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# The Legal Counterrevolution: The Jurisprudence of Constitutional Reform in 1787

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## INTRODUCTION

Did the Federalists wage a counterrevolution in 1787? Although its popularity in the legal academy has waned in recent decades, the idea that the movement for constitutional reform in 1787 had counterrevolutionary dimensions dates straight back to the Antifederalists, who often accused their counterparts of betraying the spirit of '76's republican promise. In the constitutional historiography, scholars trace the idea to Charles Beard's *An Economic Interpretation of*

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*the Constitution of the United States*, wherein Beard depicted the nation's constitutional founding as an economic counterrevolution waged by and on behalf of protocapitalist creditors and public securities holders.<sup>1</sup> Beard's critics over the years have challenged him either by purporting to show that the Federalists in fact sought to secure the Revolution's gains,<sup>2</sup> or by discrediting *An Economic Interpretation's* evidentiary basis.<sup>3</sup> The former approach too often confuses rhetoric for reality, while the latter sidesteps the question of whether some kind of alternative, non-economic revolt against the revolutionary heritage occurred in 1787. Those historians who take the position that a counterrevolution did take place in 1787 have either cleaved to Beard's materialism and thereby committed the same reductionist sins;<sup>4</sup> or, to the other extreme, so far enlarged the concept of a counterrevolution as to place within its historical ambit virtually every post-Revolutionary American who at one time or another preferred order to liberty, or who opposed equal rights for women or blacks.<sup>5</sup>

This Article steps into the historiographical divide to chart a revised course on the question of counterrevolution in 1787 — one that finds general inspiration in the Beardian enterprise even as it looks beyond Beard's materialist commitments. It contends that a historically distinct counterrevolution did occur in 1787, but that neither economic interests, nor political ideology, nor general cultural trends

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<sup>1</sup> CHARLES A. BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* (1913) [hereinafter *ECONOMIC INTERPRETATION*].

<sup>2</sup> See, e.g., 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 200-29 (1991) (critiquing Beard's arguments and placing them in scholarly context); AKHIL AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 279, 309 (2005) (critiquing Beard's assertions). For influential early works rejecting the counterrevolution thesis, see Martin Diamond, *Democracy and the Federalist: A Reconsideration of the Framers' Intent*, 53 *AM. POL. SCI. REV.* 52 (1959), and HANNAH ARENDT, *ON REVOLUTION* 140-41 (1963).

<sup>3</sup> See, e.g., FORREST MCDONALD, *WE THE PEOPLE: THE ECONOMIC ORIGINS OF THE CONSTITUTION* 40 n.6, 69 n.83 (1958) (pointing out factual errors in Beard's research).

<sup>4</sup> See, e.g., WOODY HOLTON, *UNRULY AMERICANS AND THE ORIGINS OF THE CONSTITUTION* 22-23 (2007) (affirming the explanatory power of Beard's findings that bondholders and private creditors stood as the Constitution's "most avid supporters" in 1787 and finding "chiefly economic" motives lurking behind the ideological goals invoked by key opinion leaders).

<sup>5</sup> LARRY E. TISE, *THE AMERICAN COUNTERREVOLUTION: A RETREAT FROM LIBERTY, 1783-1800*, at xlvii (1998) (arguing that in the two and a half decades after Independence nearly every American, including the Jeffersonian Republicans, came to "reject[] the very principles and ideals of their Revolution," including equal rights for women, blacks and immigrants, and the abolition of slavery). For a more discerning analysis illuminating the Constitution's counterrevolutionary dimensions at the founding, see CHRISTOPHER TOMLINS, *LAW, LABOR AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC* 60-98 (1993).

