A Tale of Two Constitutions: Nationalism in the Federalist Era

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As to crimes—an axiom, that every community ought to have within itself and retain in its own hands the powers of self preservation.

—William Paterson, 1789, defining the "Laws of the United States" before the Senate.

It is admitted that the United States form a compleat and independent nation, and possess the powers of sovereignty in as full a manner as any nation on earth. Now the right of self defense and preservation is inherent in and necessary to every nation; and therefore the malting of laws to punish libels and seditious publications [is] the exercise of a proper authority. It flows immediately from that great preservative principle, which forms an essential part of the law of nations, and which in this particular is derived from the law of nature.

—Supreme Court Justice William Paterson, 1798, upholding the constitutionality of the Sedition Act

In the spring of 1790, Chief Justice John Jay delivered a charge to a grand jury in New York District Court. After recounting the blessings of American liberty and the genius of the federal Constitution, Jay instructed the grand jurors "to direct your attention to the conduct of the national officers—and let not any corruptions, frauds, extortions, or criminal negligences, with which you may find any of them justly chargeable, pass unnoticed."[1] Jay's grand jury charge, delivered before the passage of "An Act for the Punishment of Certain Crimes," which included a section dealing with the bribery of federal officials, indicates that he was not referring to violations of criminal statutes. Instead, Jay was thinking, more generally, of "whoever fraudulently withdraws his shoulders from the common burthen" and inflicts harm on the government of the United States. In the same charge, Jay also suggested that "the law of nations make part of the laws of [the United States,] and of every other civilized

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1. John Jay, Maeva Marcus, ed., 2 *The Documentary History of the Supreme Court, 1789-1800* 25 (New York, 1988). The change was delivered April 12, 1790. An "Act For the Punishment of Certain Crimes" was passed April 30, 1790. According to Marcus, two men (in an unrelated incident) were indicted for "conspiring to destroy a vessel, make revolt, and murder the captain" even though no federal statute gave the courts authority to punish these crimes for another two weeks. *Id* at 8. Ruth Wedgwood's article on the Jonathan Robbins affair points to another grand jury charge in the same spirit as Jay's. James Wilson, in speaking to a Virginia grand jury in 1791, suggested that a Congressional statute "in excess of national prescriptive jurisdiction as allocated by . . . the law of nations" could not be enforced. At issue was Congress's right to punish murder on the high seas even if the criminal was not an American citizen; by the law of nations, piracy was limited to robbery and depredation on the high seas. Wedgewood rightly labels this charge "extraordinary." *See The Revolutionary Martyrdom of Jonathan Robbins,* 100 Yale Law School, 243-244 (1990).

nation." This expression, as one legal scholar has recently noted, later became the "centerpiece of non-statutory prosecutions" for breaches of the federal common law.[2]

These sweeping pronouncements had several profound implications. The Chief Justice implied that the common law of England, an unwritten body of laws based on customs or court decisions and distinguished from statutory laws or the collective will of a legislature, as applicable to American circumstances, fell within the cognizance of federal courts. In speaking of "offenses" against the United States, Jay seemed to suggest that there were certain crimes—common law crimes-that every nation was bound to punish. Furthermore, Jay evidently believed that the law of nations, or the law of nature applied to political states, was a necessary and indispensable component of the Constitution. He assumed that the United States, as a "civilized nation," was obligated to observe and respect this venerated body of laws.

Even more striking than the immediate ramifications of his charge, however, were Jay's general convictions, implicit although not fully articulated, about the nature and scope of the federal Constitution. Jay clearly believed that the Constitution of the United States was more than a collection of individual wills expressed in positive law. It was more than a device for securing individual rights against the authority of a central government. It was more than a pact to be dissolved at the discretion of the contracting parties. For Jay, the Constitution was an embodiment of moral and philosophical principles that had long been esteemed and revered—of laws in existence long before 1787. It was a document that depended for its authority on the principles of right and wrong. The Constitution, in short, was grounded upon universal, self-evident propositions—the principles of natural law, and the law of nations—and could only be understood in light of those propositions.

By 1798, it was evident that most Federalists shared the convictions implicit in Jay's grand jury charge. The Constitution of the United States, they believed, was intended to remedy the defects of the Articles of Confederation. It was intended to institute a vigorous and energetic government where a feeble and ineffectual confederation once stood. The authority of the federal government was thus sovereign—"supreme, irresistible, absolute"—in respect to national concerns.[3] For Federalists of the 1790s, several consequences naturally followed. First, the people, acting in their corporate capacity, have a right and obligation, by the first law of nature, to preserve themselves, using all known and usual means. Second, as a common law power is an attribute of every sovereign, independent nation, the federal judiciary possessed jurisdiction over the English common law as modified either by circumstance or the "general legislature" of the United States. Finally, the law of nations, an inherent component of

2. Stewart Jay, *Origins of Federal Common Law: Part One,* 133 University of Pennsylvania Law Review 1040 (1986) (hereinafter cited as "JAY").

3. William Blackstone, *Commentaries on the Laws of England* 49 (Chicago, 1971).

the laws of every government, was incorporated into the federal common law and constituted the basis of a just and rational foreign policy. Although both Republicans and Federalists considered natural law a source of individual rights, only Federalists regarded natural law as a source of national power in the domestic realm. After the "Revolution of 1800," these explosive ideas about the Constitution for the most part vanished from the political landscape. A second Constitution—one favored by nationalists, yet designed to allay the fears of the American public and attract the support of moderate Jeffersonians—was born. These two Constitutions had little in common. The second became, for all intents and purposes, an end in itself, rather than a means to secure those rights with which all men are equally endowed, establish justice, and promote the general welfare.

Most scholars who have examined Federalist constitutional theory, either by studying individual Federalists or a range of leaders and statesmen, have generally agreed on its defining characteristics. Focusing on Article 1, they have maintained that an expansive implied powers doctrine constituted the legal basis of Federalist nationalism. Federalists, in other words, based their theory of the Constitution on a liberal reading of the expressly enumerated powers, either separately or in combination. Thus, Clinton Rossiter has been able to trace a direct line from Hamilton's *Opinion on the Constitutionality of the Bank* to John Marshall's decision in *McCulloch v. Maryland.* In like fashion, Albert Beveridge explained that one finds "the doctrine of implied powers is expounded with . . . peculiar force and clearness" in the Virginia Federalists' defense of the Alien and Sedition Acts. There is much to be said for this interpretation. Federalists often relied on liberal interpretations of certain key provisions of the Constitution, coupled with a comprehensive implied powers doctrine, to justify their policies.[4] When applied to nationalist thought of the 1790s, however, the implied powers argument is misleading. Under the sway of legal positivism and heavily influenced by the debate over Alexander Hamilton's economic program and Marshall's opinions as Chief Justice, its advocates have neglected the defining features of Federalist constitutionalism in the first decade under the Constitution.

The conventional account of Federalist constitutional theory fails to take into consideration extra-constitutional principles that co-existed with, and often superseded, the implied powers doctrine. The conventional account suggests that the Federalists stayed within the four (albeit enlarged) corners of the document and remained committed to the text in one fashion or another. It implies that they were only concerned with laws

4. For accounts which stress the implied powers underpinnings of Federalist theory in the 1790's *see*; Clinton Rossiter, *Alexander Hamilton and the Constitution* (New York, 1964); Albert Beveridge, *The Life of John Marshall* 4 vols. (New York, 1919); John Miller, *The Federalist Era* (New York, 1960); Jefferson Powell, "How Does the Constitution Structure Government?" in Burke Marshall, ed., *A Workable Government?* (New York, 1987); William Crosskey, *Politics and the Constitution,* 3 Vols (Chicago, 1953); Stanley Elkins and Eric McKitrick, *The Age of Federalism,* (New York, 1993).

enacted by Congress or the positive expressions of the people acting in their sovereign capacity, and does not consider the possibility that Federalists regarded certain principles and laws binding upon the nation regardless of whether they were identified in a written constitution. The "implied powers" argument does not consider the possibility that men like Chief Justice Jay looked above and beyond the Constitution in order to define and interpret it.

Without a clear understanding of the full range of Federalist constitutional thought, the partisan struggles of the 1790s, the "Revolution of 1800,' and the character of the second party system will remain ambiguous. One of the most remarkable aspects of the founding era and the 1790s was the fact that debates centering on "basic, constitutive issues of power and government structure" were, as Jefferson Powell has remarked, carried on with a "remarkably high degree of sophistication." Disagreements during this decade, expressed in highly advanced political discourse, centered on conflicting interpretations of the Constitution and represented nothing less than a war for the soul of the American Republic. Without a thorough grasp of Federalist legal doctrines, the fierce partisan contests that took place will never be fully understood. The election of 1800, moreover, inaugurated the Age of Jefferson, an era which would last for well over a quarter-century. In order to describe the "Revolution of 1800," one must be able to describe what was overthrown. The disappearance of higher law constitutionalism clearly suggests that ideas about the Constitution played a significant role in the defeat of John Adams and the Federalist Party. Finally, the "Revolution of 1800" shifted the boundaries of political debate in the 1800s in a manner favorable to the interests of state governments. Examining Federalist constitutional thought in the 1790s is therefore essential to understanding the elusive character of constitutional nationalism as well as the more limited perimeters of the partisan political dialogue during the era.

What follows is a discussion of the controversy concerning the federal courts' jurisdiction over common law crimes. Not only did this controversy engender speculation over the authority of the judiciary and the scope of Article III powers, but also brought forth, at a relatively early period, a conception of the Constitution not put to rest until *United States v. Hudson and Goodwin* was decided in 1812.[5] The second part of this essay will examine the aspects of Federalist thought heretofore neglected by historians of the early national period. The debates over the "self-created societies" and the Alien and Sedition Acts generated sophisticated commentary not only on the extent and scope of the legislative powers of the federal government, but on the ultimate meaning and purpose of the Constitution itself.

5. 11 U.S. (7 Cranch) 32 (Feb., 13, 1812).

America's Birthright: The Common Law

An examination of the debate over the existence of a general federal common law of crimes reveals, as Stephen Presser has noted, that "supra-constitutional" principles of government played a vital role in eighteenth-century Federalist jurisprudence.[6] But before exploring in greater detail the Federalists' justifications for a federal common law, it is necessary to determine how they conceived the common law in general and, by implication, the law of nations. In other words, it is necessary to explore their philosophy of law before examining the practical implications of that philosophy.

According to William Blackstone, the knowledge and application of universal moral and legal principles, like the laws of the physical universe, could be reduced to a science. Like the process of discovering the laws of the universe, the process of distilling the principles of natural law into civil laws required the insights and experiences of generations of judicious and learned men. The English common law, Blackstone believed, was the product of centuries of such experience. It was the result of literally thousands of established practices, traditions, and legal decisions. The common law "was nothing else but custom, arising from the universal agreement of the whole community."[7]

The English common law, Blackstone concluded, was far from an arbitrary collection of judicial decisions. The fact that it was preserved and modified over time, amended and refined, reflected the genius of the system. After the passage of decades and contributions of numerous philosophers and statesman, it was clear to Blackstone and his followers that the common law had to be regarded as superior and distinct—as an almost uniform expression of natural law.[8] Bernard Bailyn, describing attitudes toward the law commonly held during the Revolutionary Era, writes that "God-given, natural unalienable rights, distilled from reason and justice through the social and governmental compacts, were ex-

6. Stephen Presser, *The Original Misunderstanding* 88 (Durham, 1992) (hereinafter cited as "PRESSER"); Stephen Presser, *The Supra-Constitution, the Courts, and the Federal Common Law of Crime: A comment on Palmer and Preyer*, 4 Law and History Review 327-328 (1986) (hereinafter cited as "PRESSER, SUPRA-CONSTITUTION").

