Northern states would, in the 1820s and 1830s, enact personal liberty laws with the aim of halting its operation altogether. The attempt to secure the union by forcing Northerners to participate in the recapture of enslaved people, especially after the Compromise of 1850, would become an important cause of the breakdown of intersectional relations and the outbreak of the Civil War.[27]

Untangling the meanings of the constitutional text and turning it into an effective instrument of administration in the early republic was a process driven not only by federal officials, but also by the state leaders who attempted to use the text to solve the problems they encountered in governing under the new federal system. The Fugitive Slave Law is a case in point. The law came into existence as a result of the 1788 kidnapping of John, a free black man, from Pennsylvania, and of the ensuing dispute between the Pennsylvania and Virginia governments over how his kidnappers should be brought to justice. Acknowledging the silences of the Constitution as to the resolution of such cases, and unwilling to take on the responsibility of adjudicating every such controversy himself, President George Washington handed the problem on to Congress. Not content to address only the 'fugitives from justice' clause in its deliberations, the national legislature concurrently negotiated a procedure for the proper restoration of 'fugitives from labour' to their masters.

[27] Finkelman, *An Imperfect Union*, 4, 7-11; Blackett, *Captive's Quest for Freedom*, xii-xiii.

The question of domestic fugitivity and the problem of kidnapping became minor points of contention in Congress in the 1790s and 1800s, but in general, Northern state legislatures proved themselves more than willing to cooperate with federal law where the recapture of runaway slaves was concerned. This was certainly linked to the continued prevalence of slaveholding in several states to the north of the Mason-Dixon line at that time. The budding crisis over fugitivity was most easily discernible, not in the state assemblies, but in the courtrooms, where judges began, from the 1780s, to make important choices about the kinds of remedies that should be available to test the status of accused runaways.

In its gradual abolition act of March 1780, the state of Pennsylvania required that all slaveholders register the enslaved people in their households at the local courthouse by November 1 of that year. If they failed to undertake this registration, the people they enslaved would go free. Several high-profile whites would later fall afoul of the law, including Edmund Randolph, George Washington's attorney general, and Senator Pierce Butler, the South Carolinian who had proposed the fugitive slave clause at the Constitutional Convention. Among them, too, was a man called Davis, a slaveholder from Maryland who had moved to a county in southwestern Pennsylvania that was also claimed by the state of Virginia – the border between the two states had long been disputed. When slaveholders in this disputed region protested that they had not had time to register their slaves before November 1780, the legislature extended the deadline to January 1 1783. Davis missed both deadlines, and a man he enslaved, John, became legally free under Pennsylvania law.[28]

[28] 'Pennsylvania – An Act for the Gradual Abolition of Slavery, 1780,' *The Avalon Project* at Yale Law School, https://avalon.law.yale.edu/18th_century/pennst01.asp (February 5th 2021); Dunbar, *Never Caught*, 62-63; Fehrenbacher, *Slaveholding Republic*, 59; Paul Finkelman, 'The Kidnapping of John Davis and the Adoption of the Fugitive Slave Law of 1793,' *Journal of Southern History* 56/3 (August 1990), 402.

Despite his freedom, Davis held onto John until 1788, when he took him across the Virginia line and hired him out as a labourer to a man named Miller. John escaped Miller's plantation and fled to freedom in Pennsylvania. Virginian politicians later speculated that he had received aid from the Pennsylvania Society for Promoting the Abolition of Slavery. Afraid that he would be held liable for the cost of Davies's missing property, Miller hired three white men – Francis McGuire, Absalom Wells, and Baldwin Parsons – to hunt John down and return him to slavery. On May 10 1788, they found him in Washington, Pennsylvania. They attacked and kidnapped him, taking him back across the border, where he was sold as a slave to one Nicholas Casey of Romney, Virginia.[29]

Some months later, in November, the court of oyer and terminer of Washington County, Pennsylvania, indicted McGuire, Wells, and Parsons for kidnapping. Though Pennsylvania had provided for the recovery of fugitive slaves in its jurisdiction through the gradual abolition law of 1780, it had also passed an antikidnapping law in 1785, which was designed to protect free black people like John from unscrupulous white criminals like the Virginians who had taken him. Such laws were not the sole preserve of Northern jurisdictions: Virginia had also made the kidnapping of a free black person a felony through a law of 1787.[30]

Over the ensuing years, local abolitionists in Washington County wrestled with the problem of rescuing John from his illegal enslavement. They considered encouraging another escape attempt, but feared that if he failed in his flight, John could be sold south, far beyond their reach. They tried to get John back through the Virginia courts, but without success. Finally, in December 1790, their efforts caught the attention of prominent Philadelphia abolitionists. In May 1791, the Society for Promoting the Abolition of Slavery petitioned Governor Thomas

[29] Finkelman, 'The Kidnapping of John Davis,' 402; editor's notes to Thomas Mifflin to George Washington, July 18 1791, *PGW* 8:345-348.
[30] Finkelman, 'The Kidnapping of John Davis,' 402; H. Robert Baker, 'The Fugitive Slave Clause and the Antebellum Constitution,' *Law and History Review* 30/4 (November 2012), 1142.

Mifflin for help. In June, Mifflin wrote to Governor Beverley Randolph of Virginia to request his aid in resolving the matter of John's kidnapping.[31]

Mifflin's letter was polite and comprehensive. He wanted two things. The first was the extradition of the three kidnappers to Pennsylvania, where they would face trial for 'the illegal and forcible seizure and carrying away . . . a certain free Negroe Man named John.' To lend legal support to his request, Mifflin cited article four, section two of the U.S. Constitution, which dealt with people 'charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State.' In such cases, the Constitution declared, the fugitive 'shall on Demand of the executive Authority of the state from which he fled, be delivered up' and extradited 'to the State having Jurisdiction of the Crime.' Pennsylvania's second request was that something be done to help John. Mifflin asked Randolph to use his influence 'to restore the negro to his freedom.' He appealed to the Virginia governor's 'regard for justice and humanity' in making this plea.[32]

On receiving Mifflin's letter, Governor Randolph forwarded the letter to state attorney general James Innes, who protested that it would be impossible for Virginia to comply with Pennsylvania's request vis-à-vis the kidnappers. In July 1791, Governor Randolph informed Mifflin of Virginia's refusal to extradite the men who had seized John, citing Innes's opinion. Randolph wrote, 'It is to be lamented that no means have been provided for carrying into effect so important an Article of the Constitution of the United States. This case will, however, we hope be the means of calling the Attention of the [national] Legislature to a subject of such consequence.' With all of his other options apparently exhausted, Mifflin decided to hand the case over to the federal government for adjudication. He addressed himself directly to the president of the United States, laying out his own objections to the Virginians' perverse and

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[31] Finkelman, 'The Kidnapping of John Davis,' 402-403.
[32] U.S. Const., art. IV, §2; Thomas Mifflin to Beverley Randolph, June 4 1791, *American State Papers: Class X. Miscellaneous*, ed. Walter Lowrie & Walter Franklin (2 vols., Washington, D.C., 1834), 1:40; Finkelman, 'The Kidnapping of John Davis,' 403.

'inaccurate' reading of the case, and expressing his hope that 'by the interposition of the Foederal Legislature (to whose consideration you may be pleased to submit it) such regulations may be established, as will, in future, obviate all doubt and embarrassment, upon a constitutional question, so delicate and important.'[33]

President Washington evidently agreed that the matter was a delicate one, and handed the matter on to the Attorney General of the United States, Edmund Randolph. On the one hand, Randolph acknowledged that the case of John's kidnappers clearly fell within the remit of article four, section two, since they had been charged with a crime in Pennsylvania and had fled into Virginia. He noted, 'To deliver up is an acknowledged foederal duty: and the law couples with it the right of using all incidental means, in order to discharge it.' Virginia was clearly obliged by the Constitution to hand the fugitives over to the Pennsylvanians.[34]

On the other hand, as might be expected from a former governor of Virginia, Randolph was prepared to give his countrymen the benefit of the doubt. He understood that Virginia had failed to act because its 'own constitution and laws, and those of the United States' were 'silent as to the manner and particulars of arrest and delivery' of the fugitives. The state would likely incur expenses in pursuing, arresting, and delivering up the kidnappers, and it was not clear who would pay. Furthermore, Randolph believed that Mifflin had not shown the Virginians sufficient evidence to prove that McGuire, Wells, and Parsons had in fact committed a crime under Pennsylvania law; or that, upon leaving Pennsylvania, they had in fact fled into Virginia.[35]

In the opinion he prepared for Washington, the attorney general was clear that he could 'find no obligation nor propriety, which can warrant the interposition of the President at this stage of the business.' As he considered the conflict between the two states, he foresaw a torrent

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[33] Thomas Mifflin to George Washington, July 18 1791, *PGW* 8:345-348 – Beverley Randolph's July 8 letter to Thomas Mifflin, rejecting the extradition request, is quoted in note 3; Finkelman, 'The Kidnapping of John Davis,' 404-5.
[34] Edmund Randolph to George Washington, July 23 1791, *PGW* 8:371-375; Baker, 'The Fugitive Slave Clause and the Antebellum Constitution,' 1138.
[35] Edmund Randolph to George Washington, July 23 1791, *PGW* 8:371-375.

of such complaints and disputes landing on Washington's desk over the course of his time in office. '*Now* to interfere would establish a precedent for assuming the agency in every embryo-dispute between states,' Randolph remarked. He believed Washington should only step in if the situation deteriorated considerably, and the president was of the same mind. Rather than making himself the ultimate source of authority on this uncomfortable clause of the Constitution, it would be better to hand the problem over to Congress, which could pass an act explaining the text and laying out a procedure for the resolution of such issues in the future. On October 27 1791, the president submitted the matter to Congress.[36]

The question technically at issue was the manner in which fugitives from justice should be extradited from one state jurisdiction to another, but Congress used the opportunity presented by the Pennsylvania-Virginia dispute to produce legislation explaining and implementing not only the Constitution's fugitives from justice clause, but also its fugitive slave clause. 'An Act respecting fugitives from justice, and persons escaping from the service of their masters,' signed into law on February 12 1793, provided basic extradition procedures that could be used by state authorities in each case. The act specified, in the case of fugitives from justice, a process almost identical to that pursued by Governor Mifflin in the case of Wells, Parsons, and McGuire. The governor of the state *from* which the criminals had fled was to send the relevant documents to the governor of the state *to* which they had fled, and the governor of that state was 'to cause him or her to be arrested . . . and to cause the fugitive to be delivered' to an agent of the state requesting the extradition.[37]

The section of the act covering the rendition of fugitive slaves laid out a different procedure. Rather than making an agent of the state responsible for their capture, the act

[36] Edmund Randolph to George Washington, July 23 1791, *PGW* 8:371-375; Baker, 'The Fugitive Slave Clause and the Antebellum Constitution,' 1138-1139.
[37] 1 Stat. 302.

contemplated the pursuit of the fugitive by 'the person to whom . . . labour or service may be due, his agent or attorney.' This private citizen was 'empowered to seize or arrest such fugitive . . . and to take him or her before any judge . . . of the United States, residing or being within the state, or before any magistrate' in the locality. After hearing evidence, this judge or magistrate was to determine whether 'the person so seized or arrested, doth . . . owe service or labour to the person claiming him or her.' If he found this to be the case, he was to issue to the slaveholder or their appointed agent 'a certificate thereof . . . which shall be sufficient warrant for removing the said fugitive . . . to the state or territory from which he or she fled.' Through this legislation, the federal government imposed on local officials in the North a 'duty' to facilitate the extradition of fugitive slaves at the request of their enslavers. As Thomas Morris has noted, the act allowed Northern judges some room for movement. It did not specify, for example, that evidence in the extradition hearing could only be taken from white citizens, so there remained the possibility that judges could admit evidence from the purported fugitives themselves, depending on the laws of their state.[38]

