

WHAT PETITIONS IN OPPOSITION TO THE ALIEN AND SEDITION ACTS CAN TELL US ABOUT EARLY AMERICAN FEDERALISM

It was the summer of 1798 and the leadership of the Federalist party was staring down a dire threat arrayed against the United States by opposition forces abroad and at home. To put off action against the enemy would be to give it root in American soil, where it would ceaselessly work to dismember the federal union. Severe measures were required if the United States and its citizens were to remain safe. The government would have to increase the army and the navy. Aliens from enemy nations would have to be rounded up and deported. So would immigrants who hailed from friendly powers, but who seemed in league with its foes. Finally, citizens who conspired to resist the measures of the government would need to be imprisoned, and those who would speak against the leaders of the national government, or against its measures would have to be muzzled.

The national government accomplished those final goals in the Sedition Act of 1798, which proscribed both sedition and seditious libel. Section one of the act made it illegal for individuals to conspire to oppose federal measures or to intimidate officers of the United States in carrying out the laws. It also prohibited persons from advocating “insurrection, riot, unlawful assembly, or combination, whether such . . . shall have the proposed effect or not. . . .”¹ Perpetrators could be fined up to \$5000.00 and jailed up to five years. Section two made illegal the speaking, writing or printing of any scandalous libel against the government, the Congress or the President. Authors and abettors of the libels were subject to fines of \$2000.00 and imprisonment up to two years.

¹ Id.

What seemed to the Federalists an obvious response to sweltering crisis seemed to the Republicans another example of cold overreaching by the national government. And not just overreaching. Republicans rightly saw themselves as the primary targets of the Federalist Sedition Act, which treated political opposition as insurrectionist. The act, as realized by Congressional Republicans at its introduction and as verified in subsequent practice, licensed an open-season on party supporters. Matthew Lyon, a Republican Congressman from Vermont, was convicted under the act on October 9, 1798. A series of cases, either under the act or for the common law offense of seditious libel, were initiated against Republican pressman, including Benjamin Franklin Bache, named for his irreverent grandfather and heir to his grandfather's irreverent press. For a drunken joke involving a sixteen-gun salute and John Adams's ass, a New Jersey man found himself arrested. The Fighting for what seemed to be their political lives, Republicans repeatedly barraged the Sedition Act, and the other purported security measures of the national government, as unconstitutional.

Against the Sedition Act, the Republicans' first line of attack was its incompatibility with the first amendment. In the midst of Congressional debate over the act, John Daly Burke's New York Time Piece ran encomiums to the liberty of the press, stating "[t]o the press we owe those continued discussions which alone can enlighten doubtful questions and fix upon an immoveable basis, truths too abstract, too subtle, too remote from the prejudices of the people, or the common opinion of the learned, not to be soon forgotten or lost."² In the House of Representatives, Edward Livingston attacked the bill as endangering not only freedom of the press, "but the liberty of speech on this floor."³ Months later, Matthew Lyon, locked away in a Vermont jail, received words of support in a public letter from General Stevens Mason, a Senator from Virginia, in which he praised Lyon as a

² "Liberty of the Press," New York Time Piece, Friday, July 13, 1798. Unfortunately, Burke's press was soon to be silent, as his financial backer retreated under the threat of the Sedition Act and Burke disappeared to avoid removal from the country. See Jeffery Paisley, *THE TYRANNY OF PRINTERS: NEWSPAPER POLITICS IN THE EARLY AMERICAN REPUBLIC* at 119.

³ 5 ANNALS OF CONGRESS 2104.

sufferer in the cause of free speech: “[W]hilst, as a friend I sincerely sympathize with you under your heavy load of oppression, I feel consolation in the hope [] that good to the community may arise out of it; that the people will be brought to reflect before it is too late . . . until the foundations of their liberty are sapped, all the barriers of the constitution broken down, and themselves reduced to a state of vassalage.”⁴ Commenting on an extract from an essay on the liberty of speech in **Cato’s Letters**, a writer in the Norfolk Epitome of the Times asserts that when the Alien Friends Act and the Sedition Act passed Congress, “in bending the constitution in order to make way for these bills, it absolutely was heard to crack twice.”⁵

In the years following the Sedition Act crisis, examinations of it focused on the act’s incompatibility with speech and press freedoms. St. George Tucker, in his edition of Blackstone’s **Commentaries** included an appendix on freedoms of speech and of the press in which he discussed in detail the Sedition Act.⁶ Writing about the necessity of public criticism, Tucker stated that the central evil of the Sedition Act was its traversal of “the people’s darling privilege:”

The constitutionality of the act was accordingly very generally denied, or questioned, by them. They alleged, that it is to the freedom of the press, and of speech, that the American nation is indebted for its liberty, it’s [sic] happiness, it’s [sic] enlightened state, nay more, it’s [sic] existence. That in these states the people are the only sovereign; that the government established by themselves, is for their benefit; that

⁴ “Open letter of November 17, 1798, from General Mason to Colonel Lyon,” The Times and General Advertiser, December 14, 1798. This letter, a response to an October 14, 1798, letter from Lyon, was reprinted in a number of Republican papers. Apparently, valiant martyrdom was no reward in itself for Lyon. As late as 1820, Lyon was petitioning Congress for restitution of his fine. See UNITED STATES CONGRESS, 27 SERIAL SET, Doc. 106, “Report on Petition of Mathew Lyon.” (U.S. Sen. 16th Cong., 1st Sess.).

⁵ “Extract from Cato’s Letters, with some additional remarks,’ from the Epitome of the Times,” Philadelphia Aurora and General Advertiser, August 10, 1798.

⁶ St. George Tucker, BLACKSTONE’S COMMENTARIES ON THE LAW OF ENGLAND, Vol. 1, Pt. 2, Note G.

those who administer the government, whether it be that of the state, or of the federal union, are the agents and servants of the people, not their rulers or tyrants. . . . That these agents must be, and are, from the nature and principles of our governments, responsible to the people, for their conduct. To enforce this responsibility, it is indispensably necessary that the people should inquire into the conduct of their agents; that in this inquiry, they must, or ought to scrutinize their motives, sift their intentions, and penetrate their designs; and that it was therefore, an unimpeachable right in them to censure as well as to applaud; to condemn or to acquit; and to reject, or to employ them again, as the most severe scrutiny might advise. That as no man can be forced into the service of the people against his own will and consent; so if any man employed by them in any office, should find the tenure of it too severe, because responsibility is inseparably annexed to it, he might retire; if he can not bear the scrutiny, he might resign; if his motives, or designs, will not bear sifting; or if censure be too galling to his feelings, he might avoid it in the shades of domestic privacy. [. . .] That if this absolute freedom of inquiry may be, in any manner, abridged, or impaired by those who administer the government, the nature of it will be instantly changed from a federal union of representative democracies, in which the people of the several states are the sovereign, and the administrators of the government their agents, to a consolidated oligarchy, aristocracy, or monarchy, according to the prevailing caprice of the constituted authorities, or of those who may usurp them.⁷

Tucker was not alone in attributing public ire over the Sedition Act to its trammeling of speech and

⁷ *Id.* at 15-16. Also see, St. George Tucker, *DECLARATION AND JUSTIFICATION OF THE AMERICAN CONSTITUTIONAL CONCEPT OF INTELLECTUAL LIBERTY* (1801). And see, An Impartial Citizen (James Sullivan), *DISSERTATION UPON CONSTITUTIONAL FREEDOM OF THE PRESS IN THE UNITED STATES OF AMERICA* (Boston 1801) and John E. Thomson, *AN ENQUIRY, CONCERNING THE LIBERTY, AND LICENTIOUSNESS OF THE PRESS, AND THE UNCONTROULABLE NATURE OF THE HUMAN MIND* (New York 1801)

press freedoms. Joseph Story, writing in 1833, concluded that the Alien and Sedition Acts “were impugned, as not conformable to the letter, or the spirit of the constitution; and as inconsistent in their principles with the rights of citizens, and the liberty of the press.”⁸ In their analysis of the Kentucky and Virginia Resolutions of 1798, Adrienne Koch and Harry Ammon claimed that the resolutions were a reaction to the Alien and Sedition Acts’ violations of constitutional liberties.⁹

Even now, long after the crackle of events has faded, historians and constitutional scholars continue to view the Sedition Act crisis as a first amendment issue. James Morton Smith’s **Freedom’s Fetters**, the seminal work on the Alien and Sedition Acts, is devoted to the chilling effect the acts had on pressmen and petitioners in the dog-end years of the eighteenth century. For Smith, the years of the Sedition Act crisis marked “the first instance under the Constitution in which American political leaders faced the problem of defining the role of public criticism in a representative government.”¹⁰ It was in the crucible of opposition to the act that a free right of public criticism was shown to be necessary for the existence of a democratic republic.¹¹ Leonard Levy places the Sedition Act in the context of contemporary struggles over the meaning of the first amendment guarantee of free speech and a free press.¹² For Michael Kent Curtis, “[b]oth the Sedition Act and the battle for free speech about slavery are chapters in the growth of the idea that democratic government for the United States required national constitutional protection for free speech: a protection that limited the states as well as the national government and that allowed

⁸ JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 464 (reprint, Car. Academic Press 1987)

⁹ Adrienne Koch and Harry Ammon, “The Virginia and Kentucky Resolutions: An Episode in Jefferson’s and Madison’s Defense of Civil Liberties,” 5 WM. & MARY QUAR. 3D 145, 157 (1948).

¹⁰ JAMES MORTON SMITH, FREEDOM’S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES at 418 (Cornell U.P. 1956).

¹¹ *Id.* at 430-31.

¹² Leonard Levy, THE EMERGENCE OF A FREE PRESS at 297 - 308 (Oxford U.P. 1985).

broad protection for discussion of public affairs.”¹³

For constitutional scholars and the courts, the story has also been one of constitutional progress.¹⁴ The Sedition Act is presented, at worst, as an unfortunate pothole on the road to a generally progressive free speech history. The Republican response to the act was the articulation of an expansive conception of speech and press freedoms.¹⁵ This conception was incorporated into state-court jurisprudence during the nineteenth century, re-emerging on the national stage in the twentieth century revolution in the Supreme Court’s First Amendment jurisprudence. Beginning with Justice Holmes’s dissent in Abrams v. United States, the ideas contained in the Republican response have suffused first amendment analysis.¹⁶ In the 1950s and early 60s, Justice Black made reference to the Alien and Sedition Acts in a number of dissents against anti-communist measures enacted by state and federal entities.¹⁷ The Supreme Court, in New York Times v. Sullivan, made

¹³ Michael Kent Curtis, FREE SPEECH, “THE PEOPLE’S DARLING PRIVILEGE”: STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY at 55 (Duke U.P. 2000).