7. Daniel Boorstin, *The Mysterious Science of Law* 113 (Gloucester, 1973).

8. This is not to suggest that Blackstone was the only thinker who associated the English common law with the law of nature. For a discussion of the influence of writers like Coke, Puffendorf, Burlamqui, Vattel, and Rutherforth on eighteenth-century legal and constitutional thought, *see* Thomas Grey, *Origins of the Unwritten Constitution: Fundamental Law In American Revolutionary Thought,* 30 Stanford Law Review 843 (1978); Suzanna Sherry, *The Founders' Unwritten Constitution,* 54 University of Chicago Law Review 1127 (1987); J.W. Gough, *Fundamental Law in English History* (London, 1955). For a description of the natural law background of judicial review, *see* Edwin S. Corwin, "The Higher Law Background of American Constitutional Law" and "The Debt of American Constitutional Law to Natural Law Concepts" in Richard Loss, ed., *Corwin on the Constitution* 79-139, 195-212 (Ithaca, 1981).

pressed in the common law of England."[9]

Federalist writing on the common law in the 1790s by such figures as Alexander Addison, James Wilson, and Zephaniah Swift, demonstrates that Blackstone's ideas concerning the common law had gained widespread acceptance. In what was perhaps the decade's most elaborate discussion of the common law, Wilson asserted that all civilized nations based their jurisprudence on a "common law." Although the Roman common law, for example, differed greatly from the English common law, the two nonetheless had much in common. The authority of each

> rest[s] on reception, approbation, custom, long and established. The same principles, which establish [the common law,] change, enlarge, improve, and repeal it. These operations, however, are, for the most part, gradual and imperceptible, partial and successive in a long tract of time.[10]

The "principle of accommodation" in every system of common law, Wilson continued, "will adjust its improvement to every grade and species of improvement made by the people, in consequence of practice, commerce, observation, study, and refinement."[11] To Swift, the common law was infused with fundamental and eternal truths. It was derived, he suggested, from the "immemorial practice" of the people and was warranted by the dictates of reason as well as the "wisdom and experience of successive ages, hav[ing] advanced to the highest pitch of clearness, certainty, and precision."[12]

Like Blackstone's, the Federalists' conception of the common law was organic in nature; it adapted to the situation and circumstances of the people until it attained "higher and higher degrees of perfection." Not surprisingly, Swift, Addison, and Wilson also viewed the common law as an expression of higher law. Wilson asserted that the foundations of the common law, laid many millennia ago, "have not been overturned by the successive invasions, or migrations, or revolutions which have taken place. The reason has been already hinted at: *it contains the common dictates of nature*, refined by wisdom and experience."[13]

It was because the common law "works itself pure by rules drawn from the fountain of justice" that it has been of so much value to the world's civilized nations.[14] The common law of England, Swift con-

9. Bernard Bailyn, *The Ideological Origins of the American Revolution* 77 (Cambridge, 1967). On the relationship between common and natural law, *see* Roscoe Pound, *The Spirit of the Common Law*, 85-111 (Boston, 1921).

10. James Wilson, in Robert G. McCloskey ed., *The Works of James Wilson,* 353 (Cambridge, 1967) (hereinafter cited as "WILSON").

11. *Id.*

12. Zephaniah Swift, *A System of Laws of the State of Connecticut* 40 (New York, 1972) (hereinafter cited as "SWIFT"). The common law, for Addison, was based on "certain maxims or usages, which have long prevailed, and been sanction[ed] by judicial authority, and naturally arising out of the circumstances by which the subjects of . . . government were connected with each other." *See* Addison, *Analysis of the Report of the Committee of the Virginia Assembly* 29 (Philadelphia, 1800) (hereinafter cited as "ADDISON").

13. WILSON, at 356. (emphasis added).

14. *Id.* at 357.

curred, "is a highly improved system of reason, founded on the nature and fitness of things, and furnishes the best system of civil conduct."[15] The common law, Addison maintained, was "founded on the law of nature and the revelation of God, to which all men are subject."[16]

In addition to viewing the common law through this intellectual prism, Federalists also agreed on the principles of what can be termed an external common law, the natural law of nations. Again, James Wilson provided one of the dearest definitions when he wrote that

> the law of nations, properly so called, is the law of nature applied to states and sovereigns. The law of nations, properly so called, is the law of states and sovereigns, obligatory upon them in the same manner, and for the same reasons, as the law of nature is obligatory upon individuals. Universal, indispensable, and unchangeable is the obligation of both.[17]

As the "will of Nature's God," the law of nations, for Wilson as well as for his Federalist colleagues, was "indispensably binding upon the people." "In the intercourse of nations, by common and universal consent," Zephaniah Swift agreed, "certain general rules and principles have been adopted, that are founded on the law of nature, and denominated the law of nations."[18]

Throughout the Federalist commentary on the law of nations, one finds, especially in Kent's *Dissertations* many similarities with Federalist commentary on the common law. As Kent indicated, the law of nations is a "system of rules which reason and custom have established among the civilized nations of Europe."[19] It directs relations among nations and is "founded partly on the principles of natural right."[20] Kent believed that the law of nations, like the English common law, was organic; it evolved and developed over the ages while profiting from the experience of men and nations. As the ancients possessed an imperfect understanding of the proper relationships between sovereigns, it was not until philosophers of the law such as Burlamaqui, Puffendorf, and Vattel refined and perfected the law of nations that one could say that it was truly an expression of natural law. In seeming agreement with Kent, Wilson, after lamenting the inadequate attention devoted to the law of sovereigns by the nations of late antiquity, exclaimed that "at last . . . the voice of nature, intelligible and persuasive, has been heard by nations that are civilized."[21]

On the main principles of the law of nations, the Federalists were in complete agreement. "The first and most necessary duty of nations, as well as of men," Wilson asserted, "is to do no wrong or injury, Justice is

15. SWIFT, at 41.

16. ADDISON, at 29.

17. WILSON, at 151.

18. SWIFT, at 9.

19. James Kent, *Dissertations: Preliminary Part to a Course of Law, Lectures* 51 (Littleton, 1991) (hereinafter cited as "KENT"). Originally delivered in 1794. Of course, when Kent spoke of "civilized nations," he was thinking mainly of England.

20. KENT, at 52.

21. WILSON, at 164.

the sacred law of nations."[22] The "noble aim" of the law of nations, wrote Kent, "is to preserve peace, kind offices, and good faith, among mankind in their national intercourse" while restraining the rapacity and cruelty of men.[23] In more practical terms, Wilson wrote, the great principle of the law of nations prohibits "one nation from inciting disturbances in another, from seducing its Citizens, from depriving it of its natural advantages, from calumniating its reputation . . . from fomenting or encouraging the hatred of its enemies."[24] In addition to securing the right of self-defense, "a fundamental principle of the social contract," the law of nations proscribed, according to Kent, the violation of treaties. The fulfillment of promises, he believed, is a duty as much incumbent upon states as upon men.[25]

Thus for the Federalists of the 1790s, the common law and the law of nations were both, in theory, well defined systems of law with their origins emanating from the customs and traditions of a particular country as well as from the accumulated experience of the nations of the world. They were not the products of pure reason, but were the results of time-tested practices and customs. Sanctioned by the world's civilized nations, the common law and the law of nations were regarded as manifestations of higher law. The common law, adapted to the particular needs of a nation, was an indigenous expression of divine principles while the law of nations regulated and secured the natural rights and duties of a people acting in their corporate (or national) capacity.

When the Federalists, referred to the common law or the law of nations, they were referring to pre-existing natural rights and obligations, and not to mere suggestions or recommendations. This modern natural rights doctrine, infused with a vigorous dose of Burkean conservatism, had profound implications for the American constitutional order. In sustaining federal Jurisdiction over the American common law, the author of "An Address of the Minority in the Virginia Legislature to the People of That State" (possibly John Marshall) wrote,

> We believe it to be a principle incontestably true, that a change in government *does not dissolve obligations previously created, does not annihilate existing laws, and dissolve the bonds of society;* but that a people passing from one form of government to another, *retain in full force all their municipal institutions,* not necessarily changed by the change in government. [26]

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22. WILSON, at 160.

23. KENT, at 51.

24. WILSON, at 160.

25. KENT, at 64-77.

26. An Address of the Minority in the Virginia Legislature to the People of That State, Containing a Vindication of the Constitutionality of the Alien and Sedition Laws 31 (Richmond, 1798). (emphasis added) A great deal of controversy has surrounded the authorship of this address. Albert Beveridge attributed it to Marshall. The editors of the *Marshall Papers,* however, have declined to include it among Marshall's works, suggesting that the evidence of his authorship, two letters written by Theodore Sedgwick, are inconclusive. They also point out that Marshall opposed the Alien and Sedition Acts as useless and likely

For the Federalists of the 1790s, it was only natural that the most ancient principles of American government, the principles embodied in the common law, "continued to be the law of the land" in each state after the revolution and remained in force as the people united to secure their liberties.[27] The Virginia Federalists were not alone in contending that the act of strengthening the Articles of Confederation and establishing a federal government, sovereign in respect to national concerns, did not repudiate the natural bonds of civil society. "Excepting Judge Chase," Joseph Story remarked years later, "every Judge that ever sat on the Supreme Court from the adoption of the constitution to 1804" believed in the legitimacy of a federal common law of crimes derived from principles to which all states subscribed.[28]

Between 1789 and 1793, there were few cases that involved crimes against the federal government. As Stewart Jay has remarked, those that did, like bribery and piracy, would have aroused little public attention or political controversy.[29] Although nonstatutory cases were received in fed-

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to arouse opposition to the government, and that the *Address* endorses them and finds them useful and necessary. Further, it is suggested that the Address is similar in style to a series of essays written by Henry Lee in the *Virginia Gaz & Gen. Advertiser.* I can support neither the logic nor the conclusions of the *Marshall Papers* editors. In 1793, Marshall supported Washington's Neutrality Proclamation as well as criminal common law prosecutions on the same grounds as John Jay and every other Federalist. (See pages 9-19) In 1799, Marshall, in responding to George Washington's suggestion that he examine one of Alexander Addison's grand jury charges, enthusiastically and unequivocally praised Addison's lecture. Addison, as this essay will later show, was a rabid ultra-nationalist who posited one of the most extreme Federalist positions found in the 1790's. Furthermore, in a oft-quoted letter to George Tucker, Marshall defended Oliver Ellsworth in the *Williams* Case because he applied the "common law of our country." *Williams,* it will be remembered, was a federal case. Marshall could not have been referring to anything but a national common law. These facts, I believe, suggest that Marshall's views are consistent with the ideas promulgated in the *Address* and the ideas outlined in this essay. As far as the author's alleged disapproval of the Sedition Act in the *Address* is concerned, nothing is proven by this. If someone who disapproved of the Sedition Act was asked to defend its constitutionality, he would *have* to imagine that a threat to the government really existed in order to suggest that the laws were legitimate and constitutional. To defend laws punishing sedition, one would have to imagine the presence of traitorous elements. The greatest threat at the time was the threat to Union posed by Republicans, which would have been enough to force Marshall to take up the pen even if he found the Alien and Sedition Acts distasteful. Lastly, the resemblance of the *Address* to the essays in the *Virginia Gaz.* is, I believe, vague and inconclusive. Although I can not prove unequivocally that Marshall wrote the *Address*, I do not agree with the reasons invoked by the editors of the *Marshall Papers* for denying it a place among Marshall's works. At least the editors do acknowledge Marshall *might* have had a role in producing the *Address. See* John Marshall, eds. Charles Cullen, and Herbert Johnson, *The Papers of John Marshall,* (Williamsburg, VA.). All relevant material can be found in V. 2, pgs. 181-183, 221-228; V. 3, pgs. 495-508; V. 4, pgs., 3, 4.