A great irony of the Fugitive Slave Law of 1793 was that, while it had arisen from the circumstances surrounding the kidnapping of a free man and his sale as a slave in the South, it failed to address the broader problem of the abduction and sale of free black people. That such crimes were, in fact, a major concern was clear, even to some white Americans who otherwise condoned the institution of slavery itself. In 1796, Pennsylvania congressman Albert Gallatin presented to the house a memorial from the legislature of Delaware – a slaveholding state – which discussed the question. The Delawareans informed Congress that they had taken legislative steps to prevent the kidnapping of black people within their own jurisdiction. At the same time, they put forward the case that the abduction of both free and enslaved black people

[38] 1 Stat. 302-305; Morris, *Free Men All*, 22.

was ultimately a national problem that required a national solution. Congress would need to use its power to regulate interstate commerce if it hoped to put an end to kidnapping across the union.[39]

The standing committee on Commerce and Manufactures endorsed Delaware's request for federal legislation, and called, in its report, for a bill to be brought in requiring the captains of ships to carry certificates recording the number and status (free or enslaved) of any black or mixed-race passengers. The bill's sponsors, many of them Pennsylvanians of broadly antislavery sympathies, attempted to garner Southern support for the legislation by insisting that slaveholders would benefit from federal intervention to end slave-stealing. Proslavery lawmakers, however, viewed the bill primarily as an attempt to protect free African Americans, and opposed it as a result.[40]

Even in the early years of the national government, Southern slaveholders in Congress jealously guarded their federal right to arrest fugitive slaves anywhere in the union, reacting strongly to any perceived danger and pushing for further protections against the Somerset principle. In 1801, Congressman Joseph Nicholson of Maryland reported a bill that would have enabled the federal government to impose a heavy fine on anyone hiring a black person who did not carry a certificate testifying to their freedom, and would have required such employers to advertise a description of the person they were hiring in two newspapers, in case they were a runaway. Though the 1801 bill failed, in 1817, a revised and strengthened fugitive slave bill made considerable progress in Congress before it failed due to disagreements between the House and the Senate.[41] The question that remains is whether the Southerners' fears, expressed through these attempts to strengthen federal fugitive slave laws, were justified. To what extent did the

[39] Robinson, *Slavery in the Structure of American Politics*, 286; Morris, *Free Men All*, 22.
[40] Robinson, *Slavery in the Structure of American Politics*, 287.
[41] Fehrenbacher, *Slaveholding Republic*, 213-214.

Northern state governments of the time pose a substantive threat to the slaveholders' right to their property in man?

By the time of the Compromise of 1850, Southern politicians complained that the 1793 law was a dead letter. They announced hundreds of thousands of dollars in losses to slaveholders due to the flight of enslaved people to Northern jurisdictions. The major point of contention was the open refusal of Northern state governments to co-operate with Southern states, or with the federal government, in protecting slaveholders' right to reclaim their property. Northern states not only failed to aid in the enforcement of federal laws, but they also actively resisted the recapture of the enslaved, and the kidnapping of free black people, by passing personal liberty laws, which banned state and local officials from participating in fugitivity cases.[42]

The immediate ancestor of the personal liberty law to which antebellum Southerners so fiercely objected was the antikidnapping law. Pennsylvania passed a law in 1788 providing penalties for the capture of a black person with the intention of selling him into slavery. In 1808, New York approved a law explicitly targeting the kidnapping of free people of colour, and providing for up to fourteen years' imprisonment in the event of the kidnapper's conviction. Antikidnapping laws were prevalent, as we have seen, not only across the North but also in unrepentantly slaveholding states like Virginia and Delaware. It is important to note, however, that these early antikidnapping laws were not equivalent to the personal liberty laws that arrived in the 1820s. As Morris has noted, these early laws were 'cautious and carefully framed statutes' whose authors were generally anxious not to infringe either the slaveholders' right of recaption or the laws of the United States. This is unsurprising, given that many leading

[42] Blackett, *Captive's Quest for Freedom*, 5-6; Gautham Rao, 'The Federal "Posse Comitatus" Doctrine: Slavery, Compulsion, and Statecraft in Mid-Nineteenth-Century America,' *Law and History Review* 26/1 (Spring 2008), 21.

citizens in states like Pennsylvania, New York, New Jersey, and Connecticut continued to claim property in slaves.[43]

Massachusetts remained a special case. In March 1785, the Commonwealth passed a habeas corpus statute that 'eliminated,' as Thomas Morris has written, 'the so-called right of recaption.' The act made it an offence for anyone to 'transport, or carry, or cause to be transported or carried, any subject of this Commonwealth, or other person lawfully residing and inhabiting therein, to any part or place without the limits of the same . . . without his consent or voluntary agreement.' The question of who, exactly, constituted a 'lawful resident' was for the judge to decide, but in effect the law banned the removal of fugitives from slavery, or free black people, from Massachusetts, unless they were subject to a formal extradition process to face criminal charges in another state. This measure made Massachusetts strikingly different from states like Pennsylvania, which retained statutory protections for the right of recaption. Further to the habeas corpus act, in 1787 Massachusetts made another law guaranteeing the use of the writ *de homine replegiando* to 'every person . . . who shall be imprisoned, confined, and held in duress.' Similar to the writ of habeas corpus, this writ – also called the writ of personal replevin – could be used to remove a person from the custody of the state or of a private individual in order to investigate the causes of their imprisonment.[44]

The Commonwealth did not repeal these statutes after 1789, or after 1793. It did not, as far as the records show, pass any law acknowledging or implementing the first federal Fugitive Slave Law. The law of Massachusetts was therefore in direct tension with the law of the United States from the very beginning of government under the Constitution. As Morris writes, 'After 1788 the only limitation upon the state's policy was the federal guarantee to slaveholders that they could recover their property, but the exact manner in which this qualified the state law on kidnapping was unclear.' The state legislature had not qualified its own law, as

[43] Morris, *Free Men All*, 29.
[44] *Acts and Resolves of Massachusetts, 1784-85*, 182; Morris, *Free Men All*, 11-12.

we have seen states do across a number of policy areas throughout the transition to the national government in the late 1780s and early 1790s. It would be up to individual judges to pick through what Morris terms the 'cloudy legal situation' surrounding the arrest of fugitives from slavery in Massachusetts.[45]

Not until much later would a majority of Northern state legislatures begin to interfere directly with the operation of the federal fugitive slave law. An 1819 Ohio law ended the right of recaption in that state, requiring slaveholders to use the procedure laid out by the 1793 Fugitive Slave Act – to confirm their rights to the person in question through a hearing – rather than simply arresting runaways and absconding with them. In the 1820s, Pennsylvania and New York also ended the right of recaption, and experimented variously with requiring a jury trial in fugitive cases and banning state officials from participating in the recovery of fugitives. Laws of this kind were at issue in the 1842 Supreme Court case of *Prigg* v. *Pennsylvania*, in which Associate Justice Joseph Story found that the Constitution guaranteed the right of recaption, but questioned whether state officials could be compelled to participate in the capture of runaways. Abraham Lincoln asked the same question in his first inaugural address. 'Shall fugitives from labor be surrendered by national or by State authority?' Lincoln asked. 'The Constitution does not expressly say.'[46]

Such intergovernmental controversies were, however, nowhere to be seen in the first thirty years under the national government. The vast majority of Northern state legislatures were careful not to infringe the federal fugitive slave law, and what is more, Northern courts regularly made startlingly proslavery decisions in cases surrounding fugitivity between the 1790s and the 1830s, including regularly defending the 1793 act against claims of unconstitutionality.

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[45] Morris, *Free Men All*, 25.
[46] 'First Inaugural Address of Abraham Lincoln,' *The Avalon Project* at Yale Law School, https://avalon.law.yale.edu/19th_century/lincoln1.asp (February 4 2021); *Prigg* v. *Pennsylvania*, 41 U.S. 539 (1842) at 540, 541; Fehrenbacher, *Slaveholding Republic*, 215-216.

Even the originators of the 1850 Fugitive Slave Law looked back fondly on the first two decades of the nineteenth century as a time of intersectional co-operation in the matter.[47]

The Extradition Problem

Domestic fugitivity would become a defining problem of the antebellum struggle over slavery's future in the United States, but in the early republic, the problem of extraditing enslaved fugitives from foreign jurisdictions generated pages upon pages of intergovernmental correspondence. Escape across state borders was a difficult problem for slaveholders, but its complexity was matched – even exceeded – by the conundrum of international fugitivity, through which thousands of enslaved people had already liberated themselves from Virginian, Carolinian, and Georgian masters over the course of the Revolutionary War. From 1789, Southern states continually pressed the federal government to negotiate agreements with neighbouring imperial powers for the extradition of fugitive slaves. While their efforts were unsuccessful, this was not for want of federal assistance. Though, from Washington's time onward, administration after administration would work to satisfy the slave states' demands for extradition treaties, the refusal of foreign powers – notably Britain – to co-operate would make international fugitivity a seemingly insoluble problem.

In August 1791, a group of Virginia slaveholders composed a memorial to their state assembly. The memorialists, who hailed 'from the Counties of Princess Anne, Norfolk, Nansemond and Isle of Wight,' described how they had, 'in the course of the late war, lost a considerable number of Slaves, taken away by the British Armies.' This loss of valuable property was made doubly outrageous by the fact 'that the Slaves . . . were, by the treaty of peace between the United States and his Britanic Majesty, to be restored to their owners.' Eight years had now

[47] Fehrenbacher, *Slaveholding Republic*, 217; Blackett, *Captive's Quest for Freedom*, 6.

passed, however, since Adams, Franklin, and Jay had set their names to the Treaty of Paris, and neither the Virginians' slaves, nor any monetary compensation for their loss, were anywhere to be found. The citizens demanded satisfaction.[48]

Strikingly, however, they decided not to address their complaint directly to the federal government. They were 'well aware,' they wrote, 'that the power of affording effectual relief, is not vested in the Legislature of [this State], but in the General Government of the United States.' The memorialists commented, perhaps sarcastically, that they did not seek to 'insinuate a want of Justice in the General Government' by turning to the legislature instead. While they knew that the state of Virginia did not have the power to negotiate directly with His Majesty's ministers, they believed 'that their pretensions will meet more attention when countenanced by the honorable Assembly, who are their immediate Representatives,' and hoped the legislators would 'take such measures . . . as may most likely contribute to the relief of your Memorialists.' This episode provides yet another example of the ways that federalism complicated understandings of representation in the early national period. The memorialists had 'immediate Representatives' in Congress, too, but they continued to feel closer to their elected representatives at the state level, despite the recent changes to the constitutional structure of the union.[49]

Despite this choice on the part of the memorialists, however, the Virginia legislature voted to pass the complaint along to the governor, who, in turn, was requested to send it on to Philadelphia. President Washington became the first in a long line of chief executives to wrestle with the problem of extracting compensation from the British government for wartime losses of enslaved property. British diplomats held a firm line in the face of repeated demands from American ministers for return or compensation, insisting that Article VII of the Treaty of Paris

[48] *Journal of the House of Delegates of the Commonwealth of Virginia, Begun and Held . . . on Monday, the Seventeenth Day of October, 1791* (Richmond, 1791), 21.
[49] ibid.