after the Revolution, fundamentally impelled its leading figures. Rather, a counterrevolutionary *jurisprudence* did. One year prior to *An Economic Interpretation*, Beard actually flirted around the edges of this jurisprudence in a short tract examining whether the framers endorsed “judicial control over legislation.”<sup>6</sup> Yet Beard’s circumscribed line of inquiry, presentist agenda, and economic orientations prevented him from discerning the larger conceptual transformations from which the Federalists’ views regarding “judicial control” flowed — transformations with jurisprudential implications extending well beyond judicial review. At the heart of the Federalists’ jurisprudence of reform in 1787 lay a new constellation of attitudes about the relationship between law and coercion that departed sharply from those that had prevailed in the decade after Independence. The attitudinal transformation among reformers proceeded in two nested intellectual shifts — the first *discursive*, wherein coercion superseded consent as the federal government’s perceived *sine qua non*; the second *positional*, wherein a conception of coercion that contemplated military force yielded to the constitutionalization of what leading Federalists styled “the coercion of law[.]”<sup>7</sup> Together these two shifts, addressed in turn below, form the basis for what I shall call the legal counterrevolution of 1787.

#### I. FROM CONSENT TO COERCION: DISCURSIVE CHANGE IN 1787

At the discursive level, the legally ambiguous discourse of popular consent that had flourished in the age of Independence, and which had found expression in the Declaration, the state constitutions, and the Articles of Confederation, yielded to a discourse of coercion in 1787.<sup>8</sup> A creature of the American Revolution, the older discourse of

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<sup>6</sup> CHARLES A. BEARD, *THE SUPREME COURT AND THE CONSTITUTION* 2 (1912).

<sup>7</sup> I THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 284 (Max Farrand ed., 1911) [hereinafter CONVENTION RECORDS]. Cf. THE FEDERALIST NO. 15, at 149 (Alexander Hamilton) (Isaac Kramnick ed., 1987) (distinguishing between the “COERCION of arms” and the “COERCION of the magistracy”).

<sup>8</sup> I follow David Hollinger’s influential definition of “discourse.” See David A. Hollinger, *Historians and the Discourse of Intellectuals*, in *IN THE AMERICAN PROVINCE: STUDIES IN THE HISTORY AND HISTORIOGRAPHY OF IDEAS* 130-50 (1985). The Declaration of Independence linked the consent principle to sovereign individuals, the Articles of Confederation to sovereign states. See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); see also ARTICLES OF CONFEDERATION of 1781, art. II. For an analysis of how the state constitutions enacted in the 1770s and 1780s made the direct and ongoing consent of the people their animating objective, see Donald S. Lutz, *The Theory of Consent in the Early State Constitutions*, 9 *PUBLIUS* 11, 18-20 (1979). The state constitutions’ provision for annual elections and for the right of constituents to instruct

consent incorporated a logic of self-government that equated ruler with ruled and thus rendered coercion against the people something of a contradiction in terms, for the people could not logically force themselves to comply with laws they themselves made.<sup>9</sup> It also made government by coercion *ipso facto* illegitimate. Under the Articles of Confederation, a similar logic applied to the states through the requisition mechanism, which many held up as the legal ideal for which Americans had fought the Revolution. According to one well-known “child of the revolution,”

[Americans] must recollect with gratitude the glorious effects of requisitions. It is an idea that must be grateful to every American. An English army was sent to compel us to pay money contrary to our consent—to force us by arbitrary and tyrannical coercion to satisfy their unbounded demands. We wished to pay with our own consent. Rather than pay against our consent, we engaged in that bloody contest, which terminated so gloriously. *By requisitions we pay with our own consent . . .*<sup>10</sup>

Together with the historical aversion to standing armies, 1774’s “Coercive Acts,” one of which abolished self-government in Massachusetts, helped give the term *coercion* an objectionable connotation that burrowed itself deep in the American legal consciousness in the decade after Independence.<sup>11</sup>

In 1787, however, constitutional reformers began to embrace coercion — sometimes expressed in terms of the need for a “sanction” in the laws and in euphemisms such as “energy” and “efficiency” — not only as necessary for effective constitutional government in a federal system, but essential to *law itself*.<sup>12</sup> In tandem, they began to

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their representatives formed the sacred core of the consent-based vision. *Id.* at 22, 30.

<sup>9</sup> “[I]n free governments and equal representations,” wrote one South Carolina author in 1783, “the levy of taxes, or other State transactions, do not imply compulsion; for how can that be compulsion, which reason has suggested, his delegate advised, and his self permitted.” GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, at 375 (1969) (quoting [ANONYMOUS], *RUDIMENTS OF LAW AND GOVERNMENT, DEDUCED FROM THE LAW OF NATURE* 17 (Charleston, John M’Iver, 1783)).