¹⁴ The constitutional history surrounding the Alien Acts have not been quite so rosy, as the Republican response to these acts based upon the right of jury trial have had very little constitutional resonance. However, there have been very few takers on the issue of the place of the Alien Acts (and principally, the Alien Friends Act) in the history of the right to jury trial for aliens.

¹⁵ Although constitutional historians agree that the Republican response to the Sedition Act is important for First Amendment history, they are nonetheless split on why it is important. The traditional view is that the Republican response contained very little that was novel and that its import lies in having been successful against a party hostile to those freedoms. The revisionist argument is that the Federalists were absolutely correct, if not forward-thinking, in their approach to speech and press freedoms. If anything, the Republican response was radical, having little or no historical precedent. On the revisionist account, the Sedition Act crisis is important in that it introduced a radical approach to speech and press freedoms into American constitutional consciousness.

¹⁶ 250 U.S. 616, 630 (Justice Holmes, dissenting).

¹⁷ See Communist Party of the United States v. Subversive Activities Control Board, 367 U.S. 1, 157-59 (1961) (J. Black, dissenting); Konigsburg v. State Bar of Cal., 366 U.S. 36, 66 n.23 (1961) (J. Balck, Dissenting); Barenblatt v. United States, 360 U.S. 109, 150-151 (1959) (J. Black, dissenting); Adler v. Board of Education of the City of New York, 342 U.S. 485, 506 (1952) (J. Black, dissenting); and American

the Republican repudiation of the Sedition Act a centerpiece of its decision.¹⁸

An explanation of the Sedition Act's impact in relation to the first amendment has some obvious warrant. Given the law's content, it makes sense to mine the circumstances of its passage and subsequent repudiation for an understanding of speech and press freedoms in the late eighteenth century. The historian who does so cannot be disappointed. As noted, the reports of the Congressional debate on the act and accounts of the subsequent prosecutions under it are rife with claims about the meaning of the first amendment's free speech and press clauses.¹⁹ The Republican press regularly fronted arguments about the act's conflict with their constitutionally guarded right to print what they willed.²⁰

Moreover, there is also some justification for whiggery in describing the impact of the crisis on early American politics and on constitutional thought. After all, the sunset of the Sedition Act was a triumph, if temporary, for a broad conception of speech and press freedoms.²¹ A strong, rights-based tradition was given voice by the crisis.²² Finally, Jeffersonian democratic politics overcame Federalist high-handedness in part because of the success of the Republicans in popularizing dissatisfaction with the act's restrictions on democratic participation.²³

The Sedition Act crisis was not all about free speech and democratic participation, however.

Communications Ass'n, C.I.O. v. Douds, 339 U.S. 382, 453 n.12 (1950) (J. Black, dissenting). Justice Black was on the winning side for a change in Wieman v. Updegraff, 344 U.S. 183, 192-92 (1952) (J. Black, concurring). See also, Scales v. United States, 367 U.S. 203, 263 (1961) (J. Douglas, dissenting).

¹⁸ 376 U.S. 254, 273-78 (1964).

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If we take our eyes off of the issue of civil liberties, the Sedition Act crisis comes into relief as the centerpiece in a debate over federal legislative power and the limits of the constitution. Further, looking instead at the crisis as the locus of a battle over federal power and federal structure, we have to draw conclusions that are not so rosy. Out of this battle came a deadening of American constitutional creativity, a doctrine of nullification, and the signs of a waivering right to petition. This article is an attempt to examine the crisis from the vantage point of the argument over federal power and to explore how the terms of the battle shaped its consequences.

The first two sections of this article will focus on the arguments utilized by by Federalists and Republicans in favor of and in opposition to the Sedition Act, as they were made in Congress and in the partisan press. Political agitation surrounding the Sedition Act, both in Congress and in the press, was not directed solely to whether the act violated free speech and press rights guaranteed by the first amendment to the constitution. Republican skepticism of the act extended to Congress's legislative power to enact the measure, ab initio. Federalists responded with two sorts of claims about Congress's legislative power. The first relied on a broad reading of the constitutional document. The Federalists argued, in the broadest possible terms, that the Sedition Act was necessary if officers of the national government were to execute the laws without fear of seditious mobs.²⁴ Therefore, the necessary and proper clause of article I, section 8 of the constitution sanctioned the legislation. The weakness of the argument, the Republicans claimed, was that the act could not simply be necessary and proper to some general, possible end of the government, it had to be necessary and proper to some express legislative power in the constitutional document. There was, they argued, no express power to which the act was necessary and proper to carrying out.

The second sort of claim was that Congress could enact the Sedition Act in the absence any provision in the constitutional document providing for it, because it was permitted other powers

²⁴ This argument had been continually hashed and rehashed since its first appearance in the debate over the establishment of the First Bank of the United States.

inherent in the sovereign government of the United States. Federalists contended that the written constitution did not encompass the whole of federal constitutional power, but that other powers were vested in the federal government as a sovereign entity. Formost among these was a power of national self-protection, that the government of the United States could make whatever laws it deemed necessary to combat the destruction of its sovereignty.²⁵ Seditious matter posed just such a threat, argued Federalists, by encouraging riot and colusion wth France. Of course, the Congress, or any other branch, could take steps to stem it.²⁶

In addition, where the common law had described a power of government to act, through its judiciary or its executive, the Congress could pass statutes codifying or deliniating the power.²⁷ When needed, Congress could mold the common law by statute to fit current circumstances. This power to enact legislation codifying or modifying the common law was a fundamental power, the backdrop against which the powers in the constitutional document were to be understood. Consistent with this understanding, the Sedition Act was seen as a codification and clarification of the common law offense of seditious libel, with some minor modifications.²⁸ These arguments on behalf of inherent legislative powers became the focus of Republican criticism of the Sedition Act in Congress and, eventually, in the press.

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²⁷ See *supra* at _____. On a similar point, see Stewart Jay, Origins of the Federal Common Law: Part One,” 133 U. PA. L. REV. 1003 (1985) and Origins of the Federal Common Law: Part Two, 133 PA. L. REV. 1231 (1985).

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The second section of this article examines how these arguments were translated into the vessels of public discourse in the Federalist decade, the partisan press. While both Federalists and Republicans held their opponents up for regular, vicious abuse, there are numerous examples of attempts by one side to understand and rebut the position of an opponent. How Republican responses to Federalist argument on behalf of the Sedition Act took shape is the concern of the third section. Here, the relation of the Sedition Act crisis to the development of federalism gains sharper focus. Jeffersonian-Republicans had, from the introduction of the Bank Act, complained of expansive national power.²⁹ Throughout the Federalist period, they had attempted to staunch the flow of power from the states to the national government, principally by arguing that the powers of the federal government were narrow delegations from the people and should be strictly construed. However, despite their howls of dissent, the Republicans had not yet proposed a means of response. The Sedition Act crisis altered character of the opposition. In responding to the act's passage, Republicans began to consider available responses to its unconstitutionality. Few Republicans trusted the federal judiciary, stacked with avid Federalists, to deny the national government any power they wished to seize. Therefore, some Republicans, Jefferson among them, began to tinker with using the states as bulwarks against the enforcement of unconstitutional federal laws. As numerous historians have recognized, this idea of states rights found voice in the Virginia and Kentucky Resolutions of 1798, the Kentucky Resolution of 1799, and Madison's Report of 1800. Before that, though, it found voice in petitions drafted to the Virginia and Kentucky state houses in opposition to the act.

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The final section of the article discusses how the responses set forth in petitions to varying political bodies thought capable of remedying the problem of the Sedition Act were treated by those public bodies to whom they were addressed. The focus will be on primarily on the line from the Alien and Sedition Acts to the Virginia and Kentucky Resolutions. This line has been repeatedly drawn in historiography of the Federalist period. But the line is a curved one, dodging two important questions. First, why did the Sedition Act crisis prompt the emergence of a compact theory of federalism, when other, earlier constitutional crises had not? Second, what constitutional considerations regarding the Sedition Act shaped the language of the Resolutions? Conventional wisdom has the resolutions drafted out of a concern for civil liberties, a concern for press and speech freedoms preserved in the constitution. But the resolutions themselves skimp on these matters, cursorily noting the constitutional rights the acts are thought to abridge. The resolutions, rather, concentrate on the problem of national power, not civil liberties. As such, an account of the resolutions that explains them in terms of civil liberties is missing a central point about the concerns of Madison and Jefferson, the resolutions' drafters. The account from civil liberties cannot provide an explanation of the resolutions' overriding concern with federal power and federal-state relations; nor the remedy proposed in the resolutions to overreaching federal power. Here, an examination of Republican arguments against the Sedition Act can provide an understanding of why the authors of the resolutions used the language they did. The arguments of Republicans in Congress, in petitions and the press against the act delimits the arguments of the resolutions' authors. The political action of numerous petitioners delimits the responses those authors adopt.

THE SEDITION ACT IN CONGRESS

Background of the Sedition Act

President Adams signed the Sedition bill into law atop a rising tide of revulsion with the French Republic and its politics. For many, probably most, Americans, this disruption of relations with France was an unhappy change of circumstances. French had been the states' first and

strongest ally in the war of revolution against Britain. The dawn of the French Revolution in 1789 had further cemented the alliance, as the spread of American republican ideals had seemingly spread to the European continent. As outpourings of favorable sentiment coursed in both directions across the Atlantic, relations between the two powers rose to the level of a mutual admiration club. Americans saw themselves in the French revolutionaries, rebelling against the corruption of monarchical tyranny; the French saw, when they deigned to look, an exemplar of successful republicanism in the west.

On January 21, 1793, the French Revolutionaries doffer the head of their deposed king, Louis XVI. When news of the event reached American ports that March, there was some trepidation in the reaction. Certainly, the Americans had revolted against the government of King George III, but that was a revolution to liberate the states from British authority, not the body of George from his head. The French exercise smacked too much of another episode familiar to Americans — the execution of Charles I in 1649 — and that was bad precedent. When, in the weeks following, Britain entered into war with France, relations between the two countries began tangibly to unravel.

In April of 1793, President Washington issued the Neutrality Proclamation, an effort to avoid entanglement in the Anglo-French war. The United States negotiated the Jay Treaty with Britain in 1795, a move seen by the French as placing British navigation and trade on better footing than their own. France responded with a series of half-measures, meant to show its displeasure with the policies of the American government. French ships trolled near American ports, attempting to seize vessels sailing under the enemy flags. American ships bound for British ports (or any of the ports of France's legion of enemies) were confiscated. In July of 1796, a decree was issued by the France's Executive Directory that apparently made all American ships fair game. Rumors simmered of French efforts to undermine the current federal government. Each new occurrence worked to raise resentment against France. This resentment reached its apex when news of the XYZ affair reached the United States.