– to which the Virginians had referred in their memorial – did not bind the United Kingdom to compensate for any enslaved people who had found freedom behind British lines in wartime. Since the treaty committed the king to withdraw his troops 'without . . . carrying away any Negroes or other Property of the American inhabitants,' and since departing British commanders had set sail with thousands of black passengers aboard their ships, the Americans were hardly satisfied by this response. Nonetheless, when John Jay travelled to London in 1794 to negotiate a trade agreement and clear the air, he failed to extract any further concessions from the king's ministers with regard to the black refugees. When the two U.S. senators from Virginia, Henry Tazewell and Stephens Thompson Mason, voted against the ratification of Jay's Treaty, the Virginia legislature passed a resolution approving their action, partly in response to this omission.[50]

This ongoing question in British-American relations was renewed and revitalized by the War of 1812, when, once again, thousands of enslaved African Americans, notably in the Chesapeake, seized the opportunity for self-emancipation presented by a British invasion. Although, after the conclusion of hostilities, the British government once again refused to reimburse slaveholders for the loss of their property, arbitration of the issue by Tsar Alexander I resulted in a favourable outcome for the Americans. In November 1826, the British agreed to pay well over a million dollars in compensation. The federal government's decades of diplomatic labour in support of slaveholders' claims to their property had at last borne fruit.[51]

In the case of wartime flight, slaveholders recognized that they were unlikely to recover the individual enslaved people they claimed had been stolen from them by the British forces. They

[50] 'Transcript of Treaty of Paris (1783),' art. VII, https://www.ourdocuments.gov/doc.php?flash=false&doc=6&page=transcript (February 5 2021); *Journal of the House of Delegates of the Commonwealth of Virginia . . . 1791*, 42; Taylor, *The Internal Enemy*, 28-29; Fehrenbacher, *Slaveholding Republic*, 91-93; *Journal of the House of Delegates of the Commonwealth of Virginia . . . 1795*, 38.
[51] Fehrenbacher, *Slaveholding Republic*, 93-98.

were more interested in recouping costs than recapturing slaves. The question of extraditing fugitives was of greatest interest, then, in cases where the runaways had fled over a land border into the territory of a neighbouring North American empire. Canada, already home to several thousand formerly enslaved people by the end of the 1780s, became the destination of choice for African American refugees in the antebellum period, leading to further tortuous negotiations between American and British diplomats over the question of extradition. Although the British repeatedly refused to countenance the extradition of fugitive slaves from Canada to the United States, the two parties did agree to mutual extradition of fugitives from justice in the Webster-Ashburton Treaty (1842). Slaveholders occasionally attempted to use this mechanism to secure the return of runaways, though Canadian officials were wise to this ploy from the beginning.[52]

In the early 1790s, however, the state governments of the Deep South were less concerned about Canada in this respect than they were about Florida. A minimally governed outpost of the Spanish empire, East Florida shared a border with the state of Georgia along the St Marys River, across which a considerable number of enslaved Georgians had already fled by the time the First Federal Congress met in April 1789. In July of that year, Governor George Walton of Georgia was requested by his executive council to draw the president's attention to the problem 'of the Spaniards harbouring the Slaves of the Citizens of this State, and to press that measures be taken for having them restored.' The Georgians were ambivalent towards their Spanish neighbours. Walton knew that Spain was an ally of the United States, and assured Washington that he did not wish to cause offence to 'the Catholic Monarch,' but he was nonetheless keen to impress upon the president the scale of 'the unfriendly conduct of the Spaniards with respect to our black people.'[53]

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[52] 'A treaty, to settle and define the boundaries between the territories of the United States and the possessions of her Britannic Majesty in North America . . . ,' art. X, 8 Stat. 576; Fehrenbacher, *Slaveholding Republic*, 102-104.

[53] George Walton to George Washington, July 27 1789, *PGW* 3:333-334; George Walton to George Washington, August 22 1789, *PGW* 3:527.

The Georgian slaveholders soon had reason to hope for an improvement in their situation. In the summer of 1790, a new governor of East Florida, Juan Nepomuceno de Quesada, arrived in St Augustine. In a polite introductory letter, Quesada wrote to George Washington that he hoped he would have 'the honor of being useful, as well to your Excellency as to some of the States.' The new governor had 'recieved the king's order to permit, on no account, that the slaves from the U.S. introduce themselves into this province (Florida) as free persons.' Secretary of State Thomas Jefferson wrote to the governor of Georgia, Edward Telfair, in October to let him know the good news that the Spanish would be working to combat the fugitivity problem at their end, and thus 'put to an end a grievance which had been a subject of complaint from the citizens of Georgia.'[54]

Telfair was not entirely satisfied, however. He was pleased with the Spanish commitment to halt the seepage of enslaved workers from Georgia to Florida, but mostly because it prepared the way for 'future measures.' The Georgians already had more demands. The assembly had passed a concurrent resolution demanding that the president 'procure a restoration of the negroes who have taken refuge in the Spanish provinces . . . since the peace of 1783.' Telfair also had thoughts on border enforcement: 'a respectable galley of considerable force being stationed in the River St. Mary, appears to be one of the best expedients for the prevention of future grievances of this nature.' His final recommendation was for a 'conference' to be held with Quesada to secure his permission for 'the Citizens of the United States' to enter his territory in order 'to claim, recover, and remove . . . any persons held in Slavery on satisfactory proof of ownership being produced.' Not only did Telfair want 'restitution' of any

[54] Juan Nepomuceno de Quesada to George Washington, July 17 1780, tr. Isaac Pinto, *PGW* 6:100; Thomas Jefferson to George Washington, October 27 1790, *PGW* 6:587-589; Thomas Jefferson to the Governor of Georgia, October 27 1790, *PTJ* 17:638.

runaways currently in Florida, but he actually wanted to negotiate the extension of the right of recaption, or something very like it, into Spanish territory.[55]

The federal government embraced Telfair's suggestions. While visiting Augusta on his Southern Tour in May 1791, President Washington 'dined at a private dinner with Govr. Telfair,' as he wrote in his diary. At this dinner, he gave Telfair a series of dispatches destined for Governor Quesada, 'respecting . . . the fugitive Slaves of the Union.' Telfair was to pass these dispatches on to James Seagrove, a young merchant, politician, and administrator who at that time held a position as a federal tax collector in Georgia. The plan was for Seagrove to go to St Augustine and negotiate an agreement with the Spanish. The federal government had three major objects in this prospective negotiation. First, 'to arrest the farther reception of fugitive slaves'; second, 'to obtain restitution of those slaves, who have fled to Florida' since Quesada's appointment; and third, 'which may be the greatest address,' as Washington wrote, 'to procure the Governor's order for a general relinquishment of all fugitive slaves, who were the property of citizens of the United States' and who had arrived *before* the court of Spain officially ended Florida's reception of runaways.[56]

Seagrove met with Quesada in early August 1791, but the results of his negotiations would not officially be released to the governors of Georgia and South Carolina until December of that year. Upon reading the agreements at which Seagrove and Quesada had arrived, Telfair would find that Georgia's demands had not been met. The Spanish had not even acquiesced to Seagrove's request that fugitives crossing the border should be arrested by Spanish officials and conveyed to Amelia Island, near the mouth of the St Marys, to be collected by a federal official. In fact, Quesada insisted that the fugitives be kept in prison at St Augustine, and that if they

[55] Edward Telfair to Thomas Jefferson, January 12 1791, *PTJ* 18:491-492. The editors of the Washington Papers remark that Georgians had a history of illegally entering Spanish territory in pursuit of runaways – see note 1, George Washington to James Seagrove, May 20 1791, *PGW* 8:198-200.
[56] George Washington to James Seagrove, May 20 1791, *PGW* 8:198-200.

were not to be employed by the colonial government in the public works, their upkeep would have to be paid for by their American owners. Ultimately, Seagrove agreed that the United States would contract with a local resident, George Fleming, to supply the prisoners with 'the usual allowance of provisions.'[57]

The Americans did not come away completely empty-handed. 'An order will be fixed,' Quesada offered, 'fixing a penalty on any inhabitant who will harbour a fugitive slave.' But this was small comfort when the right of recaption was explicitly denied – 'every claimer must prove his property in the negroes reclaimed, either by a certificate of the Government, or by other documents' – and the Spanish governor refused outright to return any runaways who had fled into his colony before 1790. In other words, Spain had made no commitment to active border enforcement or to 'restitution' in the way that Telfair, Washington, and Seagrove had hoped.[58]

The Florida agreement is nonetheless striking as a moment before 1793 in which the federal government committed itself to aid in the recapture of runaways – 'fugitive Slaves of the Union,' as Washington put it – on behalf of major slaveholding states. The goals of the mission were formulated by state officials and, rather than flinching away from this attempt to dictate the U.S. relationship with a major foreign power, the federal government adopted Georgia's foreign policy goals as its own.

Seagrove's mission is also remarkable for its funding structure. In May 1791, Washington authorized Seagrove to ask John Habersham, collector of customs for the port of Savannah, to supply funds to pay his expenses on his journey down to St Augustine. Two years later, in May 1793, Treasury Secretary Alexander Hamilton directed that the remainder of Seagrove's reimbursement for the mission be paid out of the ten-thousand-dollar contingent fund. Congress made regular provision in its appropriations acts for the payment of 'contingent

[57] Thomas Jefferson to the Governors of Georgia and South Carolina, December 15 1791, Enclosures I, II, and III, *PTJ* 22:407-408.
[58] Thomas Jefferson to the Governors of Georgia and South Carolina, December 15 1791, Enclosure II, *PTJ* 22:407-408.

expenses' across the different departments and offices of the federal government, but this was slightly different. In March 1790, Congress had authorized the president 'to draw from the treasury a sum not exceeding ten thousand dollars, for the purpose of defraying the contingent charges of government.' He would not have to secure advance permission to spend this sum, nor were its uses restricted by statute, though he would be obliged to submit to Congress 'a regular statement and account of such expenditures' at the end of the year. In this case, however, neither the Florida mission nor Seagrove's role in it appear to be mentioned anywhere in the Annals of Congress. Telfair, Washington, Jefferson, and Seagrove seem to have arranged the exercise entirely without legislative oversight. [59]

Legitimate Importation and the Limits of Slave Trade Bans

It was one thing to prevent enslaved people from getting *out*, but another major policy problem faced by state governments in the early national period was how to prevent them from getting *in*. As discussed above, Congress was far from the first legislature in the United States to attempt to shut down the importation of slaves into its jurisdiction. On January 1 1808, the federal slave trade ban became just one more element in a complex landscape of state-level restrictions on the transportation and sale of enslaved people across domestic borders. State legislatures had been grappling with the implications of this tangled web of statutes for decades, in some cases, but crucial ambiguities remained unresolved in the effort to enforce them. Most importantly, lawmakers still found it difficult to answer one essential question. What kind of a thing was the slave trade?