<sup>10</sup> 3 DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 176 (Jonathan Elliot ed., 2d ed. 1891) (Patrick Henry) [hereinafter *ELLIOT’S DEBATES*] (emphasis added).

<sup>11</sup> See DAVID AMMERMAN, *IN THE COMMON CAUSE: AMERICAN RESPONSE TO THE COERCIVE ACTS OF 1774*, at 5 (1975) (discussing the Coercive Acts and their historical significance). Americans tellingly restyled these laws the “Intolerable Acts.”

<sup>12</sup> “A sanction is essential to the idea of law, as coercion is to that of Government,”

formulate a vision for constitutional reform that would relegate the principle of popular consent to a secondary concern, rendering it less complete and less direct.<sup>13</sup> The question that occupied the minds of delegates to the Federal Convention, in short, asked not how to create a government predicated on the consent of the governed, as the state constitution makers had, but rather how to establish a system of coercive federal power minimally consistent with what they called “republican principles.”<sup>14</sup>

What explains this new professed commitment to coercion in government among the Federalists in 1787? The felt need for coercion corresponded to an oft-expressed perception of “anarchy” under the Articles of Confederation. Increasingly linked to democracy itself on the eve of reform, the term anarchy referred to a society without effective law or government and thus vulnerable to demagoguery and invasion. Time and again the Federalists argued that the fundamental problem facing Americans came not from the threat of governmental tyranny but, as Benjamin Franklin put it, the “*defect of obedience* in the subjects.”<sup>15</sup> Anarchy threatened Americans at two levels: federal and

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James Madison wrote in his “Vices” essay. 2 THE WRITINGS OF JAMES MADISON 363 (Gaillard Hunt ed., 1901) [hereinafter MADISON WRITINGS]. For laws under the new government to function properly, “the right of coercion should be expressly declared.” *Id.* at 348. Washington similarly opined that “any system without the means of coercion in the Sovereign” would probably fail. Letter from George Washington to James Madison (Mar. 31, 1787), in 5 THE PAPERS OF GEORGE WASHINGTON, CONFEDERATION SERIES 115 (W.W. Abbot & Dorothy Twohig eds., 1995); see also THE FEDERALIST NO. 1, *supra* note 7, at 88 (Alexander Hamilton) (noting the Federalists’ “enlightened zeal for the energy and efficiency of government”). For statements during the ratification debates evidencing the Federalists’ shared commitment to increased coercive power in the federal government, see 2 ELLIOT’S DEBATES, *supra* note 10, at 166-67 (Samuel Stillman); 2 *id.* at 186-97 (Oliver Ellsworth); 3 *id.* at 106 (Francis Corbin); 4 *id.* at 299 (John Rutledge); Edmund Randolph, *Letter on the Federal Constitution* (Oct. 10, 1787), reprinted in 1 PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES: PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE 1787-1788, at 259, 261, 263, 266 (Paul Leicester Ford ed., 1888). Military historians have appreciated this animating objective among reformers in 1787. See, e.g., ROBERT W. COAKLEY, THE ROLE OF FEDERAL MILITARY FORCES IN DOMESTIC DISORDERS, 1789-1878, at 7 (1988) (“With few exceptions the convention delegates accepted the premise that the new national government must possess a coercive power that the Confederation had lacked and that it must be capable of exercising this power in its own right without having to rely on the state governments.”). Yet military scholars have seen only half the picture and, regrettably, constitutional historians have not picked up the slack. See *infra* Part II.B and II.C.

<sup>13</sup> Lutz, *supra* note 8, at 42.

<sup>14</sup> 2 MADISON WRITINGS, *supra* note 12, at 340.