27. *Id.*

28. Joseph Story, W.W. Story, eds., *Life and Letters of Joseph Story* 200 (New York, 1851), *quoted in* PRESSER, at 82.

29. JAY, at 1039; Stephen Presser, *A Tale of Two Judges: Richard Peters, Samuel Chase, and the Broken Promise Federalist Jurisprudence,* 73 Northwestern Law Review 53-57 (1978) (hereinafter cited as "PRESSER, TWO JUDGES").

eral courts, it was not until George Washington's neutrality proclamation, the prosecution of Gideon Henfield for violating the law of nations, and the eruption of partisan warfare over relations with France, that it became necessary for Federalists to justify their actions to the public.[30]

Determined to keep the United States from becoming involved with the conflicts engulfing Europe, President Washington declared that the American government would "adopt and pursue a conduct friendly and impartial toward [all] belligerent powers."[31] After warning Americans not to engage in any actions hostile to the warring powers, Washington stated that citizens aiding and abetting said powers would be "liable to punishment or forfeiture under the law of nations." He thus instructed the proper authorities "to cause prosecutions to be instituted against all persons who shall, within the cognizance of the courts of the United States, violate the law of nations."[32] Naturally, Federalist judges were quick to endorse the President's action.

In a charge to a Richmond grand jury, Chief Justice John Jay, concerned with violations of the neutrality proclamation, described and classified the laws of the United States. Prominently featured was the law of nations. As the United States is one of the nations of the earth, Jay asserted, "all those duties, as well as rights, which spring from the relation of nation to nation, have devolved upon us."[33] By the law of nations, the United States, acting in a neutral capacity, was bound to observe the line of conduct described by Washington's proclamation. Not only would it be wicked for American citizens to harm those who have done no harm to the United States, but the unauthorized actions of licentious individuals could draw the government into a war against its best interests, thereby threatening its very existence. Throughout the charge, Jay made it clear that all sovereign nations possess an inherent right and duty to follow the law of nations or, more precisely, "the precepts of the law[s] of nature."[34]

A few months later, James Wilson, joined on the Pennsylvania Circuit Court bench by Judges Richard Peters and Justice Iredell, was even more explicit when he charged the grand jury responsible for the investigation of Gideon Henfield, who accepted a privateer's commission from the French minister Edmund Genet, the judicial system of the United States, Wilson explained, rests upon the "common law as now received in America."[35] After repeating many of the themes found in his Law Lectures, especially concerning the common law's organic character,

30. JAY, at 1053.

31. George Washington, J. Fitzpatrick, eds., 32 *The Writings of George Washington* 430-431 (New York, 1956). The proclamation was drafted by John Jay and Edmund Randolph. See Harold Syrett ed., 14 *Works of Alexander Hamilton* 308 (New York and London, 1965).

32. *Id.*

33. 11 F. Cas. 1102. For full reprint see Marcus, ed., 2 *The Documentary History of the Supreme Court, 1789-1800*, 414.

34. 11 F. Cas. 1103.

35. 11 F. Cas. 1106.

Wilson argued that, as a "social system of jurisprudence," it received other laws and systems into a "friendly correspondence." The law of nations, or the "law of nature when applied to states or political societies," being of "origin divine," was among the bodies of law incorporated into the American common law. Following Jay's logic, Wilson charged that Henfield, in taking foreign policy in his own hands, not only undermined the administration's neutrality policy in the eyes of the world, but threatened the peace and well-being of the United States. The first law of nature, the principle of self-preservation, demanded that Henfield be restrained and punished. As a citizen of the United States, Wilson maintained, Henfield "was bound to act no part which injure the nation; he was bound to keep the peace in regard to all nations with whom we are at peace. This is the law of nations; not an ex post facto law, be a law that was in existence long before Gideon Henfield existed."[36]

Like Chief Justice Jay, Wilson believed that any national government deserving its name must possess a common law and, hence, law of nations jurisdiction. "The law of nations as well as the law of nature," Wilson wrote, "is of obligation indispensable."[37]

Following *Henfield*, the federal courts continued to entertain cases for breaches of the law of nations. As Presser indicates, one such case, *United States v. Ravara*, in which a consul from Genoa attempted to extort money from a British minister, was brought to a successful conclusion only a few months later.[38] And, according to Charles Warren, the acquittal of Gideon Henfield failed to deter Federalists from indicting (and convicting) numerous other individuals for violating the common law and law of nations.[39]

The grand jury charges of James Iredell provide another clear example of Federalist jurisprudence during the two years after *Henfield*. Initially concerned only with violations of congressional statutes, Iredell's

36. 11 F. Cas. 1120.

37. 11 F. Cas. 1107. During the *Henfield* trial, Federalist Prosecutor William Rawle echoed Jay's and Wilson's precepts. In the state of nature, Rawle implied, an individual has a right to make war on other individuals as well as groups of individuals. In joining civil society, that right is lost while the "right of war and peace is always vested in the government." And when "the act of the individual is an injury to the nation," Rawle declared, "the right of punishment follows the existence of an injury." Henfield's privateering not only violated those laws which govern all sovereigns, particularly the peace treaty with England, but threatened to draw the United States into an unnecessary war. To permit a single individual to disregard the law of nations, Rawle believed, would be to destroy that contract which bound men together in civil society. Like Wilson, Rawle pointed out that the English common law incorporated law of nations doctrines and that Henfield had violated the common law in effect in the United States. 11 F. Cas. 1116-1118.

38. John D. Gordon's recent essay on the Ravara case demonstrates Robert Palmer's position that Ravara was indicted under Pennsylvania's common law is untenable. Gordon proves beyond a shadow of a doubt that the case was brought under the common law of the United States. *See* John D. Gordon III, "*United States v. Ravara*: 'Presumptuous Evidence' 'Too Many Lawyers', and a 'Federal Common Law of Crime'" in Maeva Marcus, ed., *Origins of the Federal Judiciary* 106-172 (New York, 1992). PRESSER at 75: JAY, at 1064.

39. Charles Warren, *Supreme Court in United States History*, 114-115 (Boston, 1937).

doubts about the propriety of non-statutory prosecutions had dissipated by 1794. As disturbed as Wilson and Jay were with individuals who threatened international peace and domestic security, Iredell told a grand jury in North Carolina that "whenever the law of nations is violated, it is a subject of national . . . complaint."[40] "The common law of England, from which ours derives," he continued, "fully recognizes the principles of the law of nations, and applies them in all cases falling under its jurisdiction."[41] In a charge to a grand jury in Philadelphia, (two years later) Iredell reinforced this point;

> When an individual is guilty of a violation of . . . the law of nations . . . he is not chargeable with this in our courts merely as a violation of the law of nations, but as a violation of his own country ['s laws,] of which the law of nations is a part, and of which Congress is the sole expositor as to us, when it takes that duty upon it. When no act of Congress interferes, it is an offense at common law, in the same manner and upon the same principle as any other offense committed against the common law, and in respect to which no particular statute had passed.[42]

In the North Carolina charge (1794), Iredell also implied a general federal common law of crimes, applicable to internal matters, was in force throughout the land. After citing the criminal statutes passed by Congress in April of 1790, he stated that these statutes "supersede all common law in respect to them."[43] "But where they are silent," he continued, "the common law which existed before (so far as it is applicable to our present situation) *must still operate*."[44]

Between the *Henfield Cases* and the outbreak of hostilities with France, there were a number of non-statutory prosecutions for crimes

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40. James Iredell, in Griffith McRee ed., 2 *The Life and Correspondence of James Iredell,* 423 (New York, 1949). The same charge is reprinted in the Philadelphia *Gazette of the United States,* June 12, 1794. The views attributed to Iredell here may seem inconsistent with his opinion in *Calder v. Bull.* While Iredell did reject Justice Chase's bold assertion the judges could invoke the first principles of republican government, this doesn't necessarily mean he rejected every eighteenth century variant of natural law. The common law and law of nations were written, specific, and precise, at least as far as most lawyers of the 1790s were concerned. Iredell most likely opposed Chase's assertions because he regarded them as elastic and inherently flexible. Iredell certainly did not suggest that natural law, as embodied in the common law and law of nations, was an illegitimate source of judicial power.

41. *Id.*

42. *Id.* at vol. 2, p. 472.

43. *Id.* at vol. 2, p. 425.

44. Id. (emphasis added). Throughout his charges are indications that Iredell considered such jurisdiction inherent in the very nature of government and essential to the well-being of the United States. "In all cases which affect the rights of independent sovereigns," Iredell intoned, "the only way to ascertain the duties which one nation owes to another is to inquire what reason dictates, that attribute which the Almighty has bestowed upon all mankind for the ultimate guide and director of their conduct." Iredell went on to explain that the law of nations can alone decide controversies among sovereigns and that "all civilized nations," of which the United States is one, must concur in its application. *Id.* at vol. 2, p. 414-415. Speaking to a grand jury in Philadelphia, Iredell sweepingly defined "offenses" against the United States as crimes "against the universal law[s] of society" as well as crimes against the American people "in their national character as connected with other nations . . . by the law of nature." *Id.* at vol. 2, p. 470-471.

ranging from counterfeiting to seditious libel.[45] *United States v. Worral* was delivered in 1798 when theories of the Constitution began to crystallize, providing the context for a highly polarized debate around the issue of federal jurisdiction in criminal matters.[46] *Worral* involved the attempted bribery of a Federal Commissioner of Revenue. Although Congress had passed statutes dealing explicitly with bribery, revenue commissioners were not specifically mentioned. According to the common law of England, however, Robert Worral's action was an indictable offense.