Over the summer of 1797, Adams had dispatched to France a delegation of ambassadors —

Elbridge Gerry, John Marshall, and Charles Cotesworth Pickney — to resolve the outstanding disputes. Arriving in Paris, the three quickly discovered, to their unmasked surprise, that Parisian politics revolved not around principle, but around money. Not simply a loan — a forced loan — for France, but pocket money for the members of the Executive Directory, the Foreign Minister, and the adjutants and hangers-on who attended him. The American ambassadors, who had expected their republican credentials to speed them to the bargaining table, were shocked — shocked! — to discover otherwise. Marshall quickly set to the business of recording the venality of the Foreign Minister, Tallyrand, and the unofficial adjutants who had aided in the business, Mrs. X, Y, and Z. Throughout the month of October, X, Y, and Z continued to appeal to the delegation for the money, with continued resistance throughout. The delegation soon turned its attention from treating with France, to returning to the United States. In February of 1798, Marshall and Pickney left for home. Gerry remained behind on the hope that something might be arranged.

In March, months before Marshall and Pickney successfully returned, Marshall's dispatches arrived in Philadelphia. To the Adams administration, the demands of the corrupt ministers hid a more sinister motive: France would extract its pound of flesh from the United States, through direct payment or by impounding ships in the American merchant fleet. Some in the administration, such as Timothy Pickering, saw a plot to reduce the United States to dependance on the French Republic, and demanded that the country be placed on a footing for war. A skeptical Congress was soon satisfied with the proof of French perfidity when the administration provided it with copies of the dispatches. With their publication in the press over the following weeks and months, public sentiment against France hardened.

Congress responded not only with legislation to provide the government with military resources, but also with legislation meant to quash the purported efforts of French spies and allied malcontents to undermine support of defensive measures in the face of French invasion, including the Alien Enemies Act. But it was not only enemies from abroad that worried the Federalists in the administration and the Congress. The dispatches contained a troubling hint that the French would deploy domestic agents against the current government as well. On October 30, 1797,

Marshall had recounted, Mr. Y had entered into a lengthy tirade against the delegation's refusal to acquiesce in the demand for money. In the course of the tirade, Y had threatened the government:

Perhaps, said he, you believe that, in returning and exposing to your countrymen the unreasonableness of the demands of this Government, you will unite them in their resistance to those demands; you are mistaken; you ought to know that the diplomatic skill of France, and the means she possesses in your country, are sufficient to enable her, with the French party in America, to throw the blame which will attend the rupture of the negotiations on the Federalists, as you term yourselves, but on the British party, as France terms you; and you may assure yourselves this will be done.³⁰

The diplomatic skill of France had just managed not only to public sentiment against it, but had fueled Federalist attempts to raze its weakened and alienated public opposition.

While Francophobe sentiment had a signal place in focusing Federalist efforts to root out its Republican opposition, it would be a mistake to devalue the place of party politics in its origination. In the 1790's, the phrases "political party" and "political faction" had an oily ring to them, these being seen as political evils to be avoided if at all possible. At the same time, the political system saw the development of political partisanship, as the Republican party had quickly established itself — tentatively during its opposition to disfavored measures of the Washington administrations and then forcefully against the policies of the Adams administration. The Federalists — a party more of default than of choice, as demonstrated in its unwillingness and inability to organize until its fall from power — did not conceive themselves to be part of an organization separate from the government itself, or, if they did, they cheerfully disregarded the distinction in practice.³¹ Because

³⁰ Dispatch No. 2 of Envoys Extraordinary to Timothy Pickering, October 30, 1797, in 5 ANNALS at 3355.

³¹ See DAVID HACKETT FISCHER, *THE REVOLUTION OF AMERICAN CONSERVATISM: THE FEDERALIST PART IN THE ERA OF JEFFERSONIAN DEMOCRACY* (1965).

of the Federalists' inability or unwillingness to entertain a distinction between the administration and the government, opposition to their administration in power was perceived to be opposition to the federal government itself. This view of political partisanship and government opposition dovetailed nicely with Federalist thinking about French efforts to undermine the national government. Federalists regularly supposed Republican sentiment to favor France (and not without reason!); attacks, then, by associates of the Republican party against the policies and persons of the Federalist administration were attacks on behalf of France to subvert the federal government and replace it with a regime friendly to, or worse, controlled by the Gauls. It was, perhaps, a spurious connection of ideas, but a compelling one in light of the perceived French hostilities and Federalist antipathy to party politics. The Sedition Law, therefore, can be seen not only as an effort to extinguish felt efforts of French sympathizers to rally alliances against the national government, but to put at an end the partisan sniping of the Republicans that threatened its continued existence and prosperity. To block the efforts of France's domestic allies in affecting the support of the American populace, the Federalists introduced the Sedition Law. If successful, the Federalists believed, it would cow opponents of the Adam's administration's measures contra France into silence until the present danger had subsided. Where unsuccessful, the domestic agitator could be shut up in jail.³²

So it was that introduced into the Senate on June 26, 1798, was "a bill to define, more particularly, the crime of treason, and to define and punish the crime of sedition."³³ After passage with amendment the Senate on July 4, 1798, it was introduced into the House of Representatives on July 5. It is from the debate in this chamber of Congress that we have careful records of deliberation, which proceeded on the bill apace. Leaving aside debate over the expediency of the

³² JAMES MORTON SMITH, *FREEDOM'S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES* 94-97 (Cornell U.P. 1956). See also, STANLEY ELKINS & ERIC MCKITTRICK, *THE AGE OF FEDERALISM: THE EARLY AMERICAN REPUBLIC, 1788-1800* 590-595 (Oxford U.P. 1993).

³³ *THE DEBATES AND PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES* (hereinafter "ANNALS OF CONGRESS"), 5th Cong., 2^d Sess., at 589.

Sedition Law, deliberation on it — at least as it proceeded in the House — took place on two fronts, both constitutional. One front, which constitutes most of the Congressional debate, is directed to the question of whether the Sedition Law violates the free speech and press clauses of the first amendment. This side of the debate is off-point for the argument of this paper, except for on one matter. The debate over the law's compatibility with the first amendment treated the amendment as creating a right of free speech and a right to enjoy a free press, with scruples being expressed on both sides as to the meaning of those rights. Though this interpretation as creating rights was not to be the exclusive one once debate left the House — a late interpretation would bring the first amendment within the compass of questions of federal power — in the Congressional debate, the first amendment was seen to limit the power of the government by the imposition of rights against it. The second aspect of this debate, the subject matter of this paper, is concerned with the power of Congress to enact the Sedition Law. While this front of the debate does not consume the time and energy given over to the question of speech and press freedoms, its importance for understanding what the Federalists thought they were doing and what the Republicans subsequently did is not to be understated.

Within the argument over Congressional constitutional power to enact the Sedition Law there are two strains. One strain focused on demonstrating that it had a basis in the text of the constitution. For the Federalists, it was sufficient to show that the law was necessary to the fulfillment of the goals of the national government listed, broadly conceived. For the Republicans, the debate centered on what enumerated power or powers the law was enacted under and how direct the relation between Congressional action and an enumerated power was required to be before it could be considered necessary and proper to the execution of the power. The other strain of argument centered on whether the federal government had an inherent power to censure attacks upon it. Here, the debate between the Federalist and Republican camps was over the sources of federal power lying inside and outside of the constitution.

Enumerated constitutional powers and the necessary and proper clause

Upon introduction of the Sedition Law into the House, its Federalist supports took great pains to demonstrate its necessity. There was a “dangerous combination,” Representative John Allen of Connecticut contended,

to overturn and ruin the Government by publishing the most shameless falsehoods against the Representatives of the people of all denominations, that they [the Representatives] are hostile to free Governments and genuine liberty, and of course to the welfare of this country; that they ought, therefore, to be displaced, and that the people ought to raise an *insurrection* against the Government.³⁴

This combination was operating in certain newspapers of the country — the Federalists provided examples from the *Aurora*, published in Philadelphia, and *The Time Piece* of New York. These papers printed letters, commentaries, and dispatches meant to raise the hackles of the citizenry by falsely portraying the government as an enemy to civil liberties, Allen alleged. Sufficiently roused by the libels of the press, some would rise up against the federal government, hoping to dash it to nonexistence. Even if they could not bring about a bloody revolution on the model of France, the newspapers sought to coerce the government to act against the true security of its citizens with threats of “tears, execrations, derision, and contempt.” Weakened against its better judgment, the nation would lay open to invasion or foreign control.³⁵

³⁴ ANNALS at 2093-94.

³⁵ *Id.* at 2097, liberally quoting from *The Time Piece*.

The combination was not limited to the Republican newspaper editors, those “wild and visionary theorist[s] in the bloody philosophy of the day,” but also to members of Congress, whose speeches from the floor of the House and whose letters to constituents — items regularly reprinted in the press — aggravated disrespect for the national government and encouraged resistance to its laws. Specifically drawn as exemplars were the speech of Edward Livingston in opposition to the Alien Friends Law that had recently been reprinted in the *Aurora* (and was soon to cover the front page of *The Herald of Liberty*) and a letter by Representative McDowell to his constituents in Virginia. Livingston’s speech, Allen pointed out, expressly inveighed against the Government, demanding resistance to the Alien Friends Law if passed and asserting that “whenever our laws manifestly infringe the Constitution under which they were made, the people ought not to hesitate which they should obey.”³⁶ Allen asserted that such sentiments would encourage each citizen whose idiosyncratic view of the constitution differed from that of his neighbors to forcefully resist laws generally acceded to by his fellow citizens. The furvor of his argument rising, Allen made what he thought to be the obvious close:

The people I venerate; they are truly sovereign; but a section, a part of the citizens, a town, a city, or a mob, I know them not; if they oppose the laws, they are insurgents and rebels; they are not the people. The people act in their elections by displacing obnoxious Representatives, and by the irresistible force of their opinions; when the people wills, the Government obeys. It is too manifest to admit of doubt or denial that the intention and tendency of such principles, are to produce divisions, tumults, violence, insurrection, and blood; all which are intended by the fashionable doctrine of modern times, which the gentlemen terms “a recurrence to first revolutionary principles,” from which may God preserve us.³⁷

A constitutional argument was implicit in Allen’s speech. The laws of the government were in

³⁶ *Id.* at 2095.

³⁷ *Id.* at 2096.

danger of being ignored or, worse, resisted because of libels bantered about in the press. For the execution of the existing laws to continue, some law punishing these libels was necessary. As such, the enactment of the Sedition Law would be permissible under the necessary and proper clause.