<sup>15</sup> Letter from Benjamin Franklin to Charles Carroll, May 25, 1789, in 10 WORKS OF BENJAMIN FRANKLIN 392 (Jared Sparks ed., Boston, Hilliard, Gray & Co., 1840).

state. At the federal level, the Confederation Congress had proven itself incapable of enforcing its requisitions on resistant states and the lack of dependable revenue rendered it nugatory as a governing entity.<sup>16</sup> Difficulties experienced by American authorities in securing compliance with the internal obligations imposed by the Treaty of Peace added insult to injury.<sup>17</sup> These enforcement problems derived, in part, from the self-defeating structure of the Articles of Confederation, which for all intents and purposes deemed each of the states an independent sovereign and as such, as Publius would later observe, essentially ungovernable.<sup>18</sup> At the state level, popular political action undermined law and order by, among other things, generating legislation and movements against the courts that destroyed or threatened to destroy existing contract rights.<sup>19</sup> The unruly spirit of '86 that convulsed nearly all the states in the period leading up to the Federal Convention culminated in Shays's Rebellion in Massachusetts, an event often adduced in the speeches and disquisitions of leading Federalists during the Convention and ratification debates. Historians interested in the rebellion's constitutional significance, however, have too often failed to appreciate its intellectual origins and thus the true character of the threat it posed to reformers.<sup>20</sup>

In the spring of 1786, Bostonian artisan and political upstart Benjamin Austin, Jr. spearheaded a popular revolution against the English common law, courts, and professional lawyers unlike anything that had come before it on American shores, and the jurisprudential consequences of this oft-forgotten uprising extended far beyond Massachusetts' borders.<sup>21</sup> Cutting across class lines, Austin and his

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<sup>16</sup> See MAX FARRAND, *THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES* 3-7 (1913).

<sup>17</sup> See CHRISTOPHER R. DRAHOZAL, *THE SUPREMACY CLAUSE* 8-11 (2004).

<sup>18</sup> See *infra* text accompanying notes 49-50.

<sup>19</sup> See WOOD, *supra* note 9, at 393-425.

<sup>20</sup> One key work offers class-based explanations for the Bay State uprising. DAVID P. SZATMARY, *SHAYS' REBELLION: THE MAKING OF AN AGRARIAN INSURRECTION* (1980). A more recent monograph shows a broader cross-section of the community participating, and highlights tax burdens and perceived fiscal corruption in the state government as motivating factors. See LEONARD L. RICHARDS, *SHAYS'S REBELLION: THE AMERICAN REVOLUTION'S FINAL BATTLE* 4-22 (2002).

<sup>21</sup> See generally HONESTUS [BENJAMIN AUSTIN], *OBSERVATIONS ON THE PERNICIOUS PRACTICE OF THE LAW: AS PUBLISHED OCCASIONALLY IN THE INDEPENDENT CHRONICLE* (1786) (collecting Austin's anti-lawyer essays published originally from March to June 1786 in Boston's *Independent Chronicle*); see also Aaron T. Knapp, *Law's Revolution: Benjamin Austin and the Spirit of '86*, 25 *YALE J.L. & HUMAN.* 271, 275-76 (2013) [hereinafter *Law's Revolution*] (analyzing the cultural and historical significance of Austin's writings).

many adherents understood professional lawyers in terms similar to the way post-Revolutionary American Whigs understood the Society of the Cincinnati: as an Anglicized anti-republican aristocracy inimical to the egalitarian spirit of '76.<sup>22</sup> The Austinites feared not only the common law's mysterious complexities and the lawyers' monopoly on its meaning but, most significantly, the *discretion* required to expound and practice it. Through the exercise of legal discretion, Austin argued, professional lawyers and judges would establish an *imperium in imperio*, unaccountable to the people and yet capable of acting against them under color of law.<sup>23</sup> The severity of the problem, from Austin's point of view, necessitated a radical remedy: annihilate the lawyers, abolish the common law, and close down the courts.<sup>24</sup>