Alexander James Dallas, representing the defense, argued that there was no legislative or statutory basis for an indictment at common law. Worral's action, therefore, could not be punished without the passage of a specific statute making the bribery of a federal commissioner unlawful. Dallas believed that the Constitution consisted of expressly enumerated powers and that the establishment of a federal common law would vest the central government with an intolerable degree of power. Speaking of the prosecution's case, Dallas wrote that "the nature of Federal compact will not . . . tolerate this doctrine."[47] He argued that the indictment of Gideon Henfield was distinguishable from the indictment of Robert Worral since the Constitution expressly granted jurisdiction over the law of nations to the federal courts. Following Dallas, Judge Samuel Chase argued that Congress "should define all offenses to be tried" and the United States has "no common law."[48] As Presser has remarked, Chase "was the first federal judge to utter what might be regarded as Federalist heresy."[49]

Federalist prosecutor William Rawle identified the case before him as a matter that "struck at the root of the whole system of national government; for, if opposition to the pure, regular, and efficient administration of its affairs could thus be made by fraud, the experiment of force might next be applied; and doubtless, with equal impunity and success." Rawle responded to Dallas's and Chase's objections by asserting that there was no difference between the present circumstances and the *Henfield or Ravara* indictments; both arose under the "laws of the United States." The indictment of Robert Worral was simply a prosecution "upon the princi-

45. *United States v. Smith,* 27 F. Cas. 1147. Counterfeiting was considered a case arising under the "laws of the United States" in Article III even though there was no statute describing the crime. The Court rejected the states' rights doctrine put forth by the defense. For other cases during this period, *see* Julius Goebel, *History of the Supreme Court of the United States* 629, 630 '(New York, 1971); PRESSER, at 76; JAY, at 1073; James M. Smith, *Freedom's Fetters* 188-220 (Ithaca, 1966).

46. *U.S. v. Worral,* 28 F. Cas. 774 (1798).

47. 28 F. Cas. 777.

48. 28 F. Cas. 779.

49. PRESSER, at 79. As *Calder v. Bull* (1798) makes clear, Chase did not share the conception of the Constitution set forth by Dallas in *Worral.* Neither did he regard the common law as the product of judicial discretion. Presser is correct to view Chase's opinion in *Worral* as result of lingering anti-federalist convictions. Chase believed, as he demonstrated in *Calder,* that the federal government could not act "contrary to the *great first principles of the social contract.*" Clearly, there was more to the Constitution than its written provisions.

ples of common law" while the indictment of Gideon Henfield was based on the law of nations, which was part of the common law of the United States.[50]

Because the case involved a federal officer, District Judge Peters, like Rawle, was concerned that Worral's offense would not or could not be punished in state tribunals. But this need not trouble the court because, Peters argued, "Whenever a government has been established . . . *the power to Preserve itself was a necessary and an inseparable concomitant.*" "Whenever an offense aims at the subversion of any federal institution, or at the corruption of its public officers," Peters continued, "it is an offense against the well being of the United States; from its very nature, it is cognizable under their authority." What Judge Peters termed the "common law power," to be exercised by the judiciary, provided an effective remedy to abuses such as Worral's.[51]

Following Peters and Rawle, Chief Justice Oliver Ellsworth, in *United States v. Williams,* (1799) declared that "the common law of this country remains the same as it was before the Revolution."[52] He went on to argue that (based on English common law doctrines) an American citizen could not, for any reason, renounce his allegiance to the government of the United States. In a charge to a South Carolina grand jury later in 1799, Ellsworth was even clearer as to why the federal judiciary must possess jurisdiction over a federal common law of crimes. Offenses against the United States, he wrote, are

> chiefly defined in statutes . . . the residue are, either acts contravening the law of nations . . . or they are acts manifestly subversive of the national government . . . An offense [against the United States] consists in transgressing the sovereign will, whether that be expressed or obviously implied. Conduct, therefore, clearly destructive of a government, or its powers, which the people have ordained to exist, must be criminal. It is not necessary to particularize the acts failing within this description, because they are readily perceived, and are ascertained by known and established rules; I mean the maxims and principles of the common law of our land.[53]

Like his colleague Richard Peters, Oliver Ellsworth believed that a federal common law of crimes, as Presser maintains, "was inherent in any national government worthy of its name, and thus inherent in the Constitution."[54] And like Wilson, he must have believed that a federal common law "was inherent in any government worthy of its name"

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50. 28 F. Cas. 778. Also see Stephen Presser's description of *Worral* as reflecting Justice Peter's view of an "internal law of nations," which was grounded upon a national right of self-defense in *The Supra-Constitution, the Courts, and the Federal Common Law of Crime: A comment on Palmer and Preyer.* 4 Law and History Review 327-328 (1986).

51. PRESSER, at 89 (emphasis added). Judge Peters on the common law as quoted by Presser: "Those who do not know the common law suppose it to be everything that it is not. Its rules and principles are not arbitrary, but fixed and settled by the wisdom and decisions of the most respectable and intelligent sages, of both modern and ancient times."

52. 29 F. Cas. 1331.

53. Boston *Independent Chronicle,* June 10-13, 1799.

54. PRESSER, at 97.

because it embodied laws and moral principles that were in existence long before 1799, or 1787.

The manuscripts of Justice William Paterson provide another superb source of Federalist constitutional thought. Writing in 1798, Paterson defined the common law as "the law of nations or reason, the revealed law of God, general customs, and the principles and maxims" of the community.[55] "We glory in the common law," he explained, "because our most important rights and privileges are bound up in it."[56] Before the Revolution and through 1787, the common law extended to every state. Under the present Constitution, the United States formed a "complete, sovereign, and independent nation, to which the rights of sovereigns and the law of nations attach."[57] "All the great objects of national association" were embraced. A federal common law was thus established because "the principle of self-defense and preservation, which pervades nations, as well as individuals, renders the punishment of [common law] offenses an indispensable requisite in every government."[58]

According to Justice Paterson, the ideas put forth by Jeffersonian-Republicans like Dallas were unthinkable, and struck at the very root of republican government. "Our ancestors," he wrote,

> brought [the common law] over with them as their birthright. It is somewhat remarkable, that the common law should extend to the states individually, and yet not to the states collectively, or in the aggregate. The const[itution] of the U[nited] States was intended, like the Revolution, to confirm, preserve, and perpetuate these rights . . . the result is, that the constitution is predicated upon the com[mon] law; it assumes it is an existing rule, and is built upon it as such.[59]

Without the common law, the United States would be powerless to act against those who provoked the wrath of foreign powers. Suppose, he suggested, that the United States was at peace with Great Britain and France, and that an American citizen joined English armies in their struggles against the French. The American government, "because there is no stat[ute] on the subject," would lack the means to punish this reckless individual and inevitably be drawn into a destructive war. It is only because piracy is a offense "by the law of nations, or, in other words, by the common law" that Americans can rest secure.[60]

Alexander Addison, in his defense of the Alien and Sedition Acts, also invoked the natural law principles pervading the common law in support of both judicial and congressional jurisdiction over a federal common law of crimes. The "common law," he began, "is founded on the law of

55. William Paterson, William Paterson Papers, 1783-1804, 573. The section in which these quotations can be found is labeled "Opinions From the Bench." (Transcripts of Paterson's Paper's are part of the Bancroft Collection at the New York Public Library. The originals are at Rutgers University in New Brunswick.)

56. *Id.* at 566.

57. *Id.* at 555.

58. *Id.* at 565.

59. *Id.* at 533-535.

60. *Id.* at 563.

nature and the revelation of God, to which all men are subject."[61] There has never been, Addison continued, a time

> in any society or government, in which a common law did not exist: it is incidental to the constitution of every regular state, and inseparable from its existence. However the conditions of men, societies, or governments may be modified; whatever shape or statute they assume, certain, rights, powers, and duties, forming a common law, is attached to each.[62]

"Have the 'rights of man' no authority in the Federal Courts? Or had they no authority, by a common law," Addison asked, "till they were recorded in some constitution?"[63]

According to Addison, whenever a government is formed, it must have the means of protecting and executing the powers vested in it. Whenever an organization for the trial of criminal offenses is established, Addison wrote, there results

> a common law jurisdiction in the Federal Courts, over all offenses against the authority of this government. Government, the sovereignty, is as it were the person of civil society. And, like individuals, in a state of nature, governments in a civil state will not submit their wrongs to the determination of any other, but to themselves alone. Every offense is an offense against the sovereign.[64]

The laws of nature, the dictates of reason, and the collective experience of mankind thus commanded Federalists like Addison to interpret the Constitution in light of contemporary European (and American) conceptions of natural law and natural rights. The ends of the government of the United States as well as the means to attain those ends were vested, like every other civilized nation around the world, in the nation's sovereign authority.

During the last two years of the decade, various Federalists as well as the Massachusetts Legislature, also expressed the belief that the federal judiciary possessed jurisdiction over a general common law of crimes.[65]

61. ADDISON, at 29.

62. *Id.* at 32.

63. *Id.* at 35.

64. *Id.* at 34.

65. Alexander Hamilton to Jonathan Dayton, Henry Cabot Lodge, ed., 10 *The Works of Alexander Hamilton*, 329, 335-336 (New York and London, 1904). "It will be useful," Hamilton wrote, "to declare that all such writings &c which at common law are libels if leveled against any Officer whatsoever of the UStates shall be cognizable in the Courts of the UStates." In the debate over the extension of the Sedition Act, due to expire after two years, Rep. James Bayard (Del.) declared that the Constitutions of every state in the Union were "predicated on the Common law, which is made up of the rules of right reason, founded on the experience of all ages . . . whenever a Constitution is formed, it is bottomed on the idea of the common law being in existence." See *Annals of Congress*, 6 Cong., 2 Ses., pg. 949 (1801). The Massachusetts Legislature declared; "Sedition principles . . . against the federal government . . . were punishable on the principles of the common law . . . before the act in question was passed." *See Answer of the Massachusetts Legislature to the Virginia Resolution* (Boston, 1799). George K. Taylor stated that the "common law is understood [as] the unwritten law of nature and reason, applying to the common sense of every individual, and adopted by long and universal consent. Common law attaches itself to every government which the people may establish." *See* Speech of Rep. George K. Taylor, *Journal of the House of Delegates of the Commonwealth of Virginia*, Dec. 21, 1798.

Rep. Harrison Gray Otis, (Mass) while also defending the Sedition Act, spoke for fellow Federalists inside and outside the halls of Congress when he wrote that the right of punishing crimes which have a

> tendency to destroy the Government, was inherent in the people of every State, and has never been relinquished by any of the States. It was a principle of common law essential to the preservation of the social order and of every government under Heaven. It was the basis of the present Constitution; a birthright to which we should cling to as a blessing and a privilege.[66]

In their pamphlets delineating the Federalist cause, Charles Lee, Thomas Evans, and James Ross proclaimed their conviction that the principles and doctrines of the common law of England formed the basis of American laws. They believed that the common law, based on natural principles of justice, demanded that the federal courts take action against those who would destroy republican government.[67]

The scholarship on federal common law jurisdiction is considerable.[68] William Crosskey, for example, argued that the Constitution

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66. *Annals of Congress,* 6 Cong., 1 Ses., pg. 418 (1800). Robert Goodloe Harper echoed these sentiments in the same session; "The Constitution provides that all offenses under that Constitution, or the laws made in pursuance thereof, should be punished by the judicial power. Now the law which our forefathers brought with them, and to secure which they had shed their blood, is what is termed the common law, by this law it was punishable for any person to libel the Government, by fine and imprisonment. *This [sedition] law, therefore, is an affirmance of this common or universal law.* If the subject matter exist, the law operates: if the Constitution of the United States gives birth to the subject matter, the offense is therefore punishable under that Constitution. When the Constitution created the Government, it brought into existence the subject matter: the offense therefore arise . . . [and] the judicial power punish libels against the Government of the United States." *Annals of Congress,* 6 Cong., 1 Ses., pg. 414 (1800). Emphasis added.