The same argument is implied by the speech of Robert Goodloe Harper of South Carolina, the trumpet of the Federalist party, on the introduction of the Sedition Law into the house. Taking as a starting point Allen's remarks, Harper objected not so much to Livingston's speech as to its distribution in the press. It was fine in the House, composed of deliberative citizens; it was awful in the press, where its distribution would incite the impulses of the weaker minds of the republic to sedition. In any case, for Harper, Livingston's speech was no worse than a letter of McDowell to his constituents. In the letter, McDowell had imputed "abominable motives," such as an attempt to reestablish a monarchy, to members of the government. When not checked by seditious libel laws, the seditious motives manifest in both Livingston's speech and McDowell's letter home either turned governments "upside down" in tumult or forced them "to become tyrannical, to prevent the most deplorable calamities."³⁸ The Sedition Law was necessary, then, to avert insurrection, to thwart mob rule in the countryside, to halt a slide toward despotism in government, and to maintain national unity in the face of the threat from France. It was not the laws that were threatened by the laws, it was the government itself.

Later in the debate, Harper would attempt to make clear his argument that the Congress's authority to pass the Sedition Law could be found in the necessary and proper clause. Without the Sedition Law, the efforts of the government to enact and execute the laws would be foiled by misinformed mobs of malcontents. Remarking on the nonsense of a government incapable of protecting itself against "sedition and libels," he stated that the Constitution gave the government the power to make all laws necessary to the execution of its enumerated powers or the powers of other offices. "[C]an," Harper queried, "the powers of a Government be carried into execution if sedition for opposing its laws, and libels against its officers, itself, and its proceedings are

³⁸ *Id.* at 2103.

unpunished?” Harper’s response, unsurprisingly, was “no.”³⁹

It was an interesting yarn that the Federalists had spun, but the Republicans were not in the market for it. Rather, they wanted to know what specific power in the constitution grounded the Federalists’ claims of Congressional power. Representative Nathaniel Macon of North Carolina, for example, argued that the Sedition Law’s proponents had failed to point to any power in the constitution authorizing its enactment. Statements made in the constitutional conventions of the states supported this point. Quoting Justice Iredell in the North Carolina convention, Macon stated that Congress

have the power to define and punish piracies and felonies committed on the high seas, and offences against the law of nations; but they have no power to define *any other crime whatsoever*. . . . The powers of the Government are particularly enumerated and defined. They can claim no other but such as are enumerated.⁴⁰

The constitution gave Congress only specific, enumerated powers. Powers refused the government in the ratification conventions could not be claimed by it once the government was established, Macon insisted. If, as the Federalists maintained, seditious opinions and assertions were set to weaken the federal government, the government could do nothing about it; its powers were restricted to those enumerated in the constitutional document. The national government, instead, must trust to the states to protect it from the dangers of sedition if and when they arose.

³⁹ *Id.* at 2167.

⁴⁰ *Id.* at 2152.

Albert Gallatin shrewdly followed up Macon's point. "The Government of the Union," he began, "was not a consolidated one, possessing general power; it was only a federal one, vested with specific powers, defined by the Constitution. . . ." ⁴¹ Because the federal government had been delegated only specific powers, "it became necessary for them, whenever they [Congress] passed a law, to show from what article of that charter under which they acted. . . ." ⁴² Gallatin, listing the provisions of the constitution giving Congress express power to enact statutory offenses, could, however, find no provision permitting the creation of crimes against sedition. Rather, he noted, the Federalists had seemingly claimed the general power to punish offenses against the federal government.

Gallatin next commented that certain Federalists, such as Harrison G. Otis of Massachusetts, had made reference to the necessary and proper clause as a justification for enactment of the Sedition Law. Gallatin agreed that it would be a constitutionally permissible exercise of power if it was necessary and proper for carrying into effect some other enumerated power of the government. But, as with the exercise of enumerated powers, it was incumbent upon the Federalists to show what power or powers in the constitution required the Sedition Law in order to be effectuated. They could not simply assert it necessary to some general power to punish acts against the government. This, however, was what the Federalists were doing, Gallatin contended.

Finally, the argument based on the threat of insurrection or invasion caused by libels was too tenuous to be believed. The point of Federalist argument had been to demonstrate that seditious libels, by raising the possibility of mob insurrection against enforcement of the Alien Laws, impaired the function of the government's laws. If libels did have those direct consequences, Gallatin offered, a seditious libel law might have merit. However, the supporters of the Sedition Law had done no more than claim the possibility that the law's enforcement would be furthered by it; to make their claim of unconstitutionality, they would have to show that those laws would be frustrated

⁴¹ *Id.* at 2158.

⁴² *Id.*

if no Sedition Law were passed. Drawing an example from the law's provision making false abuse of the person of the President in writing or print an offense, Gallatin stated that Congress had no power to pass such a provision unless its advocates "prove that the President dare not, cannot, will not, execute the laws, unless the abuse poured upon him from certain presses is suppressed."⁴³ Similarly, he asserted, the Sedition Law's proponents were required to show that the members of Congress protected from saucy libels running in the press would not otherwise vote their consciences. But, were they so frightened by the adverse public opinion, Gallatin averred, the law's proponents would have been too intimidated even to introduce the law. The Federalists, whatever their faults, were certainly not that timid.

General power of Congress

At the end of his fulsome rant against the excesses of the Republican press, John Allen briefly alluded to another source of federal power to legislate against the libels of the "dangerous combination" seeking to bring down the government.

[The representations against the government by the press and certain Republican Congressmen] are outrages on the national authority, which ought not to be suffered; and I have no doubt that Congress have the power to remedy the evil. If it be determined that we have not this power, the people will certainly vest it in the Congress, for no Government can exist without it; it is inherent in every Government, because it is necessary to its preservation.⁴⁴

What was the nature of the power that Allan believed to have been vested in the federal government? It was a general power vested in the Government through the brute fact of its sovereignty to preserve itself from harm. Further, it was a power the extent and character of which was defined by the common law.

⁴³ *Id.* at 2161.

⁴⁴ *Id.* at 2101.

The Federalists' claims can be observed in a speech given by Harrison G. Otis of Massachusetts from the floor in support of the Sedition Law. Otis asserted that to be a sovereign government, the federal government must have certain powers necessarily vested in it. Among these, he argued, was a power to protect itself from being displaced.

With respect to the . . . question [of the authority of Congress to enact a sedition law], it must be allowed that every independent Government has a right to preserve and defend itself against injuries and outrages which endanger its existence; for, unless it has this power, it is unworthy the name of a free Government, and must fall or be subordinate to some other for protection.

Here, Otis drew from Emer de Vattel's claim in the *Law of Nations* that every sovereign had the inherent power to protect itself from harm. This theoretical assertion had been worked into a practical one in the course of efforts by federal judges to put down violations of Washington's Neutrality Proclamation earlier in the decade. By the end of the decade, when Otis made his speech, the argument that the government had inherent powers to protect itself from harm was fairly well-established. But, a power of self-protection did not necessarily inhere in the *federal* government. It could, as Macon had suggested, be housed in the state governments. For the Federalists, permitting such power to be housed with the states was letting the foxes guard the henhouse. The power of self-protection had to be vested in the federal rather than the state government. Not allowing the government to pass laws for its own self-preservation and requiring the national government to rely on the states for protection from harm was a scenario Otis described as "absurd." The facts grounding this observation were clear enough for the Federalists. In certain regions, such as Virginia and western Pennsylvania, anti-federal faction ruled the day. Here, the states could not be trusted to protect the federal government from the strains of internal dissent, much less advocacy on behalf of the enemy in France. Moreover, it was in the nature of the states as competing sovereigns to weaken the federal government to increase their own strength. If the wild-eyed Jacobins in the Virginia General Assembly could grab power back from the federal

government, they would.⁴⁵

Having established that the federal government had an inherent power to protect itself, Otis addressed the question of where that power was to be found in the constitutional firmament of American government. Here, Otis turned to the common law.

If . . . we find in an instrument digested by men who were all familiar to the common law, not only that the distribution of power, and the great objects to be provided for, are congenial to that law, but that the terms and definitions by which those powers are described, have an evident allusion to it, and must otherwise be quite inexplicable, or at best of a very uncertain meaning, it will be natural to conclude that, in forming the Constitution, they kept in view the model of the common law, and that a safe recourse may be had to it in all cases that would otherwise be doubtful.⁴⁶

It is a startling claim, contrary to accepted thought about the delegation of power to the federal government. But, to contemporary minds, the claim was clear enough. The common law, as argued by the Federalists, was not a positive law enacted by the government setting forth the obligations and rights of citizens. It was, rather, part-and-parcel of an historically-centered constitutional law, which defined the powers and duties of government. As Otis asserted of the states, they had all brought with them common law from England, “upon which all of them have founded their statute law.” The common law was an element of their constitutions, upon which they drew in enacting their laws. The same was true with respect to the federal government: The common law was a part of the federal constitution, its mobilizing spirit, upon and in accordance with which the Congress could act in passing laws. The constitution of the federal government did not end with the constitutional “charter,” as Gallatin had referred to it. It was motivated and

⁴⁵ *Id.* at 2146.

⁴⁶ *Id.* at 2146.

extended by the common law.⁴⁷

The Congress could enact measures to take advantage of these common law powers either through a plain grant of jurisdiction to the courts to take cognizance of certain common law crimes — for example, by simply giving jurisdiction to the federal courts to hear seditious libel cases — or by a statutory enactment that modified the federal common law within the aims set forth by Congress. On the matter of granting jurisdiction, what made the federal government different from the government of the states was that jurisdiction over the common law was not automatically given to the federal courts. “No State has enacted statutes for the punishment of all crimes which may be committed,” Otis noted. However, each one had some court in which those crimes might be punished under the common law. Not necessarily so, the federal government. Otis thought such jurisdiction resided in the federal courts under the federal constitution, but that prior statutes had cut the jurisdiction out from them. By contrast, many, if not most, of his fellow Federalists believed jurisdiction over common law crimes not to have been expressly given to the courts in the constitution. According to these Federalists, the common law powers of the government had been severed from their natural institution of enforcement, the courts, when not expressly vested in them by the written constitution. Still, Congress had the power to introduce common law offenses and give the federal courts jurisdiction over them; such jurisdiction was a necessary incident to the government’s power. As Robert Harper put the matter, while he believed that “there was no common law jurisdiction in the Courts of the United States. . . ,” he nonetheless did not believe that “no common law offense could be committed against the United States.” The Congress could act — and, in the case of the Sedition Law, it did act — to punish such offenses.⁴⁸

⁴⁷ *Id.*

⁴⁸ *Id.* at 2146; *id.* at 2141. The remarks of John Wilkes Kittera are in the same vein as those of Harper:

On the one side it is said, this bill is a violation of the Constitution; on the other, it is said to be founded on common law principles. If the latter is true, it may be wise in all Governments to have the people well-informed with respect to crimes on common law principles. It was desirable on another account: It had lately been advanced as an opinion

Congress had the power not only to give jurisdiction over common law crimes to the federal courts, but also to tailor those offenses to immediate ends in statutory proscriptions. This is observable in the debate in the Committee of the Whole over the features that the seditious libel offense in the law would have. The assumption of the Federalists was that, as the law being enacted was grounded in the common law, in the absence of any amendment, the common law conception of seditious libel would govern the offense. In debate over amendments, the Federalists split over what the common law required and whether the amendments modified or reflected the common law.

by law gentlemen in the Federal Courts, that those Courts have not a common law jurisdiction in criminal cases. If so, it is important to pass a bill on the subject.
Id. at 2113.