Unsurprisingly, Austin and his followers caused Bay State lawyers great consternation. Yet according to the bar's established figures and new entries alike, the Austinites' efforts to abolish the legal profession evinced an underlying hostility not just to the legal profession or to the common law. From the lawyers' perspective, the Austinites had waged a revolution against "law itself."<sup>25</sup> Unanimously the lawyers felt compelled to rebut the Austinites and the anarchy their strident antilegalism augured. Writing under the pseudonym "Zenas," future Massachusetts governor, James Sullivan, suggested that the discourse of popular consent arising out of the American Revolution had forged the jurisprudential conditions under which antilegal anarchists like Austin could emerge. Yet given man's "proneness to ambition and avarice," Sullivan declared in one of the first articulations of the discursive shift here under examination, "coercive power must be lodged somewhere to compel justice."<sup>26</sup> In opposing the Austinites, the lawyers acquired a sense of professional solidarity they had never before possessed.<sup>27</sup> Subsequently every Bay State lawyer present at the

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<sup>22</sup> See Knapp, *Law's Revolution*, *supra* note 21, at 296, 300-01.

<sup>23</sup> See *id.* at 301.

<sup>24</sup> *Id.* at 280-81, 285, 299.

<sup>25</sup> Letter from Caleb Strong to Nathan Dane (June 24, 1786), in Clifford K. Shipton, 16 *SIBLEY'S HARVARD GRADUATES* 96, 96 (1972); see also Letter from Christopher Gore to Rufus King (June 25, 1786), in 1 *LIFE AND CORRESPONDENCE OF RUFUS KING* 138, 138 (Charles R. King ed., New York, G.P. Putnam's Sons, 1894) (emphasis added) ("[A]cts against lawyers, or more truly against law, now occupy the time of the H. of Reps.").

<sup>26</sup> Zenas [James Sullivan], *INDEP. CHRON.* (Boston), Apr. 27, 1786, at 1, cols. 1, 2.

<sup>27</sup> See Charles Robert McKirdy, *Lawyers in Crisis: The Massachusetts Legal Profession, 1760-1790*, at 182 (June 1969) (unpublished Ph.D dissertation, Northwestern University) (on file with author) (observing that the Austinite and Shaysite controversies "strengthened the solidarity of the legal profession").

Massachusetts ratifying convention voted for ratification.<sup>28</sup> The nascent professional bars in other states also mobilized behind the new Constitution and the Antifederalists immediately detected the vocational dimension of the movement for constitutional reform.<sup>29</sup>

## II. FROM THE COERCION OF ARMS TO THE COERCION OF LAW: POSITIONAL CHANGE IN 1787

Shays's Rebellion broke out but weeks after Austin concluded his essay series in Boston's *Independent Chronicle*, and in the rash of extralegal county conventions, town meetings, and courthouse blockades that ensued in Western Massachusetts, the rebels seem to have made Austin their muse.<sup>30</sup> No event in the period leading up to the Federal Convention dramatized the need for increased coercive power in government more than the uprisings in Massachusetts.<sup>31</sup> Unmistakably, a new consensus emerged around the necessity of investing government with adequate means of self-defense against internal resistance. Yet if the new terms of debate among American lawyers in 1787 assumed the *need* for coercive power in government for these purposes, critical questions still remained about what type of coercion to employ and how. The legal counterrevolution's second phase involved an evolving set of substantive positions within the new discourse of coercion that responded to these questions.

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<sup>28</sup> *Id.* at 187.

<sup>29</sup> See *Beware of Lawyers*, DAILY ADVERTISER, Mar. 4, 1789, at 2 ("Of the men who framed the monarchial, tyrannical, diabolical system of slavery, the *New Constitution*, one half were lawyers . . . to whose wicked arts we may chiefly attribute the adoption of the abominable system . . ."). For other examples of Antifederalist commentary suggesting not only hostility toward lawyers as a class but an awareness of the legal profession's vocational interest in the new frame of government, see 3 THE COMPLETE ANTI-FEDERALIST 205 (Herbert Storing ed., 1981) (reproducing statements of "Aristocrotis" in Pennsylvania); 6 *id.* at 85 (reproducing statements of "A Countryman" in New York). For an insightful essay that highlights the contrasts between the so-called "lawyer's constitution" and the "people's constitution" in and after 1787, see Saul Cornell, *The People's Constitution vs. the Lawyer's Constitution: Popular Constitutionalism and the Original Debate Over Originalism*, 23 YALE J.L. & HUMAN. 295, 304 (2011).