67. Charles Lee, *Defense of the Alien and Sedition Laws* 22 (Philadelphia, 1798) (hereinafter cited as "LEE"); James Ross, *Observations on the Alien and Sedition Laws of the United States* (Colerick, PA., 1798); Thomas Evans, *Address to the People of Virginia Respecting the Alien and Sedition Laws* 40 (Richmond, 1798) (hereinafter cited as "EVANS"). Lee wrote, "All cases in law," . . . are to be understood as cases arising under the constitution, &c. — for what is called the common law is recognized in every part of the United States, and may otherwise be called the *unwritten* law that prevails, or whose principles have force in all the states." Evans wrote, "the principles and doctrines of the common law of England form the basis of our laws." Speaking of an individual who violated the territorial rights of Spain under the law of nations, Lee wrote, "Congress had passed no act yet upon the subject, and Jones and his associates are only liable to be prosecuted in our courts at common law . . . The common law has adopted the law of nations to its fullest extent, and made it part of the law of the land." *See* Charles Lee, Ben Hall ed., *Letters From and Opinions of the Attorneys General, 1789-1811,* 38. In the debate over codifying Washington Proclamation in 1794, Fisher Ames stated on the floor of the House, "Juries . . . are not equal to the task of determining points of the Law of Nations." Therefore, it was up to Congress to clarify matters. Rep. Murray agreed; "our experience of last summer showed that our Courts of Justice are incapable of enforcing [the law of Nations]." *Annals of Congress,* 3 Cong., 1 Ses., 743, 746, (1794).

68. William Crosskey, *Politics and the Constitution*; PRESSER, TWO JUDGES, at 26; PRESSER; Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789,* 37 Harvard Law Review 49 (1923); Robert Palmer, *The Federal Common Law of Crime,* 4 Law and History Review 267 (1986); Kathryn Preyer, *Jurisdiction to Punish; Federal Authority, Federalism, and the Common Law of Crimes in the Early Republic,* 4 Law and

endowed the national government with cognizance over all cases arising under the common law. Charles Warren, after examining the legislative debate over the Judiciary Act of 1789, he found that the incorporation of a federal common law of crimes was the intention of the Act's framers in the first Congress. Drawing the opposite conclusion, Julius Goebel maintained that the common law was used as a point of reference when seeking the definition of various terms in the text such as "treason" and "jury." The framers of the Judiciary Act, in short, did not intend to establish a non-statutory criminal code. Sympathetic with this view, Kathryn Preyer suggests that few Federalists, let alone any Jeffersonians, believed in the existence of a general common law of crimes. Finally, Robert Palmer maintains that the positions of twentieth-century apologists for the Federalist Party departed radically "from the assumptions on which the Federal Constitution was built."[69] In his view, federal judges, were granted a much narrower jurisdiction than has been suggested—a jurisdiction which entailed federal application of *state common law* and law of nations jurisprudence. Anything further, according to Palmer, such as Justice Peter's "inherent powers" opinion in *Worral,* was an unconstitutional usurpation of power.

In seeking to determine either the original intention of Article III or the relevant provisions of the Judiciary Act of 1789, several problems appear. First is the concept of "original intention" itself.[70] Throughout the 1790s, Jefferson Powell cogently argues, principled constitutional disagreements over the fundamental character of the American regime persisted and intensified. These disagreements centered around political power, where it was to be lodged, and who was to exercise it. Their tenacity and force casts doubt on claims that Article III of the Constitution can be easily interpreted. If Americans disagreed over the authority of the federal government to establish a bank in 1791, thereby revealing a profound clash over the nature of federal-state relations, it is also likely that they had different ideas two years earlier upon the adoption of the Constitution and, by implication, the "Laws of the United States." The same holds true for the Judiciary Act of 1789. As Stephen Presser suggests, it may be impossible to discern an "original intent" from the congressional debates over the Judiciary Act. The Act was full of "ambiguously worded compromises deliberately leaving room for different interpretations," and the intentions of individual framers "may have been completely different, depending on their particular philosophy."[71]

What is striking about Federalist constitutional thought is that when the issue of a federal common law of crimes exploded upon the political scene, men like John Jay and James Wilson were not as concerned as

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History Review 223 (1986); Julius Goebel, *History of the Supreme Court of the United States,* 623-633 (New York, 1791).

69. PALMER, at 286.

70. Powell, "How Does the Constitution Structure Government?," 13-48.

71. PRESSER, TWO JUDGES, at 65.

Crosskey, Palmer, and Preyer, with the original intention of the framers. Presser accurately points out that not only did Federalists believe in the existence of a general federal common law of crime, but its validity "turned on the jurisprudential defenses . . . [and] not on legislative interpretations of the Constitution."[72] More precisely, Federalists came to conclude that federal jurisdiction over a general common law of crimes was essential to the preservation of the Republic and, hence, must be established.[73] Few Federalists would have found the distinctions drawn by Palmer and Preyer in any way significant. They would not have been able to separate a violation of the law of nations from a completely internal matter such as counterfeiting or the bribery of a federal official.[74] Gideon Henfield and Robert Worral were prosecuted under the common law, the nation's "birthright under heaven." The provisions of Article III relevant to this debate were interpreted, if they were interpreted at all, in light of the natural law principles which pervaded the Constitution.[75] The Federalists believed that the national government could not rightfully be called a government of the people if it were denied the privileges and immunities intrinsic to a general common law of crimes.

Article I and the Laws of Nature

In attempting to explain how leading Federalists conceived of the Constitution, and particularly congressional authority under Article 1, most historians and political scientists have focused on the debate surrounding the proposed Bank of the United States and the bill granting bounties to cod fisheries. These conflicts, it is suggested, provide a context for the development of expansive ideas concerning federal authority derived from the plain text of the Constitution. They also are supposed to show that the Federalists were constitutional positivists who regarded the Constitution as an adequate vehicle for promoting the interests of the nation.

Efforts to reconstruct Federalist constitutional thought by recaptur-

72. PRESSER, at 88, 91-92. Although he does not deny that natural law furnished a source of national power in Federalist constitutional thought, Presser seems to suggest that their logic was grounded on a national right of self-defense. This essay has tried to suggest that the Federalist theory of the Constitution was grounded on *elaborate* natural law doctrines—doctrines which incorporated the principle of a national right of self-defense. The emphasis in this essay on natural law theory (as well as the examinations of Article I powers) is thus somewhat different from Presser's.

73. JAY, at 1080. Jay also suggests "that Federalists were confident that common-law decision making was an attribute of every government."

74. *See* PRESSER, THE SUPRA-CONSTITUTION, at 328.

75. Unlike Jeffersonians in the early 1800's, the Federalists of the 1790's conflated all types of natural law, and read them into the Constitution. Thus, they would not have been able to distinguish the natural law as represented in a modified English common law from natural law as represented in the law of nations. As will be seen in the debate over the Sedition Act, natural law, in whatever form, was regarded as a legitimate source of federal power simply because it could be derived from divine principles.

ing the arguments over Alexander Hamilton's economic plan are misleading. For the most part, the constitutional clash over the bank and cod fishery bill did not force Federalists to consider the principles upon which the Constitution was grounded; it did not force them to consider why they had formed a government or adopted the present Constitution. Establishing a bank and subsidizing cod fisheries were, according to Federalists, powers inextricably intertwined with the powers expressly enumerated in Article I. Suggesting that the federal government did not possess the authority to establish a bank was like suggesting that it lacked the authority to coin money or establish uniform rules of naturalization. The powers conferred by the bank and cod fishery bills were *obviously and unmistakably* related to the power to "raise armies," "regulate commerce," "borrow money," and "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." There was simply no need to elaborate any further.

The opposition generated by Hamilton's program was something Federalists had not previously encountered under the new Constitution. The states' rights theory articulated by James Madison was not only new and moderate in tone, but it was not particularly influential with the public at large, at least in the minds of administration Federalists.[76] The challenge of an emerging opposition party in 1791 was serious, but has been exaggerated by scholars. In other words, those who would eventually be labeled Republicans did not yet threaten to disrupt America's experiment with republicanism and did not require a lecture on the principles and purposes of government.

Despite the fact that the debate over the Hamiltonian program inhibited, by its very nature, a thorough discussion of the authority of the federal government, it nonetheless failed to prevent bursts of inherent powers talk, foreshadowing later debates which would reveal much more about the nature of the Constitution. In a fiery speech in support of the bank bill, Fisher Ames, for example, declared that "if we do not have the power to establish [the bank,] our social contract is incomplete, we want the means of self-preservation."[77] In his defense of the bank bill, Hamilton claimed that there were certain "resulting powers" that could be derived "from the nature of political society."[78] These thoughts, however, were left dangling.

In contrast to his nationalist-minded colleagues, Rep. John Vining (Del.) justified the bank by invoking an unqualified inherent powers doc-

76. Fisher Ames remarked that opposition to the Bank of the United States stemmed mainly from the concern that the establishment of the bank in Philadelphia would prevent the government from moving South. In my examination of newspaper articles during this debate, constitutional arguments were scarce. This is not to suggest that Republicans in Congress were insincere, but only that their views were not necessarily representative of public opinion.

77. *Annals of Congress,* 1 Cong., 3 Ses., pg. 1906 (1791).

78. Alexander Hamilton, in Harold Syrett ed., 8 *Works of Alexander Hamilton* 100 (New York and London, 1965).

trine. He argued that the government of the United States, established in its current form to replace the flawed Articles of Confederation, was a sovereign, independent nation. As such, the United States possessed "all powers appertaining to a nation thus circumstanced."[79] Because the powers granted by the bank bill were in "agreement with usages and customs of common law," they were legitimate means for the federal government to carry out its duties. Unfortunately, Vining did not elaborate upon the reasons (or assumptions) which lead him to this conclusion. Such a discussion would have to wait until political circumstances and the object of debate changed substantially.

A Constitution Defined

In the summer of 1794, an armed rebellion over excise taxes on whiskey broke out in Western Pennsylvania. As a result, federal troops were raised and sent to the region to quell the disturbance. In defending the measures taken to combat this threat, Joseph Woodman declared that "self preservation is the first principle and law of nature. Every man has an unquestionable right to defend himself . . . it is his incumbent duty, if in his power." "The Constitutions and laws of every country," he continued, "present methods of redress for common injuries." Enlightened, patriotic citizens of the United States will therefore approve and cheerfully promote the self-defense measures "which the general government has taken to put the nation in a respectable state of defense."[80]

Although little violence ensued, with the French Revolution fresh in mind, Federalists were disturbed that Americans had resorted to violence to overturn laws passed by Congress. President Washington, in a address to the nation after the Whiskey Rebels had dispersed, voiced these concerns as he condemned the alleged cause of the rebellion: self-created societies, operating from the worst of motives, attempted to deceive and inflame the weak and ignorant. They tried to convince Americans that the government was tyrannical, and unworthy of popular support.[81]

In response to the President's speech, the Congress considered whether or not to issue a resolution condemning the Democratic-Republican, or "self created" societies. Although the debate over Washington's speech did not involve anything more than a simple condemnation of the rebels, several Federalists nonetheless felt compelled to explain where they found the authority to issue such a proclamation. The government must not allow liberty to be mocked or the virtue of the American people to be "blasted" by the foul breadth of slander and falsehood, Rep. Samuel Dexter (Mass.) exclaimed, because violent revolution would inevitably

79. *Annals of Congress,* 1 Cong., 3 Ses., pg. 1955 (1791).