One amendment, that to permit juries to try both law and fact in seditious libel cases, provides an example. Robert Harper stated the majority position among the Federalists. He believed the amendment unnecessary, as “[i]t was well known that, in this country, the jury were always judges of the law as well as the fact, in libels. . . .” The Sedition Law merely enacted the common law, in this respect allowing juries to be the arbiters of law and fact. James Bayard, a Federalist from Delaware, disagreed. Under the common law, as he understood it, judges were to decide the law and juries the fact. Further, he asserted, this was perfectly fine, as juries might decide the law wrongly, to the detriment of defendants, whereas judges, expert in the law, were likely to decide it correctly. If not, their rulings could be easily appealed and corrected. Certainty of favorable review over an unfavorable jury decision was less likely. Bayard’s reasoning brought the Federalists around to a belief that placing the determination of law and of fact in separate hands might be a good thing. But he had not convinced them that the division was a part of common law. An amendment to that effect was needed.⁴⁹

The Republicans would have no truck with any of this, either on the claim that the federal government had general powers as a sovereign or on the claim that those powers were defined by the common law. As earlier noted, Gallatin dismissed out of hand the notion that the federal government had general powers or that it could, under the necessary and proper clause, reach general ends. Certainly, the government did have the power to proscribe and prosecute offenses to protect itself from harm, as it had done in the neutrality crisis nearly five years earlier. However, as Gallatin pointedly noted, the passage of the Neutrality Act had been pursuant to Congress’s enumerated power to make laws respecting the law of nations, as had other congressional statutes premised on self-protection. It was not a general power, the boundaries of which could be drawn by the common law. Instead, the power of the government to protect itself from harm was subservient to the written constitution, which gave it definite boundaries.

⁴⁹ *Id.* at 2135.

In arguing that the common law could not give powers to the federal government outside of those expressly provided in the written constitution, the Republicans took three approaches. First, they argued that, unlike the states, which had been delegated general powers by their respective peoples, the federal government had been delegated only the specific powers set forth in the written charter, and no others. As there was no delegation of common law powers to the federal government in the constitutional document, Congress could not claim them as part of constitutional government. Second, the Republicans contended that, even if the Federalists could make the abstract claim that the common law was a part of constitutional government, there were problems of the transmission of that common law to the government. As the federal government was not a direct ancestor of the English government, originally founded under an English common law, but of the many states, determining what common law had come to permeate its structures was an irresolvable matter. Finally, the Republicans were unwilling to cleave a distinction between the common law as a body of powers, rights and duties defining the government's relation to the citizen and the judicial jurisdiction to enforce that body of powers, rights and duties. In the absence of federal jurisdiction over a common law of crimes, the idea of a common law of crimes lacked substance. Put another way, it was hard to determine what crimes the federal government might reach under its common law powers if there were no courts to define those powers. For the Republicans, then, the absence of federal court jurisdiction was conclusive on the point that Congress lacked the power to enact measures under the common law.

Congressional power and the Sedition Law in the Republican press

John Israel was a source of irritation to Federalists in western Pennsylvania. A twenty-something political activist, Israel was the editor of the *Herald of Liberty*, a Washington, Pennsylvania, weekly of a decidedly Jeffersonian stripe.⁵⁰ He was a radical egalitarian, a zealous

⁵⁰ JEFFERY L. PASLEY, *THE TYRANNY OF PRINTERS: NEWSPAPER POLITICS IN THE EARLY AMERICAN REPUBLIC* at 112. Israel founded the paper in February of 1798, running it under the motto of

advocate for Albert Gallatin, and a partisan sniper, who loaded his paper with tirades against the Adams administration and paeans to its opponents.⁵¹ Known for his unabashedly partisan tirades against the current occupants of federal office, Israel was an available, obvious target for prosecution under the Sedition Act of 1798.⁵² No surprise, then, that his invective against the act would center on his personal constitutional protection as a printer:

The sedition bill has passed. The Constitution declares that Congress shall make no law *abridging the freedom of speech or of the press* — Mum! — Look out for pimps, delators and spies! Who will be continually sneaking about for the purpose of reporting any unguarded expression regarding public measures.⁵³

“Man is Man, and Who is More?” Id. Although many Republican presses in this period, especially the rural ones, filled their column space with articles re-printed from the Philadelphia Aurora and General Advertiser, Israel was exceptional in that he produced most of the content in the paper himself. Id.

⁵¹ Id. at 112-116. As Pasley puts it, In early issues, [Israel] devoted much space to defining the broad differences between the Republican opposition and the Federalist-controlled national government. But when election time came, Israel and the Herald took on very practical political functions that would become typical of partisan newspapers and their editors in the future. In particular, the editor managed Gallitan’s congressional campaign in the district and acted as his link to the local Republican organization.

Id. at 112-113.

⁵² At the very least, Israel must have thought himself so. It was in nearby Greene County, Pennsylvania that Alexander Addison, President Judge of Pennsylvania’s Fifth Circuit (which included Washington) gave his grand jury charge defending the law of seditious libel, asserting that “[t]he principles of liberty . . . require that iur right of communicating information . . . be so restrained, as not to infringe the right of reputation.” ALEXANDER ADDISON, LIBERTY OF SPEECH, AND OF THE PRESS (1798) (republication of Addison’s charge to the September Sessions, 1798). One suspects that Addison, who resided in the town of Washington, was nudging the grand jury to a presentment against Israel under the Pennsylvania common law. See also, PASLEY at 119.

⁵³ The Herald of Liberty, Monday, July 23, 1798. In the following month, not an issue passed without some disparaging reference to either the Alien Friends Act or Sedition Act. Again on the 23^d, from the Philadelphia Aurora and General Advertiser of July 11, “The Libel and Sedition Bill yesterday passed the House, 44 to 41. We shall endeavor to give a copy of it tomorrow. In the meantime the good citizens of

The responses to the Sedition Law in the Republican press were varied, from disillusionment over constitutionalism to cautious optimism that the law would be quickly rescinded. An extract of a letter from a member of Congress to his constituents informed them that it was “dangerous to place too much confidence in the form[] and letter of the Constitution.” Officers of any government, it was stated, having been given power of the purse would come to abuse that power and undermine the government, no matter how well-formed. If the fruit was rotten, so too the tree. Others were less pessimistic about the fate of constitutional government, but nonetheless believed that the enactment of the Sedition Law bode ill for the future of the federal constitution. “Some of our legislators tell us,” wrote the editor of the *Epitome of the Times* in his commentary to Cato’s letters, “that in bending the constitution in order to make way for these bills [the Alien and Sedition Laws] it absolutely was heard to *crack* twice.”⁵⁴

Criticism went looked past the weaknesses of the constitution to those perceived as weakening it. Finding obvious unconstitutionality in the Sedition Law, certain writers criticized the Federalists’ arguments on behalf of its constitutionality as being disingenuous. In his “An Apology for the Alien and Sedition Bills,” a regular contributor to *The Herald of Liberty*, writing under the name Eccentricity, charged that “[n]o one with intellect enough to himself out[side] of a mad house ever denied the discordance between the above bills and the CONSTITUTION of the U. States.” Though many writers clearly doubted the sincerity of the Federalists’ claims of constitutionality, most made the effort to prove both to their subscribers (who were few) and their readers (who were many) that the Sedition Law was damaging to constitutional government. As with the debate over

these States had better hold their tongues and make tooth picks of their pens.” *Id.* Another, similar complaint appeared in the July 30th edition. On August 6, 1798, Israel ran a copy of Congressman Livingston’s attack on the Alien Friends Act. *The Herald of Liberty*, Monday, August 6, 1798. A copy of a poem by AMERICANUS in praise of liberty of thought was run the following week. *The Herald of Liberty*, Monday, August 13, 1798.

⁵⁴ *The Time Piece*, July 18, 1798. “Extracts of Cato’s Letters, with Commentary,” *The Aurora and General Advertiser*, August 8, 1798.

the law in Congress, much of the argument was devoted to whether it violated the free speech and press clauses of the First Amendment. This argument generated most of the heat in the early days after the Sedition Law was passed. Quickly, though, the question of Congressional power to enact the law came to the fore, becoming a central feature in argument against its enactment. It was this part of the debate, which centered on the issue of delegated powers, that most influenced the authoring and passage of the Kentucky Resolutions of 1798 and 1799, and the Virginia Resolutions of 1798.⁵⁵

Most writers in the Republican press generally assumed that the Federalists enacted the Sedition Law on the grounds of a grant of general power to Congress and began their criticism of it there. Others felt the need to explain why the Federalists were forced to ground the law in a grant of legislative power not found in the constitution. One effort to demonstrate the incongruity of Sedition Law with the powers vested by the constitution charged that the Federalists had not carried their burden of proving that the Sedition Law was founded on a textual grant of constitutional powers. In response to a letter of Adam's attorney general, Timothy Pickering, in support of the Alien and Sedition Laws, P. Johnston defied him "to point out the article in that instrument [the constitution], which give the legislature of the United States any right to act on this subject [seditious libels]." The mere claim of domestic danger from public licentiousness was inadequate to support the Sedition Law; the Federalists in Congress were required to prove that the power to prevent such libels was not expressly given in the constitution to Congress. Philodemos, writing against the Sedition Law in the *Aurora*, duplicated Johnston's point, stating that the burden of demonstrating that the law was enacted pursuant to an enumerated power fell on its proponents. According to Philodemos, they had failed even to attempt a case.⁵⁶

⁵⁵ Eccentricity, "An Apology for the Alien and Sedition Bills," *The Herald of Liberty*, February 18, 1799.