<sup>30</sup> Braintree town residents issued their widely publicized petition to "crush or at least put a proper check or restraint" on lawyers in the middle of the rebellion, as did at least twelve other towns and three country conventions. See 2 CHARLES F. ADAMS, THREE EPISODES OF MASSACHUSETTS HISTORY 897 (1892).

<sup>31</sup> See RICHARD H. KOHN, EAGLE AND SWORD: THE FEDERALISTS AND THE CREATION OF THE MILITARY ESTABLISHMENT IN AMERICA, 1783–1802, at 74 (1975).



A. “*The Coercion of Arms*”

Both of the major plans introduced in the Federal Convention’s opening weeks contained provisions expressly authorizing the new national government to use military force against recalcitrant states and individuals.<sup>32</sup> Early debates on the issue of coercion revolved around the propriety of including an express force clause in the Constitution. The Convention’s early phases saw the Virginia Plan’s drafter, 36-year-old James Madison, rising up to oppose the selfsame force clause that he had authored, favoring instead an unqualified congressional veto over state legislation, which Madison conceptually opposed to coercion.<sup>33</sup>

The rhetoric against coercion employed by Madison in the early debates in Philadelphia has served as a source of confusion in recent scholarship.<sup>34</sup> To be clear, this rhetoric specifically targeted military coercion executed on the states as political entities. Leading delegates rightly equated this with civil war and, with Madison, the lion’s share came to disfavor it. Yet if the Federalists ultimately decided against including an express force clause, they had no intention of prohibiting military coercion under the Constitution. To the contrary, by summer’s end they had approved a plan that would invest the United States government with the power to keep peacetime standing armies unlimited in size and to commandeer states militias for purposes of quelling domestic insurrections and otherwise executing the laws of union, with no prohibition on using military force against insubordinate states.<sup>35</sup>

B. “*The Coercion of Law*”

The broad provisions for national military power that became part of the Constitution with little controversy in Philadelphia confirmed reformers’ core commitment to “the coercive principle” in 1787.<sup>36</sup> Yet even as the credible threat of overawing federal military force remained essential to the constitutional structure of coercion, a

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<sup>32</sup> See 1 CONVENTION RECORDS, *supra* note 7, at 21, 245; see also 3 *id.* at 116 (reproducing military provisions of the plan submitted by Charles Pinckney to the Federal Convention on May 28, 1787).

<sup>33</sup> See 1 *id.* at 54, 164-65.

<sup>34</sup> See, e.g., Bradford R. Clark, *The Eleventh Amendment and the Nature of the Union*, 123 HARV. L. REV. 1817, 1844-45, 1853, 1871 (2010) (citing Madison’s comments and arguing that reformers came to oppose both legislative power and coercion over the states).

<sup>35</sup> See generally KOHN, *supra* note 31, at 73-88.

<sup>36</sup> 2 ELLIOT’S DEBATES, *supra* note 10, at 197 (Oliver Ellsworth).

prudential preference against employing such force in internal affairs did persist. This preference, however, did not send the delegates searching for consent-based enforcement alternatives. Instead, the delegates began to reconceptualize coercion and herein lay the essence of the legal counterrevolution's second and defining phase. A distinction that Hamilton introduced during his June 18 convention speech marked a significant moment in the underlying conceptual shift. There, having deemed coercion generally one of the "great & essential principles necessary for the support of Government," Hamilton distinguished between the "coercion of laws" and the "coercion of arms."<sup>37</sup> Under the Articles, he remarked, the "[f]irst does *not exist*" while "the last is *useless*."<sup>38</sup> Although Hamilton's speech otherwise failed to attract many overt endorsements at the Federal Convention, his distinction between the coercion of law and the coercion of arms would prove influential and, in my estimation, paradigmatic.<sup>39</sup>

It bears emphasis that the conceptual association of law with coercion first articulated by Hamilton and embraced by many other reformers signaled a distinct change in the post-Revolutionary legal consciousness. While in theory the older discourse of popular consent remained capable of legitimating some coercive power in government, in America it had produced a sharp conceptual opposition between government by consent and government by coercion that made the former the touchstone for republican legitimacy. For Americans in the decade after Independence, the less force the law exerted, the more legitimacy it had. Laws properly consented to rendered force unnecessary and irrelevant. Precisely because the *language of the law* held such singular appeal for post-Revolutionary Americans, linking coercion under the Constitution to law itself also served a legitimating purpose.<sup>40</sup> The Federalist lawyers extolled the legal process as the most