80. Joseph Woodman, *A Discourse Delivered by the Particular Desire of the Military Society* 8, 11 (Concord, 1794).

81. Miller, *The Federalist Era,* 160-61; Elkins and McKitrick, *The Age of Federalism,* 461-473.

follow.[82] When the right to speak freely was "so abused as to become hostile to liberty, and threaten her destruction, the abuses ought to be corrected; and, [Dexter] argued from the principle of self-preservation, that the government of every country must have a right to do so."[83] Rep. Fisher Ames (Mass.) thought the constitutional objections to the proclamation were ludicrous. The self-created societies, he exclaimed, "are calculated to destroy free government."[84] Congress, acting as the "Grand inquest of the nation," had a right and duty to defend the nation by informing the public of the dangers posed by wicked, self-interested factions.[85]

In the debate over Washington's speech, as in the debate over Hamilton's economic program, the assumptions on which Federalists grounded the inherent powers arguments were *not fully clarified.* The nature of the conflict at hand did not require them to do so. In terms of legislative interpretations of the Constitution, it was not until the last few years of the decade that it became essential to discuss first principles, the purpose of government, and the nature of the social contract.

Un-Americanism and the Alien and Sedition Acts

Following the Jay Treaty, French attacks on American shipping escalated. The notorious XYZ affair, which resulted from a peace overture to the French government, further aroused hostilities. By June of 1798, the United States was teetering on the brink of war, and political passions were as high as they had ever been in American history.[86] In this atmosphere, the Alien Act was passed (along party lines) in an effort to rid the country of those suspected of giving aid and comfort to foreign governments and to prevent France from interfering in the internal affairs of the United States. The President was empowered to order the departure of all aliens he should "judge dangerous to the peace and safety of the

82. *Annals of Congress,* 3 Cong., 2 Ses., pg. 936 (1794). A charge delivered by Justice Cushing at the time of these debates also alludes to the inherent rights of a nation. *See* Marcus, ed., 2 *The Documentary History of the Supreme Court, 1789-1800,* 495.

83. *Annals of Congress,* 3 Cong., 2 Ses., pg. 936 (1794). Certain "self-evident propositions" demanded as much. Forces "which threatened destruction to legitimate government," Rep. William Murray (Md.) continued, required immediate action on the part of the Congress. *See Annals of Congress,* 3 Cong., 2 Ses., pg. 906 (1794).

84. *Annals of Congress,* 3 Cong., 2 Ses., pg. 931 (1794).

85. *Annals of Congress,* 3 Cong., 2 Ses., pg. 931 (1794). In English political discourse, the "Grand Inquest of the Nation" referred to the power of the lower house of Parliament to stalk "evildoers and corrupt advisors where no other court could go; into the councils of the king." *See* Peter Hoffer and N.E.H., *Impeachment in America* 84 (New York, 1984). Ames was most likely suggesting that Congress has the power to investigate any actions, no matter who was involved, that have a tendency to inflect harm on the government of the United States.

86. *See* John Howe, *Republican Thought and the Political Violence of the 1790s,* 19 American Quarterly 147 (1967); Marshall Smelser, *The Federalist Period as an Age of Passion,* 10 American Quarterly 392-412 (1958).

United States, or shall have reasonable grounds to suspect are concerned in any treasonable or secret machinations against the government thereof."[87]

Federalists could have extended the logic employed in the debate over the bank and cod fishery bill to justify the Alien Act. They could have grounded their defense of the bill on the "common defense" and "general welfare" clauses as well as the "war powers" of Article I., Section 8 without invoking the inherent rights of all sovereign nations. Although an argument that relied solely on textual provisions of the Constitution and extended a "liberal, Hamiltonian" mode of interpretation would not have been difficult to construct, it was nowhere to be found. In order to fully grasp the thought employed to vindicate the Alien Act, one must ask how the Federalists conceived of government in general, and the federal Constitution in particular. One must explore the principles and assumptions that they brought forth when they attempted to define and expound upon the Constitution.

According to Federalist political theory, civil society was instituted to lessen the harsh burdens placed on individuals in a state of nature where might makes right and justice is the product of accident and force. The purpose of government, of forming a political union, was to ensure that the rights and obligations of man were accorded their due respect. At minimum, this meant that the first law of nature, the right and duty of self-preservation, must be obeyed. As Thomas Evans wrote in his "Address to the People of Virginia Respecting the Alien and Sedition Laws:"

> The constitution of the United States has been to us, my fellow citizens, an instrument of great good, and it will be to us, if we be not wanting to ourselves, the ultimate means under Heaven, of preserving our national independence and self-government; without which, what assurance have we, or can we have, for all or any of our [natural] rights, of life, liberty, person or property?[88]

The Federalists believed that the federal government under the Constitution, properly construed, secured man's fundamental natural rights. Indeed, by the end of the decade any lingering discomfort with the Constitution on the part of nationalist-minded thinkers had given way to unabashed admiration.

Before the adoption of the Constitution, the Articles of Confederation had presented the American people with the spectacle of a government which lacked the means to govern and of a Congress obligated to provide for the common defense of the Union, which lacked the authority to raise armies and collect taxes. In the debate on the Alien Act, Republicans like Albert Gallatin articulated a theory of the Constitution as absurd, in the minds of Federalists, as a government that depended upon the good will of the states to sacrifice for the common good. Gallatin had acknowledged that every sovereign, independent nation has a right to

87. Reprinted in Smith, *Freedom's Fetters*.

88. EVANS, at 13.

expel dangerous aliens. But the federal government, he maintained, was unlike all other nations. The fundamental principles upon which the United States Constitution is based is that of expressly delegated powers; all powers not expressly delegated to the federal government remained with the states, or with the people. Since no power is given by the Constitution to Congress to banish or remove aliens, Gallatin argued, nor any power prohibiting the states from regulating aliens, the power remained with the states, or with the people.[89]

Throughout the country, Federalists violently rejected Gallatin's formulations. They insisted that his narrow, debilitating construction was contrary to the letter and spirit of the Constitution, and would render it a "mere skeleton, devoid of sinews and nerves, incapable of motion."[90] According to Federalists impressed by the force of William Blackstone's thoughts on the nature of sovereignty, the Constitution corrected the imbalance between the states and the central government by endowing a "general legislature" with supreme authority to promote the nation's interests. As Alexander Addison remarked in his defense of the Alien and Sedition Acts, the Constitution gave to Congress "all legislative power, for the execution of their duties, and [made] the government of the United States a compleat government with all the powers within itself for general purposes."[91] "Ever since the United States assumed a separate and equal station among the powers of the earth," he continued, "they have been, as every nation must be, consolidated, as to general purposes, into one sovereignty." "It cannot be denied," according to Charles Lee, "that the constitution possesses every essential power of a complete government."[92]

To demonstrate the correctness of their theory of the Constitution, Federalists first turned to history, and then referred to what they regarded as the plain meaning of the document. "A complete participation of privileges through all states, and above all safety from abroad," wrote the author of "An Address of the Minority in the Virginia Legislature," "were perhaps the strong motives which induced America to unite [in] one government."[93] The primary weakness of the Confederation, according to

89. *Annals of Congress,* 5 Cong., 2 Ses., pg. 1955 (1798). Republicans did agree with Federalists when they concluded that certain principles and laws were binding upon the nation regardless of whether they were identified in the Constitution. Republicans simply disagreed over the nature, scope, and application of those principles. The Congress, by the general law of nations, could expel alien enemies. The regulation of alien friends was left to the states.

90. *Annals of Congress,* 6 Cong., 2 Ses., pg. 949 (1801).

91. ADDISON, at 15. The Constitution, Rep. Samuel Sewall (Mass.) was certain, "establishes the sovereignty of the United States, and that sovereignty *must reside* in the *Government* of the United States." Rep. Otis declared that with regard to "the great objects of peace and war, negotiations with foreign countries, [and] the general welfare and peace of the United States," the authority of the federal government is sovereign and absolute. *See Annals of Congress,* 5 Cong., 2 Ses., pg. 1957 (1798).

92. LEE, at 19.

93. *An Address of the Minority in the Virginia Legislature to the People of That State, Containing a Vindication of the Constitutionality of the Alien and Sedition Laws,* 15.

Addison, was the bloated powers of the states. Under the Constitution, "the authority of the people was not diminished, [but] the powers . . . of their agents were altered" until the central government possessed power "adequate to the [nation's] general wants and welfare."[94]

The Preamble, several Federalists argued, provided the ultimate proof of federal sovereignty. The words "To form a more perfect Union, establish Justice, insure domestic tranquillity" meant to Thomas Evans, for example, that certain fundamental powers were delegated to the government which were, in turn, enlarged upon and clarified by the enumerated powers.[95] More generally, though, the language and structure of the document—its vague, sweeping provisions and its clearly demarcated lines of authority—led Federalists to conclude that the Constitution had established an indestructible union and a consolidated government (as to general purposes.)

Several consequences were derived from the sovereignty of the federal government. The most important was the right of the people of the United States, acting in their corporate capacity, to preserve themselves. Rep. Samuel Dana (Mass.) concluded that there is one "inherent and common" power in every sovereign government; it is "founded upon any rational principle of policy, which is the right of preserving itself, which implies the necessary power of making all laws which are proper for the purpose."[96] Evans spoke most forcefully on behalf of his fellow nationalists, and deserves to be quoted at length. Are not, he asked, the American people, in their highest political capacity,

> a sovereign and independent nation? Have we not, as a nation, all the rights pertaining to that state, equally with any other nation? Are not those rights and the duties thence resulting, prescribed in the law of nations—that code which regulates and adjusts, or ought to regulate and adjust, the intercourse of the great community of nations? Have not the people the United States, as well as every other nation, an essential and inherent authority and power to prescribe the mode, in and by which they will assert those rights and execute those duties. And is not the constitution at once an emanation of that authority and an exemplification of that power? It is then, a *shield* to *protect* and *aid* in the *assertion of our pre-existing national rights,* in relation to both ourselves and others and to others; it is not a set of shackles to *abridge* in any manner whatever, the power of asserting those rights. With a view to this *chief end* the constitution of the United State was framed, and with a reference to the same end, all of its parts ought to be construed . . . the preservation of our national existence.[97]

Thus, from the fact of sovereignty flows the right and duty of self-preservation. For Federalists of the 1790s, this seemingly abstract right had a very definite meaning. In fact, a whole code of law was built upon this

94. ADDISON, at 17.

95. EVANS, at 15.

96. *Annals of Congress*, 5 Cong., 2 Ses., pg. 1969 (1798). As James Ross stated, "a public political authority, in which the sovereignty of the union resides, must necessarily be established; and when established, it is obliged to watch over the happiness and safety of the whole . . . [the nation's] first and paramount duty is the preservation of the body politic. See ROSS, at 14.

97. EVANS, at 14-15.

simple proposition.