⁵⁶ P. Johnston, "Letter to Timothy Pickering," *The Times and Alexandria Advertiser*, November 21, 1798. Philodemos, "An Enquiry whether the Act of Congress, 'in addition to the act, entitled an act for the Punishment of Certain crimes against the United States,' generally called the Sedition Bill is Unconstitutional

The Republicans did not stand on the argument that the Federalists had failed to carry their burden of proof. They went on to show that the Sedition Law lacked sanction in the text of the constitution. For example, Philodemus went on to examine the powers enumerated in the constitution to see whether any textual provision might support the law. The power to enact a law against seditious libels could not be found among the listing of punishable crimes provided in the constitution; rather, the absence of seditious libels from the listing implied that Congress was forbidden to punish them. Nor could refuge be found in the power of the Congress to tax for the general welfare. The general welfare aspect of the clause did not support a general power. Congress's authority to act on behalf of the general welfare was limited to *taxation*, not legislation, to that end. And, the power to declare the punishment of treason, if anything, excluded from Congressional competence the remainder of the treasonable class of offenses at common law. This included constructive treason, of which seditious libel was a close relative, if not a direct ancestor, under the common law. "Why is treason *defined* in the constitution," Philodemus asked, "if it was not to prevent constructive treason or other cases to be declared to be treason, as had been done in England, and the punishment of actions which might be supposed to approach its limits?"⁵⁷

or Not," *The Aurora and General Advertiser*, December 19, 1798.

⁵⁷ *Id.* Many of these points were made by Hortensius in his "Letter II to the People of the United States," *The Aurora and General Advertiser*, February 4, 1798.

Nor could the Sedition Law be enacted pursuant to the necessary and proper clause, the Republicans averred. An enactment could not be necessary and proper relative to general good government; it had to be necessary and proper relative to another express, enumerated power in the Constitution. The principle was restated in a number of places. Thus, in the Albemarle Remonstrance, the author stated that if the Sedition Law was necessary to carry into execution another power, “[l]et it be designated; as yet such a power escaped ordinary discernments; without such a power, to which this law may be a natural appendage, it is an unconstitutional germ from which usurpation may [] proceed uncontrouled.” In the memorial to the Congress of freeholders of Suffolk County, New York, the point was repeated:

[I]f the clause granting power to Congress, to make all laws *necessary and proper* for carrying into execution the powers vested in them by the constitution, were to be construed to apply to this case, it would defeat the object which the constitution had in view of establishing a general government with limited powers; because every other subject of legislation might well be construed as *necessary and proper* to carry into execution the powers vested in Congress.

Representative John Fowler of Kentucky, in an open letter to his constituents of July 20, 1798, stated that “the sweeping clause, as it has been usually denominated, gives *no more* nor *no other* powers, beyond the *particular enumeration*; for when it is said that congress ‘shall have the power to make all laws which shall be necessary and proper,’ those words are *limited* and *defined* by the following, ‘for carrying into execution the *foregoing* powers.’” Hortensius provided an example to illustrate the point.

One case will completely illustrate the doctrine here inculcated. In 1792 Congress passed a law punishing with death persons concerned in robbing the mail, or stealing letters from the post office. In the enumerated powers of the government be examined, it will be found that the power to pass such a law is not expressly granted — still however it is warranted by the Constitution, because it is necessary to carry into effect the general power expressly granted to Congress, to

establish post offices and post roads.

In the case of the Sedition Law, each of these writers concluded, there was no express power to which it was directly aimed. For that reason, it could not be constitutionally supported.⁵⁸

Another reason that the Federalists could not claim the benefit of the necessary and proper clause was that the relation between the Sedition Law and the furtherance of government ends was insufficiently direct. As Gallatin had argued in the House of Representatives, a broad reading of the necessary and proper clause to reach a merely possible frustration of the laws was impermissible under the language of the clause itself — the link between the law and the powers it was meant to carry into execution could not be too remote. The relation of the Sedition Law to the execution of government powers was, however, tenuous in just this way. Hortensius made this point in the press. Reviewing one of Otis's claims on behalf of the Sedition Law, Hortensius argued his position to be that because "government has a right to punish sedition or insurrections, it therefore has a right to punish every thing which may *lead* to sedition or insurrection." However, asserted Hortensius, this was incorrect, because merely arguing that libels lead to sedition was insufficient to demonstrate that a law punishing them was necessary. Rather, Otis would have to show that "libels are *acts* of sedition." Moreover, he added, the Sedition Law more directly frustrated the ends of the federal government. A consequence of its enactment was that "the public tranquility has been greatly disturbed [and] public happiness impaired" by it. This narrow interpretation of the necessary and proper clause was motivated by a fear that too broad a construction of it would give the government general legislative powers. The same fear motivated the Republican reaction to the Federalist claim of inherent legislative powers.⁵⁹

⁵⁸ "Albemarle Remonstrance," *Virginia Gazette and General Advertiser, Extra*, October 2, 1798. "Memorial of Suffolk County to Congress," *The Aurora and General Advertiser*, January 30, 1799. "Open Letter of John Fowler to his Constituents," *Stewart's Kentucky Herald*, August 7, 1798, reprinted in *The Aurora and General Advertiser*, August 8, 1798; *The Times and General Advertiser*, September 6, 1798; and *The Herald of Liberty*, September 10, 1798. Hortensius, "Letter II to the People of the United States," *The Aurora and General Advertiser*, February 4, 1799.

⁵⁹ Hortensius, "Letter III to the People of the United States," *The Aurora and General Advertiser*,

While some portion of Republican argument was devoted to proving baseless Federalist attempts to tie the Sedition Law to an express provision of the constitution, most writers in opposition to the law fixed instead on the Federalists's claims to act under an implied grant of legislative authority. The idea that Congress might have implied authority no different to the Republicans than a claim to general legislative power. As the Independent charged, “[s]ome supple minds in the enthusiasm of party zeal, to support a power in Congress to pass the laws in question, have twisted out principles from before unobserved implications, and now constructions of this ill-fated instrument, to the envy and admiration of all; others . . . have developed truths; which were miraculous as immaculate, to sanctify those same acts. . . .” If a power to proscribe seditious libels could be implied from the fact of sovereignty, so could any other power. As a result, the Sedition Law was roundly decried as obnoxious to the letter and spirit of the constitution. The response to this exercise of general power was uniform on a single point: No general legislative power was ever delegated to Congress. In Republican responses, from county conventions and from legislators, as well as from public commentators, the principle of non-delegation was repeated. It was grounded first and foremost on the idea of popular sovereignty. Any focus on the language of the constitution — particularly the language of the tenth amendment — was reflective of that idea. A dispatch from Newburg in the *Aurora* is reflective of this tenor. The Sedition Law, the author stated, was an anathema to the constitution, compatible only with a general grant of legislative power. In arguing his point, the author treated the matter of delegation. First commenting on the original source of power in the people against Congress, the author next turned to the tenth amendment, reading it as a guarantee of popular sovereignty “— to secure the privileges of the people still further, a clause was inserted ‘that the powers not delegated to the United States by the constitution, not prohibited to it by the states, are reserved to the states, respectively, or to

February 5, 1799. “Resolutions of the Freeholders of Dinwiddie County of November 10, 1798,” *The Aurora and General Advertiser*, December 6, 1798. “November 22, 1799, Address of the General Assembly to the People of the Commonwealth of Virginia,” *The Aurora and General Advertiser*, February 5, 1799; *The Herald of Liberty*, February 11, 1799.

the people.”⁶⁰

⁶⁰ The Independent, “Letter I in Reply to Virginiensis,” *The Aurora and General Advertiser*, February 16, 1798. *The Aurora and General Advertiser*, August 22, 1798.

The concern over popular sovereignty is reflected in a number of treatments in the Republican press of the constitutional role of the ratifying conventions. In an open letter to Matthew Lyon, George Mason consoled him in his confinement by reciting reasons why his prosecution under the Sedition Law was unconstitutional. Among these, Mason noted that at the time of the constitution's adoption, Virginians had been assured that a bill of rights was an unnecessary addition to the constitution, under the pretext that the constitution would not be a general grant of legislative powers from the people to the federal government. The specific powers delegated to the government would not encompass those ends against which a bill of rights would be needed. However, with the Sedition Law, the Federalists had claimed the very grant of broad power that was shown absent from the constitution in the conventions. If the people did not promptly act to reassert constitutional limits, the claims of limited power would "soon pass away and be forgotten."⁶¹

Commentators in the Republican press also focused on assertions about the limitations on federal power made in the ratifying conventions, on the argument that because the powers of Congress were delegated by the people, the instruments of their delegation, the ratifying conventions, were properly examined in determining whether a general power had been given over. One of the People recited the words of James Wilson to prove his point. Drawing from Wilson's speech to the Virginia ratifying convention, he noted the denial "that Congress were intended to be possessed of legislative powers." Such powers, he stated, remained either with the state governments — as Wilson had asserted — or with the people — as he believed. Philodemos examined the arguments offered at the Virginia convention to show that the government was one of delegated, not general, powers, noting the assertion of Henry Lee that while "under the state governments, the people reserved to themselves certain enumerated rights, and . . . the rest were

⁶¹ "Open letter of General Mason to Colonel Lyon," *The Times and General Advertiser*, December 14, 1798.

vested in their rulers,” the converse was true with regard to the federal government.⁶²

Hortensius looked to the broader history of the federal union to make the same point. All power originally belonging to the people, those people, through their constitutions, gave their state legislatures “a *general* power to do what they might think the public good required.” However, because certain ends lay outside of the states’ powers to affect when they acted individually — Hortensius noted the need to pay the public debt, to regulate interstate commerce, and the like — a federal government was envisioned to permit concerted action by the states toward those ends. Such a government was not conceived to supplant the general powers of the states, but only to act in the states’ service to do what they could not, acting individually. “The powers therefore delegated to this government were special and limited, and from the state of things could not have been otherwise.” Adding to this, Hortensius remarked that granting Congress a general power to legislate would establish a government within a government, with both the states and federal government compassing identical ends. This would permit the federal government to controvert state government in any matter, certainly not a result that would aid the states in accomplishing the ends invested in them by the people.⁶³

Not only did the argument for inherent powers flout the idea of popular sovereignty, it also ran against the text of the constitution itself. Here, though, the interpretation of the tenth amendment was filtered through the idea of a popular delegation of power. Petitions by county leaders in Virginia, Pennsylvania, and New York made such protest. After noting the limitations on federal power placed by the people on the federal government, as reflected in the tenth

⁶² One of the People, “Letter to Robert G. Harper,” *The Aurora and General Advertiser*, July 11, 1798. Philodemos, “An Enquiry whether the Act of Congress ‘in addition to the act, entitled an act for the Punishment of Certain crimes against the United States, generally called the sedition bill, unconstitutional or not,” *The Aurora and General Advertiser*, December 19, 1798.