As Walter Johnson has argued, while we might think we know what the domestic slave trade looked like – the slave pens of Washington, Charleston, and New Orleans; the journey

[59] 1 Stat. 105; Alexander Hamilton to Tobias Lear, May 25 1793, *PGW* 12:628-629. For an example of the normal usage of 'contingent expenses,' see 1 Stat. 325-329.

south into the Cotton Kingdom; the terror and degradation of the auction block – enslaved people passed across borders and between households under a great variety of circumstances in the early United States, which made it all the more difficult to regulate and oversee their movement. Trading was an essential element of the institution of chattel slavery, for the enslaved were not construed simply as labourers, but rather as capital made flesh. Their potential to be traded at market was an essential source of their value.[60]

At the same time, however, slaveholders and non-slaveholders could agree that the trade was a destabilizing influence. From a public relations perspective, slave trading, and especially the Atlantic trade, appeared morally abhorrent to white Americans in the early nineteenth century in a way that far outstripped mere slaveholding. The excessive importation of enslaved people was also productive of social ills – the tilting of the demographic balance in favour of black people, increased risk of violent rebellion and the overthrow of slave regimes. Long before the advent of the federal ban, then, state assemblies responded to these anxieties by legislating to cut off slave importation from outside their own borders.[61]

Here, the definitional problems arose. What kinds of behaviour could be taken to constitute slave trading? State legislative records reveal how lawmakers grappled with this problem, both in drafting bills and in responding to petitions from slaveholders who sought to move to the state with their slaves but risked falling afoul of anti-slave-trading regulations. Georgia ended its importation of foreign-born slaves a decade ahead of the federal government. After passing a prohibition on importation from the West Indies in 1794, doubtless in response to the war in Saint-Domingue, it followed up with a ban on African slaves in 1798. In November 1801, however, one Mr Troup announced in the Georgia house of representatives that he was

[60] Johnson, 'The Future Store,' 2-3; Rothman, 'The Domestication of the Slave Trade,' 33, 46.
[61] Johnson, 'The Future Store,' 4; Rothman, 'The Domestication of the Slave Trade,' 32, 37-38.

seeking the introduction of a bill 'more effectually to prohibit the importation of slaves into this State.'[62]

The legislators struggled with the new bill for weeks. Finally, on November 20, they agreed to postpone the bill until the next session of the General Assembly, but Troup requested that it be entered on the journal of the house. The bill, as amended, would make it 'unlawful for any person . . . to bring or import into this state, from Africa, or any one of the United States, any foreign state or kingdom, or elsewhere, any negro or negroes . . . for the purposes of sale, disposal, or otherwise.' Anyone importing black people in this way would be subject to a fine of five hundred dollars for every slave, followed by one thousand dollars 'for every subsequent offence.' The purchasers would receive fines in the same amounts.[63]

The enormous loophole in the bill, however, came in section three, which provided that no one who genuinely wished to become a citizen of the state could be prevented from bringing their slaves with them by the terms of the act. Nor was the act to be construed to prevent white Georgians from selling their slaves within the boundaries of the state. Abuses of the law were supposed to be avoided by requiring that immigrants to the state bring with them a certificate from their local justice of the peace that they owned the slaves they were bringing with them, and had no intention of selling them 'contrary to the true meaning and intendment of this act.'[64]

Troup's bill does not appear to have ended up on the books, but it captures neatly the distinctions that Southern state legislators were accustomed to draw between 'legitimate' and 'illegitimate' slave importation in the early republic. As Adam Rothman has written, contemporary legislation from Virginia and South Carolina carried the same loopholes as the Georgia bill, prohibiting importation for sale while allowing transportation for personal use. The efforts of proslavery reformers to end interstate slave trading could only ever be half-

[62] *Journal of the House of Representatives of the State of Georgia for the Year 1801* (Louisville, GA, 1802), 11; Rothman, 'The Domestication of the Slave Trade,' 38.
[63] *Journal of the House of Representatives of the State of Georgia for the Year 1801*, 14, 21, 27, 35-37.
[64] ibid., 38.

hearted, not least because they believed that domestic slaveholders had a fundamental right to move with their property wherever they wished. This right was enshrined in Georgia's 1798 constitution, which was evidently the cause of the loophole in Troup's bill.[65]

Enforcement of state-level importation bans was patchy. At least 100,000 enslaved people are thought to have arrived in North America between 1800 and 1810. Rothman describes an 'efflorescence' of trading between Charleston and New Orleans after South Carolina ended its African slave trade ban in 1803, despite federal attempts to restrict importation into the Orleans Territory from 1804. Meanwhile, Southern state legislatures throughout the period received numerous petitions from domestic slaveholders either seeking to move with their slaves, or, having moved already, claiming ignorance of local importation restrictions and praying not to be punished for breaking state laws. In 1797, Richard White petitioned the Virginia Assembly to ask that his slaves not be given their freedom, despite the fact that he had entered Virginia with them illegally in 1793. The same session, a group of petitioners from Frederick County declared that they had been 'ignorant of the existence of the law passed in the year 1778, prohibiting the further importation of slaves,' and praying the intervention of the legislature to prevent the loss of their enslaved property by the operation of the law.[66]

In 1806, the Virginia legislature received a series of petitions from slaveholders seeking further exemptions from the importation restrictions. William Yerby claimed to have been given an eleven-year-old African boy as part of a reward for aiding in the rescue of shipwrecked traders and their enslaved cargo off the coast of South Carolina. He wanted to bring the boy back to Virginia without paying a fine or forfeiting his new young slave. Though the committee that examined it reported favourably on Yerby's request, the house of representatives

[65] Rothman, 'The Domestication of the Slave Trade,' 42, 44.
[66] *Journal of the House of Delegates of the Commonwealth of Virginia, Begun and Held . . . on Monday, the Fourth Day of December, 1797* (Richmond, 1798), 12, 25; Rothman, 'The Domestication of the Slave Trade,' 35, 39.

nevertheless rejected his petition. When 'sundry inhabitants of Patrick county' petitioned for an overhaul of the state importation ban, including allowing Virginians who owned slaves in neighbouring states, or indeed in any state, to bring their property into Virginia, the committee similarly found the petition 'reasonable,' but the house tabled its report. Enforcement was evidently tricky, with slaveholders bringing enslaved people into the state illegally and keeping them there for years without challenge, but the legislature was also clearly unwilling to make overt exceptions to its importation rules.[67]

What changed with the implementation of the federal slave trade ban in January 1808? The federal government had already taken earlier opportunities to limit American involvement in the Atlantic trade as far as was constitutionally possible, with Congress passing a 1794 act forbidding the outfitting of vessels destined for the trade in American ports, and an 1800 act banning American citizens from selling Africans into slavery. In 1803, a further act of Congress secured active federal support for state-level importation bans, making it 'the duty of the collectors and other officers of the customs, and all other officers of the revenue' to prevent 'any negro, mulatto, or other person of colour' from being brought into the ports of 'any state which by law has prohibited . . . the admission or importation' of such people.[68]

The 1807 act took the final step of closing American ports to traders, and mustering the combined efforts of the Treasury's Customs Service, the Justice Department's U.S. Marshals' Service, and the War Department's naval vessels for the shuttering of the international trade with the United States. This is not to say that the ban ended the importation of enslaved people from abroad. The acts of 1794 and 1800 had been largely ineffectual in practice, and Ernest Obadele-Starks has shown how the enforcement of the federal slave trade ban from

[67] *Journal of the House of Delegates of the Commonwealth of Virginia, Begun and Held . . . on Monday the First Day of December, 1806* (Richmond, 1807), 28-29, 45-46.
[68] 1 Stat. 347-349; 2 Stat. 70-71; 2 Stat. 205-206.

1808 was marred by corruption, principally as a result of the considerable profits officials could obtain through the auction of confiscated slaves, and the cash rewards offered to informants. Slave smugglers like the Lafitte brothers of New Orleans played a considerable role in maintaining the importation of enslaved people from foreign parts into the United States after 1808.[69]

Federal importation restrictions were also challenged by a peculiar refugee crisis that revived the questions earlier confronted by state officials about the parameters of legitimate and illegitimate slave importation. The massive upheaval in the Atlantic world in the twenty-five years after the outbreak of the French Revolution had sent slaveholders scurrying for shelter, first from the uprising on Saint-Domingue from the early 1790s onwards, then again in 1809, when French refugees were exiled from Cuba following Napoleon's 1808 invasion of Spain. Proslavery officials at the state and federal levels struggled for years with how to help the threatened planters of the French Caribbean. Governor Charles Pinckney of South Carolina addressed President Washington on the question as early as 1791, asking what the United States could do to alleviate 'the wretched & distressed situation in which these unhappy people are,' especially given the potential for the 'flame' of insurrection to spread to other Atlantic slave regimes. On receiving a letter from the Assembly of Saint-Domingue pleading for assistance, however, Pinckney replied to clarify that 'the individual States are expressly restrained from any interference without the consent of Congress.' As it turned out, the federal government was more than happy to help and 'advanced over $700,000,' as Don Fehrenbacher wrote, 'to help the French planters of Haiti in their resistance to the revolt.'[70]

These efforts failed, and in the years and decades following the beginning of the Haitian Revolution, thousands of slaveholding refugees sought safety in the United States. Despite the

[69] Obadele-Starks, *Freebooters and Smugglers*, 4, 12-13, 23-24.
[70] Charles Pinckney to George Washington, September 20 1791, *PGW* 8:542-546; Fehrenbacher, *Slaveholding Republic*, 111-112.

horror and sympathy with which Southern officials had received news of the rebellion, they were ambivalent about this development, fearing that the enslaved people the refugees brought with them might themselves seed rebellion on the North American mainland. State-level prohibitions on slave importation from the West Indies, like Georgia's 1793 legislation, were bound up with terror that the Saint-Domingue contagion would spread to American shores. Despite state and federal restrictions, however, the refugees and their slaves continued to pour into the ports of the union, leaving officials on the ground in the states and territories with difficult choices to make.[71]

The expulsion of the Saint-Domingue refugees from Cuba coincided almost perfectly with the initial implementation of the federal slave trade ban, providing an early test of how it would be enforced. The federal ban itself was sweeping by comparison with the state laws described above, prohibiting the introduction of 'any negro, mulatto, or person of colour, with intent to hold, sell, or dispose of such negro . . . as a slave, or to be held to service or labour.' Importation for the purposes of use was no longer an acceptable excuse.[72]

As a result, what to do with white refugees arriving alongside cargoes of their slaves became a concerning problem. Governor William C.C. Claiborne of the Orleans Territory wrote to Julien Poydras, a delegate to Congress, on June 4 1809 that 'near one thousand people from Cuba, have reached this City . . . Some of those arrived are in great distress.' While the whites had been allowed to disembark, however, 'the negro's are still detained on Board the Vessels in which they came. – I should myself, be well pleased,' Claiborne complained, 'if Congress would relax the Law forbiding the importation of Slaves, as relates to these miserable exiles.' Two weeks later, Claiborne informed Treasury Secretary Gallatin that the number of refugees had risen to two thousand, and that he had chosen to let the enslaved people off the

[71] Robinson, *Slavery in the Structure of American Politics*, 298; Sally Hadden, *Slave Patrols: Law and Violence in Virginia and the Carolinas* (Cambridge, MA, 2001), 149.
[72] 2 Stat. 426.

ships and into the custody 'of their masters, upon their giving security.' Nervous about the uncertain legality of his actions, he added, 'I hope my Conduct may be approved.'[73]

Governor John Tyler of Virginia faced the same questions as Claiborne in the spring and summer of 1809. On June 1, he wrote to President James Madison that a number of refugees had arrived from Cuba 'at the port of Norfolk in great distress, accompanied by some domestic servants, which is all the visible property they have with them.' Investigating the problem with other officials, 'the laws of our State as well as those of the United States were examined and of course some difficulties occurred.' There was no justification under the law for admitting the refugees with their enslaved servants. It was at this point that Tyler turned to a kind of perverse 'higher law' in order to reconcile the refugee crisis with the importation ban. 'The great laws of huminity and hospitality,' he wrote, 'seemed to us superior to the rigid policy which forbids any slave to be brought into the United States.' As a result, Tyler had determined to grant the slaveholding refugees permission to remain with their slaves 'until the next session of our assembly or until Congress may act thereon.' In the meantime, he had asked Virginia's senators, William Branch Giles and Richard Brent, to take up the question in Washington, which they did. Their efforts resulted in the passage, on June 28 1809, of 'an Act for the remission of certain penalties and forfeitures,' which allowed the president the discretionary power of exempting 'persons, who shall have been forcibly expelled from the island of Cuba' from forfeiting their slaves on their arrival in the United States.[74]

State importation prohibitions from the 1770s to the 1790s had established a distinction between importing slaves for sale and transporting them for personal use which, despite its conceptual haziness, continued to influence the ways state and local officials viewed the slave

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[73] William C.C. Claiborne to Julien Poydras, June 4 1809, *The Territorial Papers of the United States*, ed. Clarence Carter & John Porter Bloom (28 vols., Washington, D.C, 1934-1975), 9:843; William C.C. Claiborne to Albert Gallatin, June 21 1809, *Territorial Papers of the United States*, 9:847-848; Obadele-Starks, *Freebooters and Smugglers*, 27.