In the eighteenth century, the law of nations was considered an exact science, consisting of the just and rational application of the laws of nature and nature's God to the affairs and conduct of sovereigns or nations. According to Federalist theory, it was incumbent upon every sovereign nation to obey these laws when carrying on intercourse with foreign powers. The government, Evans asserted, has a duty to obey the law of nations "which were pre-existent, and were therefore recognized as [an] existing obligation by this constitution."[98] The United States was established, Addison wrote, with "all the rights which the law of nations gives to every sovereign government. Nothing . . . appears from the Constitution, that can show, that the people of the United States meant to deny their own government any right, which by the law of nations, any other sovereignty enjoys with respect to foreign nationals."[99]

Policies dealing with aliens (technically citizens of foreign nations) fell within the purview of foreign policy. Alien laws, Addison maintained, "only affect foreign nations."[100] Federalists therefore relied heavily on the venerated Emmerich de Vattel for guidance and wisdom in the application of these time-honored principles. According to Vattel's *Law of Nations*, strangers in a foreign land do not possess a right of residence.[101] They possess only the bare permission to reside in a particular area, a permission that may be revoked "on account of certain affairs, according as [the sovereign] may find it most for the advantage of the state."[102] "Alien friends," Addison asserted, "have by the law of nations certain hospitable rights subject to the reasonable discretion of the government."[103] But when the preservation of the government is at stake, according to Vattel and his American admirers, it becomes imperative for a nation's sovereign power to act forcefully to prevent its dissolution. "Alien enemies" who conspire to threaten the order and safety of a nation must be ordered to depart.

Federalists across the country, certain that war was imminent, were also convinced that the "French party" in America was paving the way for a demagogic, Jacobin regime by helping to plan the overthrow of the American government. They therefore invoked first principles and spoke about the nature of government in defense of the Alien Act.[104]

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98. *Id.* at 16. The "rules of justice and self-preservation," Ross observed, dictate the adherence to the law of nations even where "no positive law exists." *See* ROSS, at 11.

99. ADDISON, at 20.

100. *Id.* at 26.

101. Emer. de Vattel, Joseph Chitty, ed., *The Law of Nations; or, Principle of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns* (Philadelphia, 1883), 323-331.

102. ROSS, at 10.

103. ADDISON, at 22.

104. The importation clause invoked by Republicans, according to Federalists, referred to slaves alone.

"The general theory of our government," the Virginia Federalists declared, meant that

> the power of protecting the nation from the intrigues and conspiracies of dangerous aliens who may have introduced themselves into the bosom of our country, seems to be of the class with those necessarily delegated to the general government: security to the union from their wicked machinations, cannot be otherwise ensured, and this security is essential to the common good.[105]

By the law of nations, the United States was obligated to preserve itself, and it could only accomplish this if the national government expelled "wicked and dangerous" aliens. An anonymous author responding to George Nicholas declared that the "alien law is not a vindictive measure, but a measure of self-preservation. It is the practice of all nations and is founded on the law of nature and of nations."[106]

Federalists did not completely neglect the text of the Constitution. They often invoked, for example, the "general welfare" and "common defense" clauses in support of their actions. The Virginia Legislature invoked the power of Congress to "protect each of [the states] against invasions." The "right of taking proper and necessary steps for its prevention," the minority address implied, could be derived from the right to "protect *against* an evil."[107] All of these efforts, however, must be viewed against the backdrop of what the Federalists considered the extra-constitutional basis of the America's fundamental written law. This meant that the Federalists examined many of the Constitution's ambiguous provisions and reasoned, on the basis of the principles of the law of nations, that there must be the authority to act in the manner they proposed. Most would have agreed with Justice William Paterson when he wrote that "Rutherford, Vattel and other writers concur in defining a nation to be a body politic, or society of men associated for the purposes of promoting their common safety, common interests, common rights, and common welfare."[108] When thinking about the Constitution, the lofty and exalted

105. *An Address of the Minority in the Virginia Legislature to the People of That State, Containing a Vindication of the Constitutionality of the Alien and Sedition Laws,* 16.

106. An Inhabitant of the Northwestern Territory, *Observations on a Letter From George Nicholas of Kentucky To His Friend in Virginia* (Cincinnatti, 1799) "This being an independent nation," Justice Iredell declared, "it has all the rights concerning the removal of aliens which belong by the law of nations to any other" nation. Unless aliens behave as men of "good moral character, attached to the principles of the Constitution," they can be ejected from the country. Iredell, McRee ed., 2 *The Life and Correspondence of James Iredell,* 557 "There can be no complete sovereignty without the power of removing aliens." according to Lee, because the "exercise of such a power is inseparably incident to the nation." *See* LEE, at 8, 9. The Massachusetts Legislature declared; "The removal of aliens . . . is always justified by the invariable usage of nations." See *Answer of the Massachusetts Legislature to the Virginia Resolutions* (Boston, 1799). "By the general law of nations," George K. Taylor stated, "the admission of Aliens into country was altogether a matter of grace. They might therefore be removed by the government whenever deemed necessary. *See* Speech of Rep. George K. Taylor, *Journal of the House of Delegates of the Commonwealth of Virginia,* Dec. 13, 1798.

107. *An Address of the Minority in the Virginia Legislature to the People of That State, Containing a Vindication of the Constitutionality of the Alien and Sedition Laws,* at 17-19.

108. Paterson, William Paterson Papers, 557.

motives which convinced Americans to form a political union could not be ignored.

It must also be emphasized that the Federalists were not unprincipled Machiavellians who, in order to rationalize their agenda, turned to natural law simply out of convenience. Instead, they believed that the framers of the Constitution could not have foreseen every future challenge and that the absence of an express constitutional provision should not be taken to mean that the Constitution intended to deny the government the authority to expel dangerous aliens. More significantly, the Federalists referred to the principles of natural law because they believed that the Constitution could only be understood as an expression of those principles; the meaning of the document could only be understood by examining its moral, political, and intellectual foundations. As Walter Berns has remarked, the Constitution was "designed with a view to a particular and substantive end."[109] It was designed to secure the rights with which all men are equally endowed, establish justice, and promote the general welfare. The Constitution, grounded on laws, customs, and traditions sanctioned by the experience of men and nations throughout the ages as well as by God, could only be interpreted in light of these considerations.

As hostilities with France escalated, partisan insults, on both sides of the aisle, became more reckless and abusive. Federalists interpreted Republican criticism as deliberate assaults on a struggling nine-year old republic—a republic in the midst of a great foreign policy crisis—on behalf of an enemy power. The Sedition Act, passed immediately in the wake of the Alien Act, was intended to apply the logic behind the Alien Act to American citizens. The Act declared "that if any person shall write, print, utter or publish . . . any false, scandalous, or malicious writing" against the President or any member of Congress, he shall face criminal penalties in federal court.[110]

The vast preponderance of Federalist constitutional thought in the debate over the Sedition Act must be thought of as extra-constitutional in origin. It is impossible to understand how the Federalists sustained prosecutions for seditious libel (the prevention of the promulgation of false or malicious charges concerning the conduct of the government) without reference to their conception of the Constitution as an expression of higher law. It is impossible to describe the Federalist theory of the Constitution simply by reporting on references to the text. Once again, it is imperative to explore what the Federalists thought about the relationship between the state of nature and civil society, between the rights of man and the obligations of government.

Although the state of nature might not have been, as Hobbes had portrayed it, "solitary, poor, nasty, short & brutish," mankind was nonetheless bequeathed a wretched environment in which to live. In a Lockean

109. Walter Berns, *Judicial Review and the Rights and Laws of Nature,* Supreme Court Review 55 (1982).

110. *Reprinted in* Smith, *Freedom's Fetters. See also,* PRESSER, at 119.

state of nature, men were left to their own devices for securing their property and defending their lives. But when they united in civil society, according to James Ross, that society was

> from thence forward, intrusted with the power of providing for the safety of its members; and for that purpose every one resigned up to it the right of punishment. The whole body is then, in protecting the citizens, to revenge the injuries suffered by particular persons. And, as it is a moral person, capable of being injured, it has a right to provide for its own safety.[111]

Every individual had a right, by the law of nature, to preserve himself, promote his own welfare, and punish those who violated the laws of nature. The responsibility for protection of those rights was then transferred to the state. It therefore seemed reasonable to Ross as well as other Federalists that "societies of men" possess the same rights, including the right to punish attacks on their honor, as individuals had possessed in the state of nature.[112] In fact, all civilized nations had exercised such rights and there was no reason to think that "this nation an exception to all the nations on the earth, that the supreme authority shall not have the right" to punish libels.[113]

For some Federalists, the very act of forming a government—of uniting in political society—justified the Sedition Act. Like destroying, or interfering in the use of, one's land, damaging a person's reputation was considered a violation of personal property rights. Libels were, according to Ross,

> crimes, in their own nature, which every man, before he entered into society, had a right to punish if he was able. If they may be rightfully punished by an individual, they may rightfully be punished by a society—by a nation; because, the rights of individuals, are in that respect, transferred to the nation.[114]

The offenses enumerated in the Sedition Act were, for Thomas Evans, "evil in themselves, and therefore not only prohibited by the common law, but by the law of nature, and original principles of society."[115] The Sedition Act, which punished anyone who falsely impugned the motives of the people's representatives, was one inducement for men to enter into a social contract. Instead of relying on individual force to punish those launching scurrilous personal attacks, the government, acting as an impartial arbiter, would ensure that licentiousness was checked and that liberty did not extend to the fight to injure others.

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111. ROSS, at 33.

112. G. Taylor advanced a similar argument; "Each individual possessed certain rights from nature of great value and importance. Among these was . . . the right to his good name and reputation." Speech of Rep. George K. Taylor, *Journal of the House of Delegates of the Commonwealth of Virginia,* Dec. 21, 1798.

113. ROSS, at 36.

114. *Id.* at 31.

115. EVANS, at 59. In complete agreement with these sentiments, Alexander Addison asserted that a "libel is an offense against all those [natural] laws, a violation of the rights of man, one of which is reputation, and is punished under every government in the court of the government offended by it. No evil can arise from the exercise of this power by Congress as a general authority." *See* ADDISON, at 45.

The Federalist defense of the Sedition Act, however, did not focus on violations of individual rights by other individuals. The Sedition Act was justified on the grounds that the people of the United States, acting in their sovereign and corporate capacity, had a right to preserve their nation. "Government is instituted and preserved for the general happiness and safety," the Virginia Federalists declared, "[and] the people are therefore interested in its preservation and have a right to adopt measures for its securities, as well against secret plots as open hostility."[116]

Because most of the targets of the Sedition Act were United States citizens, the law of nations generally was not invoked. As the "Virginia Minority Address" indicates, a more general right of self-preservation constituted the basis of the defense of the Sedition Act. Rep. John Allen, (Mass) for example, stated that "the people will certainly vest [the authority to punish sedition] in the Congress; for no government can exist without it; it is inherent in every government; because it is necessary to its preservation."[117] The powers exercised in the Sedition Act, Addison wrote, "necessarily result from the organization of the government . . . for by the common law, the principles of right and wrong, morality, the rules of religion, the criminal courts of every government must have jurisdiction over this offense."[118]

If one grants the United States the power to preserve itself, Federalists reasoned, the power to punish those who maliciously or falsely assail the government, or its representatives, inevitably follows. All offenses committed by the press, according to Ross, are committed

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116. *An Address of the Minority in the Virginia Legislature to the People of That State, Containing a Vindication of the Constitutionality of the Alien and Sedition Laws*, at 25. A number of Federalists, including Marshall, argued that the jurisdiction of the federal courts over the common law gave Congress the authority to modify the English definition of freedom of speech ("no prior restraints") by passing the Sedition Act.