⁶³ Hortensius, “Letter II to the People of the United States,” *The Aurora and General Advertiser*, February 4, 1799. Hortensius, “Letter III to the People of the United States,” *The Aurora and General Advertiser*, February 5, 1799.

amendment, the author of the Albemarle Remonstrance stated that “in controversies between the general and state governments on the demarcation of power, the constitution, and the constitution alone is the standard. . . .” “The people of America, in framing their own constitution intended to establish a confederation, not a consolidated government; and therefore wisely prescribed limits to the authorities constituted under it. . . .,” asserted a convention called to the courthouse of Spotsylvania County, Virginia. Protesting the Alien and Sedition Laws, the proponents of the Suffolk County Memorial to the Congress admonished it for attempting to establish a general government by those laws.

By the constitution of the United States, the people of America intended to erect for themselves a general government over the union, with defined and limited powers. They did not conceive it consistent with their political happiness, and the preservation of their liberties, that this general government should legislate in every possible case, and on every possible subject as it might judge most expedient. This appears evident from the first section of the first article, which states, that “all legislative powers *herein granted* shall be vested in Congress [A]nd by the 12th article of these amendments, it is also declared that “the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.”⁶⁴

Reciting the Albemarle Remonstrance, *The Independent* contended that the tenth amendment entirely blocked the idea that general powers had been delegated to Congress. Hortensius referred to the same amendment in arguing that the text forbade an assumption of general power. Further, Hortensius asserted, that the constitution would contain an enumeration “made with a degree of accuracy and precision” would be “absolutely ridiculous, if a general power

⁶⁴ “Albemarle Remonstrance,” *Virginia Gazette and General Advertiser, Extra*, October 2, 1798. “Spotsylvania Resolutions,” *The Times and Alexandria Advertiser*, November 13, 1798; *The Aurora and General Advertiser*, November 20, 1798. “Memorial of Suffolk County to Congress,” *The Aurora and General Advertiser*, January 30, 1799.

was mean to be given.”

[I]f such had been the object, men of common honesty, and common understanding, after expressing in plain words what their object was, would not have employed themselves in so idle and useless a task as the enumeration of special powers; but would have proceeded directly to mark out the different department of government, and to decide among these departments the general power meant to be bestowed.⁶⁵

The Republicans offered more than the positive non-delegation argument against the constitutionality of the Sedition Law. Seeking to deprive the Federalist claim of inherent legislative power of reasonable grounds, pieces in the Republican press also attacked the arguments given by the Federalists in favor of the claim of power. Against the Federalist claim that the power to punish seditious libels was necessary for the self-protection of the government, the Republicans asserted that the mere need for such a power by the government did not imply that such a power had been given. “[A]n act may be evil and yet cognizable by none but the state governments, unless the constitution has bestowed the United States superior or concurrent jurisdiction,” stated the Albemarle Remonstrance. The Address of the General Assembly to the People of the Commonwealth of Virginia asserted that the idea of an inherent power of self-preservation was “a repetition of the doctrine of implication and expediency in different language and admits of a similar, and decisive answer. . .” that Congress was given only narrowly enumerated powers. P. Johnston, in an open letter to Timothy Pickering likewise denied that Congress was given no power of self-preservation beyond that stated in the constitution.⁶⁶

⁶⁵ The Independent, “Letter I in Reply to Virginiensis,” *The Aurora and General Advertiser*, February 16, 1798. Hortensius, “Letter III to the People of the United States,” *The Aurora and General Advertiser*, February 5, 1798.

⁶⁶ “Albemarle Remonstrance,” *Virginia Gazette and General Advertiser, Extra*, October 2, 1798. “January 22, 1798, Address of the General Assembly to the People of the Commonwealth of Virginia,” *The Aurora and General Advertiser*, February 5, 1799; *The Herald of Liberty*, February 11, 1799. “Open letter to Timothy Pickering of October 20, 1798,” *The Times and Alexandria Advertiser*, November 21, 1798.

Johnston extended his view beyond the horizon of the federal government. No such power of self-preservation, particularly as it related to punishing sedition, could ever be claimed by a free government unless it had been invested in the government by the people. The author of a “General argument in favor of expatriation to the Editor of the *Aurora*,” criticized the origins of the doctrine in Vattel’s writings, finding him “more liberal than Pufendorf, but not sufficiently so, as published under the despotic rule of Frederich of Prussia. . . .”⁶⁷

Others did not deny the power of the government to protect itself from harm, but found that the constitution adequately provided for self-protection without incorporating a power to punish seditious libels. Thus, Orange County, in its address to the state of Virginia asserted that despite the dangers of sedition, “the constitution has itself made ample provision for greater emergencies than have happened, or are likely to happen, and it would be an unmerited reflection on it to allege to the contrary.” There was no cause for the invention of imaginary powers.⁶⁸

⁶⁷ *Id.* “Generally in favor of expatriation to the Editor of the *Aurora*,” *The Aurora and General Advertiser*, January 27, 1800.

⁶⁸ “Orange County Address to the General Assembly,” *The Aurora and General Advertiser*, December 1, 1798.

The Republicans likewise took Federalist pretensions of having found inherent common law powers in the constitution of the government to be meaningless hash. Again, the non-delegation principle reared its head. “The right of enacting [the Sedition Law],” wrote the author of the Albemarle Remonstrance, “has been said to appertain to Congress because false, scandalous and malicious writings, riots and unlawful assemblies were punishable at common law, when the constitution was adopted.” The author doubted this, because only the constitution could give such a power to Congress, nowhere was it expressly given. Believing that the Federalists had neither attempted to or could show a common law power to be present in the written constitution, Philodemus argued that it could not form the basis for the exercise of federal power.

It is evident that an offense against the government could not exist before its establishment, and what is meant by the argument I suppose is, that because offences of a similar nature were punishable in the states, that such against the United States are equally so in the courts of the United States under the government; but this doctrine is inadmissible, as it would be a doctrine of implication. To this it may be replied, and perhaps fairly, that it could not be supposed that the state government should alone have power to punish such offenses against the United government, and therefore this cannot be one of the rights retained to the States — even this might be conceded; for the 12th article declares that the powers not *delegated* to the United States *by* the constitution, nor *prohibited by* it to the states, are reserved to the states respectively, *or to the people*. Is not then the right of speaking or writing relative to the government or its officers *expressly* retained by the 3^d and 12th amendments taken together *to the people*? If the cognizance be not retained to the state courts, it is disputably, unless *delegated* to the United States by the constitution, which cannot be the case, to prevent *implied delegation* being the object of the amendments.

As with other commentators, Hortensius raised the non-delegation principle against the argument for Congressional authority to enact statutes under the common law. “If the common law of

England be in force in the United States, it must be in force because it is declared to be so by the constitution or by some law of the United States — no *municipal* system of law can be of any authority here, unless expressly adopted in one of those two ways.” As the constitution expressly delegated no common law power to Congress, the Congress could not act to punish crimes under it.⁶⁹

Not only did the non-delegation principle pose a difficulty for the Federalist claim of power to enact the common law, there were also practical problems about the content of the common law that would inhere in the body politic. One issue, raised by Philodemos, concerned the elements of the English common law brought over. The colonists, he remarked, had left England at different times, under different conditions, and not all hoping to bring the entirety of English common law with them. Each sought to bring a favorable slice, perhaps incompatible with that brought by others. As a matter of specific importance, many of the colonists had fled seditious libel laws of the sort that Congress had recently passed. For what reason, Philodemos asked, would these emigrants bring a common law containing the crime of seditious libel with them?⁷⁰

While Philodemos wondered which common law of England the colonists might have brought to American shores, Hortensius questioned why the focus should remain on the common law, since emigres came from a variety of countries. “If this *singular* invasion of our country is not firmly repelled, we may expect depredations on our state institutions from all the ends of the eastern world.” In addition, Hortensius wondered if alterations to the common law made in the states since its introduction there made would affect the common law of the federal government. It

⁶⁹ “Albemarle Remonstrance,” *Virginia Gazette and General Advertiser, Extra*, October 2, 1798. Philodemos, “An Enquiry whether the Act of Congress ‘in addition to the act, entitled an act for the Punishment of Certain crimes against the United States, generally called the sedition bill, unconstitutional or not,” *The Aurora and General Advertiser*, December 19, 1798. Hortensius, “Letter II to the People of the United States,” *The Aurora and General Advertiser*, February 5, 1798.

⁷⁰ Philodemos, “An Enquiry whether the Act of Congress ‘in addition to the act, entitled an act for the Punishment of Certain crimes against the United States, generally called the sedition bill, unconstitutional or not,” *The Aurora and General Advertiser*, December 19, 1798.

would be impossible to choose among varying conceptions of the common law. The authors of the Washington County Petition and Remonstrance, responding to the Federal assertion that the Alien and Sedition Laws were merely reflective powers inhering in the government as described by the common law, mocked it. If it existed, such a power in the hands of Congress would be “undefined and *talismanic*.” The Congress could with as much authority and reliability legislate that toads fly.⁷¹

The logic of non-delegation

⁷¹ Hortensius, “Letter II to the People of the United States,” *The Aurora and General Advertiser*, February 5, 1798. “Washington County Petition and Remonstrance,” *The Herald of Liberty*, November 26, 1798.

Concerns over enactment of the Sedition Law, as well as the Alien Laws, led Republicans not only to question the nature of the powers assumed by Congress, the judiciary, and the executive, but also to formulate an appropriate public response to overreaching by the branches of the federal government. In remonstrating against the government for enacting the Alien and Sedition Laws, the authors of the memorials, petitions, and remonstrances tended to one of three positions. Some, like the authors of the Albemarle Remonstrance, the Suffolk County Memorial, or the Washington Petition concluded that the appropriate response was to petition directly to Congress, informing it of their displeasure and trusting to a favorable response. “On ordinary occasions we deem it inexpedient to interrupt with petitions and remonstrances, the public deliberations of the Nation,” asserted the authors of the Washington County Petition, “[b]ut when a great constitutional question is before us, we trust the legislative body will not be indifferent to the representations of their mediate and immediate constituents.” Likewise, the proponents of the Suffolk County Memorial closed with the desire that Congress attend to their sentiments:

Your memorialists having stated the nature of their grievance, and expressed their opinions on defensive measures, have no doubt but that your honorable body will take the same into consideration, and will come to such determination thereon, as will be conformable to the Constitution, and the true interest of your country; and they as in duty bound will ever pray, &c.