[74] John Tyler [Sr., Governor of Virginia] to James Madison, June 1 1809, *PJM* Presidential Series 1:219-220; 2 Stat. 549.

trade ban after 1808. Based on their experiences of state-level bans, their sympathy for slaveholders whom they perceived as victims, and their local perspectives on law enforcement, officials like Claiborne and Tyler shaped the implementation of federal anti-slave-trading legislation by making decisions which would only later be confirmed and legalized by Congress.

Insurrection

In Article IV of the Constitution, the framers provided a mechanism for co-operation between the state and federal governments in times of extraordinary crisis. Section 4 guaranteed that 'The United States . . . shall protect each [State] against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.' As David Waldstreicher points out, the clause was evidently not specific to slave rebellions – '"domestic" could mean many things' – but, when paired with the power of Congress to call forth the militia to 'suppress Insurrections,' it could easily be applied to the case of uprisings led by the enslaved. Gouverneur Morris drew attention to the draft Constitution's protection of Southern states from such uprisings in the extraordinary speech on the evil of slavery that he gave at the Constitutional Convention on August 8 1787. By setting their names to the Constitution, he said, the Northern states would 'bind themselves to march their militia for the defence of the S[outhern] States; for their defence ag[ain]st those very slaves of whom they complain.'[75]

An important question rarely addressed by the existing historiography, however, is how often the state and federal governments actually collaborated in the suppression of slave rebellions. A major, co-ordinated federal response to a slave uprising within one of the American states appears to have taken place for the first time only in 1831, during Nat Turner's

[75] U.S. Const. art. IV, §4; Madison's Notes, August 8, Farrand 2:222; Waldstreicher, *Slavery's Constitution*, 9.

Rebellion, when personnel from USS *Warren* and USS *Natchez*, alongside three companies of artillery from Fort Monroe, assisted Virginia and North Carolina militiamen in the defeat and massacre of Turner's forces near Southampton. Federal forces were also deployed to secure other slaveholding regions in the aftermath of the rising.[76]

Before 1831, however, I have only been able to identify one significant instance of federal participation in such an action, and not within the boundaries of a state: General Wade Hampton's 1811 response to the German Coast Uprising in the Orleans Territory. This section examines the response to the German Coast Uprising alongside the suppression of Gabriel's Rebellion, an 1800 conspiracy in Virginia, in order to demonstrate the general superfluousness of federal action to the crushing of slave insurrections in the Southern states, and the difficulties the federal government would have faced in carrying out its constitutional obligation to rescue the states from 'domestic Violence,' had they in fact called for such intervention. Enormous distances, poor communications, and minimal federal forces could ensure that rebellions were over and done with before news of them even reached the federal capital.

Time was the first problem. As previously discussed in the cases of military preparedness and the management of Indian affairs, unless federal forces were already in the vicinity of the area under threat, they were unlikely to arrive at the scene quickly enough to prevent any projected violence on the part of black insurrectionists. It is therefore unsurprising that the only black rebellion to be subdued with federal assistance before 1830 took place not within the jurisdiction of any state, but rather in a frontier territory, where soldiers of the union were far more likely to be stationed.

In January 1811, almost purely by chance, General Wade Hampton of the U.S. Army led federal troops in the brutal suppression of the German Coast Uprising, just a few miles from New Orleans. Hampton and his forces were in the Orleans Territory for another reason

[76] Herbert Aptheker, *American Negro Slave Revolts* (New York, 1943), 300, 310, 312.

entirely. They had been called out in December 1810 to aid in the U.S. annexation of the Republic of West Florida, a short-lived, unauthorized settler state in what is now Louisiana. Due to delays in his sea passage from Charleston, Hampton was too late for the annexation mission, and arrived in New Orleans on January 6. The revolt, apparently led by an enslaved Creole man named Charles Deslondes, got underway two days later on January 8.[77]

The uprising saw an army of two hundred rebels burn plantation buildings, raid a local weapons store, and begin to exact violent vengeance on their enslavers. General Hampton summoned a troop of light horse for reinforcement, and led his men in pursuit of the insurrectionists, but struggled to catch them as they made their way from plantation to plantation. Ultimately, Deslondes's forces were only halted in their tracks on January 10 in Bernard Bernoudi's sugar fields, his men surrounded on three sides by Hampton, the federal cavalry unit, and a band of local whites who had finally mobilized after their initial disarray. Deslondes suffered a gruesome battlefield execution; his surviving soldiers were hanged in their dozens. Their bodies were left to rot on scaffolds across the region, or their heads cut off and displayed on pikes along the levees.[78]

While it was the elite whites of the Orleans Territory who doled out this merciless justice in the aftermath of the rising, these same whites were poorly prepared when faced with the highly organized insurrectionists, and might well have struggled to defend New Orleans without this fortuitous federal intervention. Timing was everything, and it is perhaps for this reason that the federal government generally played a minimal role in the suppression of black rebellions before Turner.[79]

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[77] Kastor, *The Nation's Crucible*, 124-128; Walter Johnson, *River of Dark Dreams: Slavery and Empire in the Cotton Kingdom* (Cambridge, MA, 2013), 18.
[78] Johnson, *River of Dark Dreams*, 19-22; Kastor, *The Nation's Crucible*, 128-130.
[79] Kastor, *The Nation's Crucible*, 128, discusses the role of timing in the failure of the revolt.

The other main reason why the federal government was rarely called upon to assist in the quashing of 'domestic violence' was that the apparatus of a typical Southern state had been constructed explicitly for that purpose. External interference was largely surplus to requirements in societies where massive white-on-black brutality and repression were the norm. In times of real or imagined crisis, the paranoia of white citizens in areas with large enslaved populations encouraged such heightened governmental responses on the part of the individual states as to make federal intervention unnecessary. In her work on slave patrols in Virginia and the Carolinas, Sally Hadden identifies few changes in the response of state and local authorities to insurrection as a result either of the Revolution or of ratification. The mechanisms developed to deal with rebellion in the eighteenth century – increased militia presence, stop-and-search tactics on public roads, searches of dwellings, spates of hangings – made Southern slave regimes broadly successful in preventing violent mass uprisings of enslaved people until the Civil War.[80]

This general state competence in the sphere of racial repression may explain why no correspondence appears to exist between Governor James Monroe and President John Adams on the subject of Gabriel's Rebellion, a major conspiracy involving enslaved people across several Virginia counties and planned for the late summer of 1800. Governor Monroe first heard of the intended rebellion on Sunday 31 August, and, without even knowing the full extent of the planned uprising, leapt into action to protect the state capital of Richmond. Over the following weeks, militia units and slave patrols across the state mobilized to shut down any budding black resistance. Slaveholders hired what amounted to private security for their plantations and sent the bill to the state. Distant towns and counties demanded armed protection, despite being comfortably out of harm's way. In less than two weeks, the state spent

[80] Hadden, *Slave Patrols*, 142-146.

$5,431.90 out of an annual budget of $377,703 – and this for a rebellion that had been thwarted by bad weather and roads before it even began.[81]

At no point did the governor reach out to the federal administration for help in managing this expensive crisis. Monroe communicated news of the plot to his Albemarle County neighbour and political ally, Vice President Thomas Jefferson, on September 9, but this information was not shared in pursuit of any particular response on the part of the federal executive. Congress was not in session in September 1800, and the whole affair was over – Gabriel in his grave – by the time it met again on December 7.[82]

There are a number of reasons why Monroe may have chosen not to involve, or even inform, the federal executive at the time of the rebellion. For one thing, he and Adams stood on opposite sides of a rapidly widening political chasm as Federalists and Jeffersonians faced off in the run-up to the presidential election of 1800. Adams was also the only president until his son, John Quincy, to be neither a Virginian nor a slaveholder. His sympathy was not guaranteed. But Monroe may also have relied on calculations about policy, not merely politics, in crafting his response. In the early days of the crisis, the Virginia governor was loath to allow information to escape that might cause panic. He did not even confirm rumours of the rising for a concerned fellow governor, South Carolina's John Drayton, until late in October.[83] Bringing federal troops into the mix would hardly have promoted calm among the white population.

As Monroe told Jefferson, he knew the aftermath of the uprising would look bad for Virginia. Not only did its white elites rely on the labour of suffering slaves, but now the state

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[81] Douglas Egerton, *Gabriel's Rebellion: The Virginia Slave Conspiracies of 1800 and 1802* (Chapel Hill, 1993), 72-79.
[82] James Monroe to Thomas Jefferson, September 9 1800, *PTJ* 32:131. Gabriel and six others were executed on the morning of October 10 1800 – see Egerton, *Gabriel's Rebellion*, 110-111. My thanks to Dr Sara Georgini, editor of the Papers of John Adams, for confirming that no correspondence between Adams and Monroe survives on this topic.
[83] Egerton, *Gabriel's Rebellion*, 72.

would also indulge in the gruesome spectacle of mass public executions of those who had sought their freedom. The key question, Monroe wrote, was 'where to arrest the hand of the Executioner.' Jefferson agreed, writing, 'The other states & the world at large will for ever condemn us if we indulge a principle of revenge, or go one step beyond absolute necessity.' In such politically delicate circumstances, both Jefferson and the governor clearly hoped to avoid drawing national attention to the ugly resolution of the crisis.[84]

When it came to slave rebellions, then, the 'domestic violence' clause was essentially a dead letter for most of the first four decades after 1789. Although, as Gouverneur Morris noted at the Convention, the constitutional settlement had been tainted by the federal promise to aid in the suppression of such insurrections, in fact, the slaveholding regimes of the Southern states were so effective in the violent repression of their enslaved populations that the federal government rarely had to go to their aid. The federal government supported such violent repression only indirectly, through the manufacture and provision of weapons to state militiamen.

## The Virginia Colonization Plan

Intergovernmental relationships in the early republic were often as much about personal bonds as they were about professional interactions. In the aftermath of Gabriel's Rebellion, Albemarle County neighbours Thomas Jefferson and James Monroe worked together to secure the implementation of a project that meant a great deal to both of them: a federally-supported scheme for the deportation of African Americans from the United States as a means of cleansing the republic of the stain of slavery while also avoiding the dreaded mixing of the black

[84] James Monroe to Thomas Jefferson, September 15 1800, *PTJ* 32:144-145; Thomas Jefferson to James Monroe, September 20 1800, *PTJ* 32:160; Egerton, *Gabriel's Rebellion*, 92-93.

and white races. Seeking to avoid the distasteful bloodbath that usually followed an attempted uprising, Governor Monroe and his Virginia assemblymen imagined deporting Gabriel's surviving conspirators to South America, the Caribbean, or West Africa, and they sought the help and advice of President Jefferson in putting their plan into effect. Ever the Virginian, Jefferson committed his intellect, and his political influence, to the aid of his countrymen as they contemplated a colony to which the enslaved rebels could be expelled, saving them from the hangman and the Virginia government from a potential reputational disaster.