117. *Annals of Congress,* 5 Cong., 2 Ses., pg .2101 (1798). In like fashion, Rep. Harrison Grey Otis declared that the right of the government "to defend itself against injuries and outrages" flows "from the nature of things." It was a right, in other words, "resulting from the spirit of the Constitution." *See Annals of Congress*, 5 Cong., 2 Ses., pg. 2046-47 (1798). "The constitution must be very defective," stated Henry Lee, "if it held not the power of self-preservation. It was not defective; and a fair construction of it would warrant the sedition law." *See* Speech of General Henry Lee, *Journal of the House of Delegates of the Commonwealth of Virginia,* Dec. 20, 1798.

118. ADDISON, at 45. Charles Lee described the offenses punished by the Sedition Act as offenses "created by the constitution." Disobedience to the Constitution, "which is the supreme law above all earthly laws, must be a public offense." LEE, at 32. Also see page 389 for Lee's discussion of the "rights of self-preservation." "There is not civilized country," according to Samuel Chase, "that does not punish such offenses; and it is necessary to the peace and welfare of this country, that these offenses should meet their proper punishment, since ours is a government founded on the opinions and the confidence of the people . . . All governments . . . punish libels against themselves." *See* Stephen Presser and Jamil Zainaldin, eds., *Law and Jurisprudence in American History: Cases and Materials* 203-204 (St. Paul, 1989). George Taylor stated; "The right to punish libels against the government or its officers is founded in the principles of nature, of reason, and of common law." Speech of Rep. George K. Taylor, *Journal of the House of Delegates of the Commonwealth of Virginia*, Dec. 21, 1798.

against

> a moral person, [created] by the action of union, shall be tried and punished, if they be committed, which, though crimes in themselves, no provision for the trial and punishment of them existed anywhere, and, to do this was strictly conformable to reason, to the law of nature, to laws of all Civilized societies, and to the Constitution of the United States.[119]

Evans argued that there never had been a government that "did or can exist" without the power of "correcting the irregular conduct" of those who refuse to respect the rights of others. "What is government," Evans asked, but "an institution to make people do their duty."[120] And every citizen of the United States, all Federalists agreed, was obliged to honor and respect the nation's duly elected leaders.

It would have been irresponsible and reckless, Federalists believed, if they did not act in a manner prescribed by the Sedition Act. "The experience of the world, and our own experience," the Virginia Federalists concluded, "prove that a continued course of defamation will at length sully the fairest reputation." "[In] all nations where the presses are known," he continued, "some corrective of licentiousness has been indispensable." In the same spirit, Addison claimed that in order to "preserve good government, the confidence of the people is necessary; but falsehood, if it may be propagated with impunity, may be as fatal to a good, as truth to a bad government."[121] If "every individual has a right to misrepresent the character and conduct of the magistrates [and] to pervert the judgment of the people," he concluded, republicanism would be doomed to failure. [122]

Richard Hofstadter points out that Americans, like the English through the eighteenth century, viewed parties and factions as narrow, selfish interests intent on corrupting and subverting the state and its representatives; organizations that aroused malice and hostility, and discouraged the ideal of disinterested judgment, were seen as cancerous sores on the body politic.[123] Federalists believed, in part due to these ideas, that maligning the character of federal office-holders by suggesting, for example, that they may be more loyal to the King of England or more devoted to their own needs than the interests of the nation would plant seeds of distrust in the American public. To allow the nation's most respectable

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119. ROSS, at 40.

120. EVANS, at 56. Justice Iredell claimed that no "civilized society" could permit men versed in the "art of sophistry . . . to tell falsehoods to the people, with an express intention to deceive them, and lead them into discontent." Iredell, McRee ed., 2 *The Life and Correspondence of James Iredell*, 564-565. Suppressing libelous publications, according to Justice Paterson, "is a necessary instrument or means of self-preservation" that no government can long survive without. Paterson, William Paterson Papers, 533. See rep. Bayard's statement in the *Annals of Congress*, 6 Cong., 1 Ses., pg. 412 (1800).

121. ADDISON, at 39, 46.

122. *An Address of the Minority in the Virginia Legislature to the People of That State, Containing a Vindication of the Constitutionality of the Alien and Sedition Laws,* 26, 27.

123. *See* Richard Hofstadter, *The Idea of a Party System* (Berkeley, 1970).

men to be assaulted with some of the most abusive, vituperative language heard since the Revolutionary War, was to permit traitorous elements to bang the world's only republican government into disrepute. An examination of the history of republics demonstrated to Federalists that only a vigilant government, alert to the seeds of rebellion, could survive and prosper. Prosecuting acts that constituted the "germs of resistance" was therefore essential to preserving the peace of the nation. The idea "that a government must look on," the Virginia Federalists suggested, "and see preparation for resistance which it shall be unable to control until" open force shall break out, was patently absurd.[124]

Besides the claim that every nation possessed an inherent light of self-preservation, one finds throughout Federalist commentary on the Sedition Act the notion that the people themselves have a right of redress when the government is assaulted. All those who have an interest in a particular government, Federalists argued, have a right to inflict punishment on the author of a libel. The American people, according to the minority address of the Virginia legislature "have a common interest in their government, and sustain in common the injury which affects that government." They therefore have a "NATURAL RIGHT to an adequate remedy."[125]

A number of Republicans argued that the power to punish the author of libels against the government, although granted to other sovereign nations, was withdrawn from the cognizance of Congress due to the first amendment and the peculiar federal structure of the United States.[126] Federalists responded by contending that the government was not forbidden from making any law respecting the press but only from making any law *abridging* the rights of the press. Expressing the sentiments of his colleagues, Rep. Dana asked:

> What is the rational, the honest, the Constitutional idea of language or of conduct? Can it be anything more than the right of uttering and doing what is not injurious to others? This limitation of doing no injury to the rights of others? This limitation of doing nothing to the injury of others, undoubtedly belongs to the character *of true liberty*.[127]

If everyone had a right to act in any manner he pleased regardless of the consequences, Federalists contended, the purpose of permitting a free

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124. *An Address of the Minority in the Virginia Legislature to the People of That State, Containing a Vindication of the Constitutionality of the Alien and Sedition Laws,* 26-28.

125. *Id.* (Emphasis added)

126. The literature on the meaning of the first amendment is voluminous. For the best treatment of Republican thought on this issue *see* Leonard Levy, *Emergence of a Free Press* (New York, 1985) (hereinafter cited as "LEVY"); Walter Berns, *Freedom of the Press and the Alien and Sedition Laws: A Reappraisal, The Supreme Court Review,* 109-160 (1970). Although Berns and Levy disagree on the emergence of libertarian thought among Jeffersonians, they agree that immediate opposition to the Sedition Act was based on the rights of state governments to enact their own sedition laws, not the meaning of freedom of speech. Not surprisingly, there has been little scholarly controversy over the Federalist view of freedom of the press.

127. *Annals of Congress,* 5 Cong., 2 Ses., pg. 2122 (1798).

press—the enlightenment of the citizenry under a republican regime and the maintenance of that regime—would be undermined. Therefore, the first amendment did not affect in any way the inherent rights possessed by the United States as a sovereign, independent nation.[128] As Leonard Levy has reminded us, the Sedition Act, by modifying the common law definition of freedom of speech ("no prior restraint") and making truth a defense, was mild in comparison to past sedition laws in the United States and abroad.[129]

Positivism Forsaken

The views of scholars as diverse as Clinton Rossiter, William Crosskey, Kathryn Preyer and Robert Palmer, seem to have been clouded by the legal and philosophical doctrines that have influenced twentieth-century constitutional thought. For much of this century, the principles of natural law and the idea of "self-evident truths" have been regarded as subjective and inherently biased. As a result, it has proven difficult for many commentators to imagine that a significant number of thoughtful Americans once subscribed to the belief that the Constitution could only be understood in light of higher-law principles and certain "self-evident truths."

It is clear, though, that for the Federalists of the 1790s, the Constitution was a means to an end. It was an instrument to guarantee that Americans were accorded their natural tights as well as a device to ensure that they fulfilled their most solemn duties. To accomplish the objectives enumerated in the Preamble, the Federalists believed, the federal government was endowed with powers, including the right to preserve itself, possessed by every sovereign, independent nation upon earth. The Constitution of the United States, heir to the great bodies of knowledge embodied in the law of nations and the English common law, was to be interpreted as an expression of, and consistent with, these fundamental laws. The Federalists would not have agreed with James Madison when he declared during the bank debate that, had the power to make treaties been omitted from the text, the only remedy would have been to adopt an amendment.[130] As to general purposes, the Constitution was complete. As

128. For a superb discussion of relationship between freedom of speech, natural liberty, and civil law *see* Philip Hamburger, *Natural Rights, Natural Law, and American Constitutions,* 102 Yale Law School, 907 (1993).

129. It was not until 1799-1800 t hat Blackstone's definition of freedom of speech, no prior restraints for publishing, was directly challenged. *See* LEVY, at 282-349.

130. Unlike Palmer and Preyer, Republicans recognized what the Federalists were up to. William Giles stated that "the powers of the government were derived from the constitution, and not from the reason and nature of things." Speech of Rep. William Giles, Journal of the House of Delegates of the Commonwealth of Virginia, Dec. 21, 1798. John Taylor denied that "every government inherently possesses the powers necessary for its own preservation." Speech of Rep. John Taylor, Journal of the House of Delegates of the Commonwealth of Virginia, Dec. 20, 1798.

Fisher Ames remarked in the same debate, if a power to raise armies had not been expressly stated, it could easily have been implied from the spirit of the Constitution.

During the early half of the decade, the extra-constitutional basis of Federalist thought, in terms of legislative powers, generally remained latent. In 1791, it was clear to Federalists that the establishment of a national bank and the payment of bounties to cod fisheries were policies unmistakably related to the delegated powers enumerated in Article I, Section 8. In the minds of most Federalists, to deny that Congress possessed the power to establish a bank was the same as denying that Congress possessed the authority to establish post offices. In 1798, when the power to expel aliens and punish sedition was not as clear, and when the cries for "states' rights" reached their most deafening peak since 1787, the Federalists thought deeply about the Constitution and turned to the moral principles which informed it. They did not attempt to conceal their positions, but freely and boldly advertised them. Indeed, the controversies involving the application of the common law and the law of nations demonstrate that higher-law principles were present in Federalist constitutional thought early in the 1790s.

As a result of the "Revolution of 1800," the Federalists, along with their expansive, higher law theories of the Constitution, were swept from office. Public opinion seems to have determined that the government of the United States was to be a limited one, consisting of clearly defined and enumerated powers. After the "Revolution of 1800," whenever nationalism was to prevail in the nation's courts, it would have to be under the banner of textualism—a banner prominently displayed by John Marshall in *McCulloch v. Maryland.* Although natural law was occasionally invoked by the nation's highest court, it was done so haphazardly, and never in as coherent or doctrinaire fashion as during the 1790's.