The final paragraph of the Albemarle Remonstrance closed with no threat, but with the “hope that upon a calm revision of these acts, they will sink into oblivion and that their repeal will yield grounds for the belief, that the right of the people to remonstrate is not illusory.” The people had made their voices heard; Congress, as the deliberative body of the people, would incorporate the thoughts of the memorialists into their reasoning and act appropriately.⁷²

On the first approach, the non-delegation principle did not dictate the response of the

⁷² “Washington County Petition,” *The Herald of Liberty*, November 26, 1798. “Suffolk County Memorial,” *The Aurora and General Advertiser*, January 30, 1799. “Albemarle Remonstrance,” *Virginia Gazette and General Advertiser, Extra*, October 2, 1798.

memorialists. The second approach utilized the full force of the non-delegation principle, however. A dispatch to the *Aurora* from Albany, New York, complained that the exercise of power behind the Sedition Law was that of tyranny, and informed the people to be on their guard against its exercise. In delegating power under the political compact, the people created constitutional boundaries “to tyranny on one hand and anarchy on the other.” If the national government overran its boundaries and veered toward the former, the people did have a remedy. That remedy, the author stated, was implied from the nature of the political compact — dissolution of the compact itself. The language of revolution in this context was not uncommon. “Acts that violate our chartered rights, have no binding force,” stated an address to Representative John Clopton of Virginia, “and are not entitled to the respect and obedience of the people; and where they must choose between an obedience to measures adopted by their own servants, and an adherence to the constitution, it must not be doubted but that they will cling to the constitution as the *rock* of their salvation.” In choosing to “cling to the constitution,” the people reserved a right to rebel against those who breached it. The political compact creating the federal government was dissolved or open to dissolution, and open resistance or rebellion was the proper final response to consolidation of legislative powers by the national government.⁷³

Others treated Congressional employment of powers not delegated to it as a revolution against the people, imposing a duty of resistance on them. The memorial of the citizens of Caroline County to the General Assembly of Virginia characterized the supposed assumption of power by the Congress on these terms. By utilizing powers not delegated to it, the federal government sought to replace the constitutional system with a government lacking popular sanction. “If they are unconstitutional, the government has usurped the power of the people, by constituting itself a creator of a new political system. It has committed rebellion against that to which it has sworn allegiance — and by violating the constitution with a view to revolution, has dissolved the social

⁷³ *The Aurora and General Advertiser*, July 31, 1798. “Address of the citizens of Richmond, Virginia, to John Clopton,” *The Aurora and General Advertiser*, August 20, 1798.

compact as far as it could.” The non-delegation principle implied its own relief against usurped power — the threat of non-compliance, or the recall of delegated powers through revolt. While the remonstrances following this approach held out a threat of insurrection with their assertions of unconstitutionality, the threat was, at best, weak. For one thing, it was hardly believable that the authors of these remonstrances would or could take to the streets in anything more than a mob riot. Moreover, the threats with which these remonstrances closed proved the very point of the Federalists were trying to make. Calls to revolt showed that the countryside was held hostage to the rebellious temperament of a few disaffected Jacobins who were desperately in need of jailing.⁷⁴

The third category of remonstrances made a genuine threat against the Federalists, asserting the right of the people to use the states as instruments against the unconstitutional measures of the federal government. Thus, the authors of the Goochland County Resolutions stated that in fulfillment of their duty as citizens to oppose unconstitutional acts of Congress, they instructed their state delegates “to use their utmost endeavors to prevail with our State legislature in their ensuing session, to remonstrate to Congress against the [Alien and Sedition Laws].” In an address to the county delegates fronting the resolutions, its authors made clear why they sought the efforts of the state: “We conceive that a remonstrance from the state of Virginia, collectively against them [Congress], would have far greater efficacy than from ourselves.” The Orange County Address closed by referring their observations to the General Assembly of the state, “relying that you will take care of the commonwealth, and pledging ourselves to support as far as we are able such remedial measures as are firm and temperate, and which in your wisdom you may adopt.”⁷⁵

Resolutions such as these, calling on the state to act on behalf of the remonstrants, fell on fertile ground. Soon, Jefferson and Madison had authored the Kentucky and Virginia Resolutions, which attempted to restate the concerns that had been circulating over the past months and put the

⁷⁴ “Caroline County Memorial,” *The Herald of Liberty*, December 17, 1798.

⁷⁵ “Goochland County Resolutions,” *The Aurora and General Advertiser*, September 3, 1798.
“Address of Orange County,” *The Aurora and General Advertiser*, December 1, 1798.

force of state sanction behind them. Here the logic of the non-delegation principle was fully extended and given a nasty twist that placed the states at the center of the determination of constitutional power.

The Kentucky Resolutions of 1798 criticized the enactment of the Sedition Law on two grounds. First, it was asserted that only those powers enumerated in the constitution had been delegated to Congress and those powers not delegated did not lie with the federal government. Further, the necessary and proper clause was a delegation of a limited power to Congress, and “ought not to be so construed as themselves to give unlimited powers. . . .” Listing the enumerated Congressional powers to punish offenses, the Resolutions noted that the power to punish libels was not among them. The power to punish libels not being among those expressly delegated to the government or given as necessary and proper to carrying into execution an enumerated power, Congress could not enact a law on the subject, with the consequence that the Sedition Law was “altogether void and of no force.” Second, the free speech and press clauses removed the capacity of the government to regulate libels from the range of delegated power. The free speech and press clauses, so construed in the Kentucky Resolutions, were not grants of such rights to the people. Rather, they were expressly conceived as limitations on the delegation of Congressional power to legislate. The Sedition Law, then, violated the non-delegation principle for a second reason — the cognizance of all matters related to the speech or the press were invested in the states, not Congress.

As Adrienne Koch and Harry Ammon stated in their classic study of the Virginia and Kentucky Resolutions, “The Kentucky Resolutions were not the first legislative protest against laws deemed unconstitutional, but they were the first such set of resolutions not only to expostulate a grievance, but to put forward a method of redress other than their repeal in Congress.” It is now possible to see why. Throughout the Kentucky Resolutions ran the vein of the tenth amendment, the requirement of that federal government employ only those powers delegated to it repeated in a majority of its sections. The non-delegation principle, as it had been posed in Congress, was simply presented as a basis from which to claim certain powers as beyond the cognizance of

Congress and left it at that. Others, writing in the Republican press, had, however, followed the argument of the principle to its conclusion, that if Congress had exercised powers not vested in it, the sovereignty in which that power resided had the authority to resist the imposition by remonstrance, non-compliance, or open revolt. What most of these writers had done, however, is suppose that the repository of non-delegated power remained with the people. Jefferson, in drafting the 1798 Resolutions, and the Kentucky legislature, in passing the 1799 Resolutions, severed the non-delegation principle from its moorings in the idea of popular sovereignty and attached it firmly to the states' rights interpretation of the tenth amendment. For Jefferson and the Kentucky legislature, the repository of non-delegated power lay with the states, putting them at the center of resistance to unconstitutional exercises of power by the federal government. There was adequate basis for this. After all, the language of the tenth amendment reserved non-delegated power to the states before the people. Still, from the ratification onward, it had largely been assumed that ultimate sovereign authority lay with the people. This was plainly abandoned in the crafting of the Kentucky Resolutions, and the precedence of the states to the people in the tenth amendment was given teeth. As a consequence, the states, not the people, were seen as having the ultimate authority to resist the imposition of federal power, through remonstrance, resistance, or, ultimately, nullification. Thus in advocating nullification, Jefferson, in drafting the original 1798 resolutions, and the Kentucky legislature, in enacting the 1799 resolutions, were only carrying through the argument in opposition to the Sedition Law to its full and logical ends.⁷⁶

Conclusion

The Virginia Resolutions of 1798 did not make so bold a stroke. Madison would not go so far. He was too committed to the federal union, and the notion of popular sovereignty behind it, to conceive of any compact among the states as more than ultimately traceable to a grant of power

⁷⁶ Adrienne Koch and Harry Ammon, "The Virginia and Kentucky Resolutions: An Episode in Jefferson's and Madison's Defense of Civil Liberties," 5 WM. & MARY QUAR. 3D 145, 157 (1948).

from a sovereign people. However, the damage was done. The idea of nullification had been endorsed through an argument with reasonable constitutional pedigree and set on its disastrous course.

With regard to the conception of federal power, the debate over the Sedition Law ultimately closed a door and opened a possibility. Through the Federalist's eventual loss to the Republicans, whose principles of constitutional government generally came to assert a stranglehold on exercises of legislative power for the following forty years, the idea that a basis constitutional power might exist outside of the confines of the constitutional compact became a dead letter. At the same time, the actions of the Federalists in 1798 is a clear indicator that creativity in the development of constitutional government did not wane after the ratification of the constitution, and that the idea of a constitution remained malleable throughout the early years of the Republic. This serves as a reminder, both to legislators and judges approaching the question of federal power, that the constitution was not done when it was "done." Nor, necessarily, should it be.

That the Federalists would argue on behalf of legislative powers not formulated in the constitutional document belies other recent conclusions about American constitutionalism. In his Ideological Origins of the American Revolution, Bernard Bailyn contended that by the start of the American Revolution — and certainly by its end — nearly all of the pieces of American constitutionalism had fallen into place. Before the steady breakdown of colonial relations with Britian, the concept of a constitution in the colonies was resolutely English. The constitution was simultaneously positive and normative. It was a description of the state, its institutions, and its laws, and (plus or minus a few points), for self-satisfied Englishmen at home and abroad, it was an account of how English governance should be. After the Seven Years war, as relations between Britain and the colonies began to degrade, the Americans slowly moved away from the English constitution. By the start of the Revolution, people had come to understand a constitution as a set of "first principles" that defined the structure of government and the rights of citizens. A constituion was also to be enshrined in a constitutional document that set forth those principles.

Gordon Wood wrote his seminal work, The Creation of the American Republic, shortly after

Bailyn finished his work on the revolution. In his book, Wood largely took Bailyn's claims regarding the rediments of American constitutional thought as givens. The question of whether a constitution was prior to the political state was resolved by the start of the Revolution; the remaining question facing the states was how to draft a document prior to and superior to everyday government. Similarly, Jefferson Powell, in his study of constitutional interpretation in the early years of the Union, has premised his work on the assumption that the fundamental principles of American constitutionalism were the subject of broad consensus at the framing of the constitution and after. For Powell, the work of the first decades under the constitution was that of interpreting and applying a comprehensive and settled constitutional document setting forth the first principles of government.

This article is meant as an exploratory challenge to the thesis that American constitutionalism — constitutional government based on a comprehensive written document setting forth the powers of government and the rights of citizens — was part of settled public consensus by the end of the Revolutionary era. Rather, based on an analysis of Congressional debates and of newspaper politics, it appears that even by the end of the Federalist era, no consensus had been reached on what the constitution comprised and on the status of the written document within that constitutional structure. This article is meant to prompt a second look at the entire period, from the close of the Seven Years War to the opening of the Jeffersonian presidency, for the development of a document-bound constitutionalism.