As Nicholas Guyatt has written, the clear impracticability of resettling millions of African Americans outside of the United States, rather than granting them citizenship, has led some historians to underestimate the attractiveness of colonization as a solution to the problem of slavery for nineteenth-century Americans. In fact, however, American leaders of the period devoted considerable time and energy to devising such plans.[85] Though Jefferson and Monroe's scheme fell through, their years of correspondence on the matter demonstrate how state governors could act as de facto advisors to the chief executive of the union, and how presidents could lend their ears, their influence, and their resources to the pursuit of policy proposals generated at the state level.

As the presidential election crisis inched towards its resolution over the winter of 1800-1801, Monroe kept Jefferson updated on the activities of the Virginia state legislature 'respecting the late conspiracy of the negroes.' Unfortunately, their efforts 'to unite in some measure to prevent or suppress future negro conspiracies' had thus far been 'without effect.' Then, in June 1801, the house of representatives came to a resolution that opened the way to a deportation procedure for enslaved rebels. Though it took Jefferson some months to respond to Monroe's letter covering the resolution, when he did reply in November, it was clear that he had given considerable thought to the matter. In fact, the idea of transporting enslaved conspirators

[85] Nicholas Guyatt, *Bind Us Apart: How Enlightened Americans Invented Racial Segregation* (New York, 2016), 3-5.

outside of Virginia had preoccupied him since the 1770s, when, during the revision of the state's laws, he had drafted a bill providing for deportation to 'the West Indies, S. America or Africa, as the Governor shall direct, there to be continued in slavery.' Now, he ran through the list of possible locations 'to form a receptacle for these people.'[86]

The Virginians had wondered whether they could find some lands in the western territories of the United States that might be suitable, but Jefferson was sceptical: what would happen if the black colony petitioned for statehood, or if white Americans were afraid to settle 'in it's vicinity'? He found it unlikely that Canada or any Indian nation would want to receive the deportees, but he told Monroe he would ask Spain, France, and Portugal if their colonists in South America would consider it. The West Indies seemed 'promising' to him, including especially Saint-Domingue, 'where the blacks are established into a sovereignty de facto,' and where black people 'deemed criminal by us' due to their insurrectionary goals might be considered 'meritorious' by revolutionary leaders. Finally, 'Africa would offer a last & undoubted resort, if all others more desireable should fail us.'[87]

Jefferson offered his services in making the Virginians' plans a reality: 'Whenever the legislature of Virginia shall have brought it's mind to a point, so that I may know exactly what to propose to foreign authorities, I will execute their wishes with fidelity & zeal.' Monroe seized the chance to take advantage of the resources of the U.S. government, replying in February 1802 with new resolutions from the assembly and a full explanation of Virginia's colonization interests. The scheme was to have two strands: one for the deportation of enslaved people who had committed 'certain enumerated Crimes'; and the other for 'free negroes and mulattoes, including those who may hereafter be emancipated and sent, or chuse to remove to such place as may be acquired.' They had no particular preferences as to the locations of these colonies,

[86] James Monroe to Thomas Jefferson, January 3 1801, *PTJ* 32:389; James Monroe to Thomas Jefferson, January 18 1801, *PTJ* 32:481-482; Thomas Jefferson to James Monroe, November 24 1801, *PTJ* 35:718-722.
[87] Thomas Jefferson to James Monroe, November 24 1801, *PTJ* 35:718-722.

but asked only that Jefferson would 'be so good as to endeavour to promote the views of the State.'[88]

The plan appears to have fallen apart as a result of a misunderstanding on Jefferson's end. In June 1802 he wrote excitedly to Monroe that he had found an ideal solution. A discussion with the British chargé d'affaires in Washington had confirmed that the colony of Sierra Leone, established by British abolitionists in West Africa, would like have 'no objection . . . to recieve blacks from us . . . provided they are sent as free persons, the principles of their institution admitting no slavery among them.' He promised to write to Rufus King, the American ambassador in London, to arrange negotiations as soon as he had Monroe's permission.[89]

Monroe quickly realised that there had been a mistake. The Virginia legislature had never intended to free the insurrectionists, but rather to sell them into slavery in a distant colony. In fact, the state had passed a law in January 1801 providing for the sale of any enslaved people 'who now are or hereafter may be under sentence of death, for conspiracy, insurrection, or other crimes.' Any purchasers would have to commit to transport the people in question out of the United States. Monroe justified the Virginians' position with finance: the conspirators were to be sold so as to pay the costs of their deportation. At the very least, he told Jefferson, they would need to be placed in temporary servitude in Sierra Leone in order to pay their way to Africa.[90]

After this point, Jefferson began to backtrack. He had written to Rufus King in London regarding a potential Sierra Leone solution, he told Monroe in November 1802, but he had had no answer as yet. Worse, the imperial governments of the Atlantic world had been spooked, he

[88] Thomas Jefferson to James Monroe, November 24 1801, *PTJ* 35:718-722; James Monroe to Thomas Jefferson, February 13 1802, *PTJ* 36:576-577.
[89] Thomas Jefferson to James Monroe, June 3 1802, *PTJ* 37:531-533.
[90] James Monroe to Thomas Jefferson, June 11 1802, *PTJ* 37:588-589; Guyatt, *Bind Us Apart*, 254.

said, by 'the convulsions prevailing in the French West India islands,' and would doubtless be unwilling to countenance the admission of black insurrectionists into any colonies they administered. As it turned out, the Sierra Leone Company would have nothing to do with Virginia's proposed deportees. Despite its pretensions to love of liberty, the company was averse to accepting rebels into its population.[91]

After Monroe's departure from the governor's mansion late in 1802, Virginia's colonization hopes were briefly revived thanks to the close friendship between the new governor, John Page, and President Jefferson. Jefferson's suggestion this time around was that a colony could be established in the vast new territory of Louisiana, which he had lately purchased from Napoleon, or in Haiti, now that the victory of the revolutionary leadership seemed close. Page and his legislators imagined sending insurrectionary figures to Haiti, where their talents might be appreciated, while moving the state's 19,000 free people of colour west across the Mississippi to found their own colony in the American interior. In his next communication, however, Jefferson threw cold water on Page's proposals and quietly withdrew his support from the colonization scheme. Guyatt speculates that concerns about wars with Native peoples in the Louisiana Territory, the risks of later contact between the expanding United States and Virginia's black colonists, and the likelihood of a hostile response to the scheme from the Deep South were all potential factors leading to Jefferson's loss of enthusiasm for a federally-led colonization effort. Despite a new resolution in the legislature calling for Virginia's congressional representatives to promote a black colony in Louisiana, the plans fostered by Jefferson, Monroe, and Page had finally sputtered out by 1805.[92]

Despite the ultimate failure of the plan, the Virginia colonization scheme remains a remarkable episode of explicit and long-term co-operation between senior state and federal

[91] Thomas Jefferson to James Monroe, November 24 1802, *PTJ* 39:67-68; Guyatt, *Bind Us Apart*, 254.
[92] Guyatt, *Bind Us Apart*, 255-257.

officials in the crafting and partial implementation of a policy programme. Much like the example of Edward Telfair's international extradition efforts, the scheme highlights the extraordinary responsiveness of the federal executive to the wishes and concerns of major slaveholding states in the early republic. Perhaps as a result of the long friendships and 'enlightened' concerns he shared with Virginia's leading officials, Jefferson appears here virtually as an extension of the Virginia state government, offering at times the almost unlimited assistance of the federal executive branch.

## Conclusion

In the first three decades under the Constitution, major slaveholding states not only tolerated, but rather actively sought out the intervention of the federal government in the sphere of slavery policy. Virginians and Pennsylvanians together solicited action from the president and from Congress for the creation of a mechanism of interstate rendition for fugitives from justice and from labour. Though Southern officials at the local level contested aspects of the international slave trade ban after 1808, state authorities were on the whole respectful of the law as a national extension of longstanding local policies. Foreign affairs, in the early republic as in the antebellum and Civil War eras, constituted an area over which Southern state governments were especially keen to exercise control, and where they regularly succeeded in influencing policy by leveraging their relationships with leading Southerners in the federal executive branch. While the hand of the U.S. government was strikingly absent from most efforts to suppress violent rebellion among enslaved people in this period, despite constitutional provisions that would have justified such actions, state governments nonetheless felt that they could rely on the federal administrations of Washington, Jefferson, and Madison to promote their security and property interests in domestic settings and on the world stage.

# Conclusion

Making federal union work as a system of government in the early American republic required constant co-ordination and negotiation between the state and federal levels. Despite the repeated insistence that the federal government, and especially the federal judiciary, alone had the right to interpret the Constitution, this was an impracticable demand in the context of day-to-day governance. State administrations were so thoroughly entangled in the design and implementation of federal laws that their understandings of how the Constitution and the laws of Congress ought to work had considerable real-world impact, regardless of the doctrine of federal supremacy.

These insights into the realities of government in the early republic qualify the arguments of historians and legal scholars that the federal judiciary was the institution through which intergovernmental conflicts were generally resolved. The first section of this conclusion examines the efforts of the Supreme Court of the United States, from 1819 onwards, to resolve in favour of the federal government several of the federalism controversies discussed in this dissertation, notably the right of the national bank to establish branches in the different states without their explicit consent; the right of the president alone to determine under what circumstances the state militias could be called into national service; and the right of state governments to interact unilaterally with federally-recognized Indigenous nations. While the Court in some senses closed a chapter in the history of federalism through the spate of decisions it produced between 1819 and 1832, answering many of the questions raised by state-federal interactions across the preceding decades, it also proved itself in several cases to be an inadequate institution for the resolution of these struggles. The difficulties of enforcing judicialized solutions to what were fundamentally political problems only reinforces the centrality of intergovernmental negotiation and co-ordination for the successful functioning of the union.

From the mid-1790s onwards, and especially from the rise of the Jeffersonians to national power after the election of 1800, the relationships between the national government and certain of the state governments were severely strained by partisanship. The problem of making federal union work where different parties occupy the central and state governments, respectively, is one with considerable resonance in the modern world, both in the United States and elsewhere. The second section of this conclusion makes the case that federal and devolved unions cannot rely upon the kind of informal institutions and personal relationships seen throughout this dissertation if they hope for successful communication and co-ordination between governments controlled by different parties. Building a resilient institutional infrastructure that facilitates ongoing intergovernmental co-operation is crucial to fostering union despite the centrifugal influence of partisanship.

Federalism in the Supreme Court

In the first three decades under the Constitution, political actors, government officials, and citizens were free to interact with the text of their fundamental law in ways little constrained or defined by judicial precedent. Congressional interpretation, presidential interpretation, and the interpretations cobbled together through intergovernmental discussion and negotiation were so important not least because authoritative judicial readings of the text, and notably of its meagre federalism provisions, were so few and far between.[1]

The 1820s marked a golden age of doctrine-making in the sphere of federalism. John Marshall and his associate justices attempted to tie up the loose ends of many of the conflicts

[1] Alison LaCroix notes that many of 'the constellation of related doctrines concerning congressional power that we now place under the general heading of "federalism"' originated in the 'early nineteenth century.' Alison LaCroix, 'The Interbellum Constitution: Federalism in the Long Founding Moment,' *Stanford Law Review* 67/2 (February 2015), 400. In *The Second Creation*, Jonathan Gienapp explores the central role of Congress in shaping how Americans understood their Constitution throughout the 1790s.

and confusions explored in this dissertation. This section will briefly discuss the key cases through which the Supreme Court of the United States attacked the problems of concurrent jurisdiction, pre-emption, and the scope of federal and state powers. It will also evaluate the limits of the Court's institutional capacity to set to rights the most contentious problems of federalism which had arisen to that point.