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<sup>37</sup> 1 CONVENTION RECORDS, *supra* note 7, at 284. Madison's notes of Hamilton's speech spell *coercion* with a "t" (*i.e.*, "coertion"), an alternative eighteenth-century spelling that I have corrected here. *See also* 1 *id.* at 296 (noting Hamilton's distinction between "the *coercion* of law and the coercion of arms") (Robert Yates' notes).

<sup>38</sup> 1 THE WORKS OF ALEXANDER HAMILTON 372 (Henry Cabot Lodge ed., 1904) (emphasis in original); *see also* THE FEDERALIST NO. 27, *supra* note 7, at 203 (Alexander Hamilton) (stating that in a mere "league" of sovereign states — "a Confederacy" — "there can be no sanction for the laws but [military] force").

<sup>39</sup> Thereafter a number of other Federalists employed it. *See, e.g.*, 2 ELLIOT'S DEBATES, *supra* note 10, at 197 (Oliver Ellsworth); 4 *id.* at 155-56 (William R. Davie of North Carolina).

<sup>40</sup> *See, e.g.*, STEVEN WILF, LAW'S IMAGINED REPUBLIC: POPULAR POLITICS AND CRIMINAL JUSTICE IN REVOLUTIONARY AMERICA 1 (2010) (arguing that "[p]opular law talk" lay at

“mild and salutary” alternative to military force, and they assured the public that, as the “weakest” branch of government, the federal government’s special department of law could exercise neither “will” nor “force” but merely “judgment.”<sup>41</sup> The language they used, however, establishes that they meant the law to exert a coercion all its own.

But how? Understanding the meaning reformers attached to the coercion of law in historical context requires that we look beyond contemporary scholarly controversies surrounding the question of coercion in 1787. The modern Supreme Court’s “anti-commandeering” jurisprudence has too narrowly confined debates on founding-era attitudes toward coercion to whether the framers intended to empower *Congress* to coerce the states.<sup>42</sup> From a historical perspective, the question misfires for, according to leading reformers in 1787, *Congress itself* had no coercive power whatsoever.<sup>43</sup> Coercion by non-militaristic means would not take place in the realm of legislation but in the *administration* of government, the importance of which leading Federalists emphasized time and again in distinguishing between the Constitution and the Articles of Confederation.<sup>44</sup> To be sure, in what Hamilton called “the COERCION of the magistracy” the Article II executive department would play a considerable role in the employment of non-militaristic coercion to carry the laws, particularly taxation, into effect under the new constitutional framework.<sup>45</sup> With respect to the coercion of law in particular, however, an independent federal judiciary would ultimately bring it, in the words of the

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“the heart of revolutionary law-making and at the heart of the American Revolution itself”).

<sup>41</sup> THE FEDERALIST NO. 20, *supra* note 7, at 172 (James Madison); THE FEDERALIST NO. 78, *supra* note 7, at 437 (Alexander Hamilton).

<sup>42</sup> For the modern Court’s anti-commandeering jurisprudence, see *New York v. United States*, 505 U.S. 144 (1992), *Printz v. United States*, 521 U.S. 898 (1997), and *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. \_\_\_ (2012). For an example of the voluminous scholarship in this area, see Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001 (1995).

<sup>43</sup> Madison likened Congress to “a mere trunk of a body without arms or legs to act or move.” 1 CONVENTION RECORDS, *supra* note 7, at 124. *Cf.* THE FEDERALIST NO. 48, *supra* note 7, at 309 (James Madison) (suggesting need for efficacious executive and judicial departments for otherwise the legislature would “everywhere extend[] the sphere of its activity, and draw[] all power into its impetuous vortex”).

<sup>44</sup> See, e.g., THE FEDERALIST NO. 67-77, *supra* note 7 (Alexander Hamilton) (discussing the necessity of effective administration and the Article II executive’s role therein).