In 1816, Congress chartered the Second Bank of the United States, thereby reigniting the struggle over its own incorporation rights in which so many earlier American statesmen had already joined battle. In the 1819 case of *McCulloch* v. *Maryland*, the Supreme Court found itself asked to determine the constitutionality, on the one hand, of the Bank's charter, and on the other, of a Maryland state law imposing a punitive tax on the emission of bank notes by any bank not chartered by the state legislature. Marshall's opinion attempted to settle the decades of contention by declaring the constitutionality of the Bank and the unconstitutionality of any and all state attempts to harass federal institutions with taxes. 'Congress has power to incorporate a bank,' the Court insisted, by virtue of the 'incidental or implied powers' indicated in the necessary and proper clause. Leaving nothing to chance, the unanimous justices added, 'The Bank of the United States has, constitutionally, a right to establish its branches or offices of discount and deposit within any state.' Therefore, '[t]he State within which such branch may be established cannot, without violating the Constitution, tax that branch.'[2]

In weighing the arguments offered at the bar, Marshall took the opportunity to adjudicate not only the facts of the case, but also the different theories of constitutional interpretation which had arisen around the relative powers of the state and federal governments. Maryland's attorneys had relied for their defence upon the 'compact theory' of federalism on which Madison had built his case in the Virginia Resolution, and which would later become a

[2] *McCulloch* v. *Maryland* (1819) at 316-317.

cornerstone of Southern secessionist thought. As Marshall summarized, 'The powers of the General Government, it has been said, are delegated by the States, who alone are truly sovereign, and must be exercised in subordination to the States, who alone possess supreme dominion.' The Chief Justice refuted this argument, insisting that, because the Constitution had been ratified not by the state governments, but by conventions of the people held within each state, that instrument 'could not be negatived by the State Governments' but in fact 'bound the State sovereignties.' While he acknowledged that the federal government was 'one of enumerated powers,' his opinion offered a ringing confirmation of the automatic supremacy of federal law over the states. 'The Government of the Union, though limited in its powers, is supreme within its sphere of action.'[3]

Such an affirmation of the supremacy clause had consequences for the scope of a state's power to challenge the operation of federal law within its jurisdiction, as the Court showed. 'The States,' it declared, 'have no power, by taxation or otherwise, to retard, impede, burthen, or in any manner control the operations of the constitutional laws enacted by Congress to carry into effect the powers vested in the national Government.'[4] While there was no requirement that the state governments actively facilitate the operations of the federal government within their jurisdictions, and states would continue to question the laws of Congress on the basis of constitutionality, *McCulloch* confirmed a presumption of federal supremacy in the face of state challenges.

Despite the considerable significance of this decision as a foundation stone of the legal doctrine of American federalism, *McCulloch* also provided an early example of the limitations of the Supreme Court as an institution for controlling the actual operation of governments within the American system. Just a few weeks before the Court handed down its judgment in the Maryland case, the state legislature of Ohio passed 'an act to levy and collect a tax' from all

[3] *McCulloch* v. *Maryland* (1819) at 402-405.
[4] ibid. at 316-317.

companies and organizations 'that may transact banking business in this State, without being allowed to do so by the laws thereof.' Going further even than Maryland, Ohio declared the operations of the Bank of the United States 'contrary to a law of the State' and announced its intention to levy 'an annual tax of 50,000 dollars on each office of discount and deposit.'[5] The state's attempts to enforce this law would, five years later, become the subject of yet another Supreme Court case in *Osborn* v. *Bank of the United States* (1824). In deciding the case, Chief Justice Marshall was forced to revisit the reasoning underlying the Court's findings in *McCulloch*. Marshall did not back down, writing,

> [T]he court adheres to its decision in the case of *M'Culloch against The State of Maryland*, and is of opinion that the act of the State of Ohio, which is certainly much more objectionable than that of the State of Maryland, is repugnant to a law of the United States, made in pursuance of the Constitution, and therefore void."[6]

It took many years and multiple court cases for the federal judiciary to stamp out the widespread and longstanding phenomenon of attempts by the state governments to tax the branches of the Bank of the United States out of existence. Though *McCulloch* and *Osborn* provided, in the long term, a useful precedent for an expansive judicial construction of federal power under the Constitution, the cases themselves proved, in the short term, an unwieldy tool for the practical management of state behaviour.

The Court's 1824 judgment in *Gibbons* v. *Ogden* followed *McCulloch* in creating a precedent for an expansive construction of federal power, this time over the regulation of interstate commerce. The court battle was over a steamboat monopoly granted by the state of New York to Robert Livingston and Robert Fulton. Thomas Gibbons, who was found by the New York Court of Chancery to be operating his own two steamboats in violation of this monopoly,

[5] *Osborn* v. *Bank of the United States* (1824) at 740.
[6] ibid. at 867, 868.

challenged New York's right to grant such exclusive privileges, citing the fact that his own boats were licensed by Congress, under an act of 1793, 'to be employed in carrying on the coasting trade.' The task of the Supreme Court was to decide which of the two – the monopoly, or the act of Congress – was constitutional.[7]

In his opinion of the Court, Marshall found unequivocally in favour of Gibbons, justifying his decision with a sweeping endorsement of Congress's power to regulate commerce. 'Commerce' was defined to include 'every species of commercial intercourse between the United States and foreign nations, and among the several States,' 'navigation' in general, and also 'navigation carried on by vessels exclusively employed in transporting passengers.' While he acknowledged that New York did have power to grant monopolies, Marshall found the state laws in question to be 'in collision with the acts of Congress regulating the coasting trade, which . . . are supreme, and the State laws must yield to that supremacy.'[8]

In explaining this finding, his opinion furnished important reflections on federal supremacy and what we would now call pre-emption – the rule according to which states may not legislate on matters already dealt with in congressional statute. Whereas Ogden's attorneys had argued that, 'if a law passed by a State, in the exercise of its acknowledged sovereignty, comes into conflicts with a law passed by Congress in pursuance of the Constitution, they affect the subject and each other like equal opposing powers,' Marshall's federal system operated according to a different rule. Federal law, 'made in pursuance of' the U.S. Constitution, would always be supreme over state law. The act of 1793 licensing vessels for the coasting trade therefore pre-empted and nullified New York's laws granting Fulton and Livingston their monopoly.[9]

[7] *Gibbons* v. *Ogden* (1824) at 1, 2.
[8] ibid. at 1.
[9] ibid. at 205, 210, 211.

Despite this restatement of federal supremacy, however, Marshall's opinion also served to define the powers of the state governments positively against those of the federal government. His definition of commercial regulation specifically excluded from federal interference all 'state inspection laws, health laws, and laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, &c.'[10] This made *Gibbons* an important cornerstone case in the formal definition of the powers of internal police retained by the states under the Constitution.

Two cases arising out of the militia call-up during the War of 1812 gave the Marshall Court further occasion to affirm the extent of federal power in the sphere of national defence. *Houston* v. *Moore* (1820) and *Martin* v. *Mott* (1827) both concerned militiamen who had been court-martialled for failing to muster on the orders of the president during the recent international conflict. Houston, the plaintiff in error in the first case, called into question whether the state of Pennsylvania had the right to court-martial him under a state law when he had – he claimed – broken a *federal* law by refusing to muster, and ought therefore to be punished under a law of the United States. Delivering the opinion of the Court, Associate Justice Bushrod Washington made two clarifications with respect to the nature of state and federal authority over militiamen under the act of Congress of 1795. First, no militiaman could be considered to be in the service of the United States until he had mustered at the point of rendezvous. It would be at this point only that state authority would cease and federal authority commence.[11] Second, Washington wrote, 'the state court martial had a concurrent jurisdiction with the tribunal pointed out by the acts of Congress to try a militiaman who had disobeyed the call of the President.'[12] Though Congress did have the power to remove this concurrent jurisdiction from the state, Washington

[10] *Gibbons* v. *Ogden* (1824) at 1.
[11] *Houston* v. *Moore* (1820) at 18, 20.
[12] ibid. at 32.

confirmed that it was not unconstitutional for the state of Pennsylvania to assist in the enforcement of federal law in this case.

The more significant case for the resolution of the intergovernmental conflicts arising from the War of 1812 was *Martin* v. *Mott.* Jacob Mott, a New York militiaman, had refused to muster in the service of the United States at the call of Governor Tompkins, and had therefore been court-martialled and fined ninety-six dollars. When Mott refused to pay, Martin, the U.S. deputy marshal, had seized his possessions. Mott had sued for their recovery on a writ of replevin and had won, at which point Martin had appealed.[13] Mott's attorneys argued that Martin had not shown 'that any of the exigencies had occurred in which the President is empowered to call out the militia by the Constitution of the United States,' and that it was unclear whether the militia had been called out by the authority of the president or by that of the governor only.[14] The case thereby revived the central questions of the controversy which had arisen in New England in the lead-up to the Hartford Convention.

In delivering the opinion of the Court, Joseph Story of Massachusetts therefore took the opportunity to squelch the arguments made by the Federalist authorities of his home state in resistance to the federal militia call-up during the war. He referred to the act of 1795 to establish the circumstances under which the president could lawfully call out the militia. 'We are all of opinion,' Story wrote, 'that the authority to decide whether the exigency has arisen belongs exclusively to the President, and that his decision is conclusive upon all other persons.' Neither a state governor, nor a militia officer, nor a rank-and-file militiaman like Jacob Mott had the right to question such a decision. 'The law does not provide for any appeal from the judgment of the President or for any right in subordinate officers to review his decision and in effect defeat it.'[15] *Martin* v. *Mott*, like all of the other cases discussed here, attempted to resolve

[13] *Martin* v. *Mott* (1827) at 19-27.
[14] ibid. at 23, 24.
[15] ibid. at 28, 29, 30

an ongoing intergovernmental controversy in the federal government's favour. The spate of federalism cases arising in the 1820s gave the Court the opportunity to set the seal upon federal power after thirty years of contestation and confusion.

Despite the Court's success in resolving some troublesome matters of the early national period through its spree of federalism decisions, the responsibility it had accrued for the oversight of this politically volatile area would soon prove both unwieldy and burdensome. At the very moment that Marshall and his justices were attempting to draw a line under the controversial intergovernmental questions of the early national period, a new era of conflict over the relative powers of the state and federal governments was taking shape. As Alison LaCroix notes, between the 1810s and the 1850s, the question of Congress's power to fund and organize a national infrastructure programme – 'internal improvements' – would become a central source of contention between the union's two levels of government.[16]

Then there was slavery. The crisis over the admission of the state of Missouri to the union ushered in four decades of intensifying conflict over the right of the federal government to regulate slavery in the territories, and the rights of states seeking admission to determine their own status as 'slave' or 'free.'[17] At the same time as the divide hardened between a 'free' North and a 'slave' South, Northern state governments used personal liberty laws to hinder the operation of federal fugitive slave laws, drawing the fury and frustration of their Southern counterparts.[18] The limitations of the Supreme Court as an arbiter of federalism doctrine or a centre for intergovernmental conflict resolution would become starkly clear as decisions such

[16] LaCroix, 'The Interbellum Constitution,' 400.
[17] Mason, *Slavery and Politics*, 213.
[18] Morris, *Free Men All*, 1.

as *Prigg* v. *Pennsylvania* and *Scott* v. *Sandford* failed to produce practical solutions to these growing tensions that were broadly acceptable either to government officials or to the general public.[19]

The capacity of the Court to determine unilaterally constitutional questions rooted in this kind of social and political conflict had been thrown into doubt even earlier, in the context of Indian Removal. In the early 1830s, two cases reached the Court in each of which the plaintiff in error sought to curtail the trespasses of the state of Georgia upon the self-determination of the Cherokee Nation. While John Marshall's opinions in *Cherokee Nation* v. *Georgia* and *Worcester* v. *Georgia* both had long-term consequences for legal doctrine concerning the relationship between the United States and Native American polities, neither judgment materially altered the course of action subsequently pursued either by the state or by the federal government. To some extent, this was by design. As Claudio Saunt has pointed out, there were political reasons for Marshall's vague opinion in *Cherokee Nation* (1831), in which he denied that the Supreme Court had jurisdiction over the dispute between Georgia and the Cherokees on the grounds that the latter constituted a 'domestic dependent nation' rather than a foreign state. Such inconclusive language was calculated to secure the support of a majority of justices and to appease the administration of Andrew Jackson, whose attorney general was himself a white Georgian.[20] It was Marshall's choice to craft a decision with no teeth.

In *Worcester* (1832), however, the chief justice took a stronger line against the Georgians. 'The third article of the treaty of Hopewell,' he wrote, 'acknowledges the Cherokees to be under the protection of the United States of America, and of no other power . . . . The Cherokees acknowledge themselves to be under the protection of the United States, and of no other power.' The state of Georgia, therefore, had no business interfering with the Cherokee people in their own territory, nor, as in this case, prosecuting white missionaries in the Cherokee nation

[19] *Prigg* v. *Pennsylvania* (1842); *Dred Scott* v. *Sandford*, 60 U.S. 393 (1856); Rao, 'The Federal "Posse Comitatus" Doctrine,' 21-22.
[20] *Cherokee Nation* v. *Georgia*, 30 U.S. 1 (1831) at 2; Saunt, *Unworthy Republic*, 99-100.

for refusing to take an oath to 'support and defend the constitution and laws of the State of Georiga.'[21] Marshall's opinion of the Court established that there existed, through federal treaties, an exclusive relationship between certain Indian nations and the federal government to which the states were not party. Though this would have major implications for federal Indian law going forward, however, his pronouncement did nothing to prevent the mistreatment of Cherokee people by Georgia authorities in the Removal era. Both state and federal governments ignored this attempt to delineate the proper legal relationship between state, federal, and Native governments.

As it was ratified, the text of the Constitution gestured to the federal judiciary as the institution with the responsibility to resolve questions of constitutional meaning and, in particular, the correct distribution of power between the state and federal governments. During the national controversy over the Virginia and Kentucky Resolutions, even certain state governments pointed to the federal court system as the ultimate arbiter of such questions.[22] The Court itself took to this role with gusto, granting itself the explicit power of judicial review through *Marbury* v. *Madison* and then launching into the project of marshalling state and federal powers. Despite its energetic efforts to construct a viable boundary between these two sets of powers, however, the responsibility for resolving intergovernmental conflict would prove too great for the Court. Judicial mediation between the state and federal governments could offer only the partial and belated resolution of disputes. It was often too little and too late. Intergovernmental negotiation continued to be a central means of preventing the escalation of such disputes to the Supreme Court docket and beyond.

[21] *Worcester* v. *Georgia* (1832) at 517, 518, 523; Saunt, *Unworthy Republic*, 163-164.
[22] Anderson, 'Contemporary Opinion of the Virginia and Kentucky Resolutions I,' 47.

The Problem of Party and the Political Culture of Union

On the eve of the Embargo, perhaps the first great test of federal authority experienced by the Jeffersonians in government, President Jefferson greeted with excitement the news that Massachusetts, the Federalists' final stronghold, had at last elected a Democratic-Republican governor. In his letter of congratulations to the new governor, James Sullivan, Jefferson laid out his vision for a union in which his party's policy goals could be actively pursued at every level of government. Sullivan's election was a crucial step 'towards securing that union of action & effort in all it's parts, without which no nation can be happy or safe.' It would offer the opportunity for 'a more intimate correspondence between the executives of the several States, & that of the Union,' which in turn would allow for the implementation of a co-ordinated legislative programme across the different states, touching many of the policy areas in which the federal government had an interest but for which it was not formally responsible – 'quarantines, health laws, regulations of the press, banking institutions, training militia, &c. &c.'[23]

Jefferson's excitement is understandable. Partisanship was, and remains, the most significant barrier to the coherent and unified administration of the law in a federal system of government. This was not a problem that was immediately obvious to the Constitution's framers, not least because they built the fundamental law of the American union around a vision of the United States in which there would be no party. In a union without party, policies could be formulated on the basis of rational debate, not partisan preference.[24] State officials would co-operate with the federal government out of loyalty to the union, not loyalty to party. The period before party organization became entrenched, in the very early 1790s, offered a taste of

[23] Thomas Jefferson to James Sullivan, June 19 1807, *WTJ* 10:420.
[24] Ralph Ketcham, *Presidents Above Party: The First American Presidency, 1789-1829* (Chapel Hill, 1984), 3, 91-92.

such a world. Many governors had served with the president and his cabinet officers in the Revolutionary War; a sense of mutual respect and indeed friendship prevailed in many cases, despite growing differences over the direction of national policy from the First Federal Congress onward. These circumstances prefigure the era of devolution in late-twentieth-century Britain, for example, where all of the governments, central and devolved, were initially held by the same party. Disputes could be resolved through personal relationships and party channels. Formal institutions for the management of intergovernmental relations often seemed surplus to requirements.[25]

In neither the early American nor the contemporary British case would such opportune arrangements last long. In Britain, the 2010 general election marked the end of party uniformity across the central and devolved governments, and the beginning of an increasingly difficult struggle to co-ordinate policy design and implementation across the United Kingdom as a whole. As Michael Kenny and others have observed, the crises over withdrawal from the European Union and the coronavirus pandemic have revealed in stark terms 'the structural absence of a settled pattern of engagement and trusted decision-making among the governments of the UK.'[26] In a similar way, the growing power of partisan attachment in the United States during the 1790s allowed the Jeffersonian opposition to encamp in certain state legislatures, using that position – as in the case of the Virginia and Kentucky Resolutions – to project their dissatisfaction with federal policy to the nation at large. State legislatures dominated by the opposition party might even use their own authority to stymie the implementation of federal laws within their respective jurisdictions, as this dissertation has shown.

The partisan divide between the occupants of the federal and state governments had the potential to turn policy disagreements into constitutional disputes. Jefferson, Madison, and

[25] Michael Kenny, Philip Rycroft, and Jack Sheldon, 'Union at the Crossroads. Can the British state handle the challenges of devolution?,' report of the Bennett Institute for Public Policy, Cambridge University (London 2021), 10-12.
[26] Kenny et al., 'Union at the Crossroads,' 31.

their supporters in the Virginia and Kentucky state legislatures disagreed on ideological grounds with the federal policies which had been given expression through the Alien and Sedition Acts. Rather than simply arguing that these policies were corrupt and immoral, however, they presented their opposition – in the voice of the state legislators – in constitutional terms, suggesting that the federal government lacked the power to pass such laws and that, conversely, the state governments possessed the power, not only to determine the constitutionality of federal actions, but also to reject unilaterally those laws which they found to be in breach of the national charter. The New England secession crisis during the War of 1812 followed a similar pattern: political disagreement over the wisdom of pursuing armed conflict with the United Kingdom; conversion of the dispute into constitutional terms, specifically the respective powers of the state and federal governments; and the onset of a situation in which the federal government was threatened with a total loss of control over several of the union's constituent states. This mode of conducting partisan politics, fuelled by the judicialized conception of intergovernmental conflict resolution described above, became embedded within American political culture.

The question of how to foster intergovernmental communication and co-ordination remains fundamental to the management of multi-party federal or devolved unions. In both the early United States and the contemporary United Kingdom, the fading of ideological unity and the rise of partisan difference across domestic governments has at different times threatened union itself. The solution, as contemporary American legal scholars point out, cannot simply be an endless cycle of litigation to attempt to demarcate the true boundary between the state and federal spheres of responsibility. Court proceedings are not only contentious, time-consuming, and expensive, but they often do not have the desired effect of meaningfully restraining the future actions of legislators and other officials. Litigation is a sign that negotiation has failed. As Kenny has suggested in the case of the contemporary United Kingdom, governments must build robust institutional structures for the support of intergovernmental

communication despite partisan differences.[27] Such institutions have the potential to de-escalate constitutional disputes by allowing central government and state or local officials to work jointly through the tricky implications of constitutional and legal language without resorting to the courts. They can also provide an extra-legislative forum for debating policy details with an eye to the good of the union and all of its member states.

'In our complex system,' wrote Marshall in *Gibbons* v. *Ogden*,

> presenting the rare and difficult scheme of one General Government whose action extends over the whole but which possesses only certain enumerated powers, and of numerous State governments which retain and exercise all powers not delegated to the Union, contests respecting power must arise.[28]

Two hundred years later, the observation is still more pertinent. Through continued legislative and judicial re-interpretation of the Constitution, the scope of broadly acknowledged federal policy responsibility in the United States has expanded considerably since the founding era, creating still further overlap between the regulatory interests of the state and federal legislatures. The political scientist Morton Grodzins coined the term 'marble-cake federalism' to characterize this smudged reality.[29] In the United Kingdom, meanwhile, the boundary between reserved and devolved competencies is often referred to as a 'jagged edge,' a phrase intended to capture the intense complexity of the division of responsibility. Kenny remarks that legislation enacted at Westminster can have considerable 'knock-on effects . . . for the devolved territories,' including in other policy areas for which the devolved governments are largely responsible.[30]

Legislating under such conditions ought of necessity to involve considerable cross-governmental discussion and co-ordination. In the United States, particularly since the Second

[27] Kenny et al., 'Union at the Crossroads,' 22, 39.
[28] *Gibbons* v. *Ogden* (1824) at 204, 205.
[29] Grodzins, *The American System*, 7-8.
[30] Kenny et al., 'Union at the Crossroads,' 38.

World War, the informal mechanisms for the management of intergovernmental relations described here have been partially replaced, at both the state and federal levels, by formal offices, departments, and committees with the designated purpose of facilitating state-federal communication.[31] While these have not provided a complete solution to the ongoing problem of troubled relationships between the federal government and those state governments controlled by the opposition party, such 'discretionary spaces of federalism' nevertheless offer a crucial venue for the out-of-court negotiation of constitutional meaning and the continuous co-ordination of state and federal policies.[32] Public policy research indicates an urgent need to build a similar network of institutions in the British context, where the failure of central government officials to concern themselves with the needs and wishes of devolved partners has generated bitterness and fuelled secessionist movements. Intergovernmental communication and co-operation is crucial to developing a political culture in which union is valued, even where partisan divisions are entrenched.

[31] G. Ross Stephens & Nelson Wikstrom, *American Intergovernmental Relations: A Fragmented Federal Polity* (New York, 2007), 123-126.
[32] Rodríguez, 'Negotiating Conflict Through Federalism,' 2097.

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