<sup>45</sup> THE FEDERALIST NO. 15, *supra* note 7, at 149 (Alexander Hamilton).

Antifederalist Brutus, “home to the feelings of the people.”<sup>46</sup> Yet before it could do so, two antecedent conceptual shifts touching the nature of law itself had to occur.

First, *the separation of law from will*. The revolutionary discourse of popular consent equated ruler with ruled, law with the popular will, and could tolerate no other check on legislatures but the people themselves. In the 1780s, popular legislation perceived by elites as unjust and infirm, and changing views regarding human nature, gave rise to a new legal ideal — disinterested, fixed, disembodied, and general. This new ideal of law found expression in Madison’s theory of representative filtration (a departure from the discourse of consent’s “mirror” theory), as well as in the idea of fundamental law, each in its own way capable of displacing the people’s collective wishes.<sup>47</sup>

Second, *the embrace of national supremacy as a legal norm*. To effectively govern individuals and states through the coercion of law, the federal government would have to possess legal supremacy, expressly declared, over all competing legal norms and systems in the union. Indeed, “[a] LAW, by the very meaning of the term,” wrote Publius, “includes supremacy.”<sup>48</sup> As a substantive matter, national legal supremacy would derive from four primary sources: the Constitution itself, federal legislation, treaties, and some measure of judge-made federal common law. In these areas, legal supremacy required that political sovereignty vest unequivocally in the federal government. Supreme law, in other words, flowed *from* a sovereign government *to* subjects. It could not workably apply *to* sovereigns. Why? “[T]here is, in the nature of sovereign power,” Hamilton wrote, “an impatience of control” that “looks with an evil eye upon all external attempts to restrain or direct its operations.”<sup>49</sup> “[A] sovereignty over sovereigns” therefore subverted “the order and ends of civil polity.”<sup>50</sup>

If true, Hamilton’s observation created a puzzle for the Federalists once it became clear that the states would retain some sovereign character in the new system. Reformers purported to resolve this puzzle by constitutionally dividing sovereignty along substantive and

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<sup>46</sup> 2 THE COMPLETE ANTI-FEDERALIST 418 (Herbert Storing ed., 1981).

<sup>47</sup> For Madison’s theory of representative filtration, see THE FEDERALIST NO. 10, *supra* note 7 (James Madison). On the emergence of a distinction between fundamental law and ordinary law, see WOOD, *supra* note 9, at 306-10; Jack N. Rakove, *The Original Justifications for Judicial Independence*, 95 GEO. L.J. 1061, 1067 (2007).

<sup>48</sup> THE FEDERALIST NO. 33, *supra* note 7, at 225 (Alexander Hamilton) (emphasis added).

<sup>49</sup> THE FEDERALIST NO. 15, *supra* note 7, at 150 (Alexander Hamilton).

<sup>50</sup> THE FEDERALIST NO. 20, *supra* note 7, at 172 (James Madison).

jurisdictional lines, thereby rendering legally intelligible the old solecism of *imperium in imperio*.<sup>51</sup> Yet within its sphere, the federal government would remain supreme and unlimited, requiring the states and the people respectively to surrender that portion of their native sovereignty corresponding to delegated national power.

### C. “Coercion Through the Judiciary”

But how would national legal supremacy within its designated sphere get enforced? The answer goes to the very heart of the coercion of law under the Constitution, for as Publius emphasized, the essence of law lay not only in its separation from popular will, and not only in its constitutional supremacy over competing norms: “*It is essential to the idea of a law that it be attended with a sanction.*”<sup>52</sup> By all appearances, without expressly saying so in the Constitution itself, and even though James Madison himself expressed uneasiness with the result, the delegates in Philadelphia, having shied away from the military option and abandoned the legislative veto, handed federal supremacy’s ultimate enforcement to an independent federal judiciary.<sup>53</sup>

Indeed, leading Federalists equated the coercion of law under the Constitution with “coercion through the judiciary.”<sup>54</sup> At the institutional level, by “coercion through the judiciary” the Federalists meant not only court proceedings and processes, but also those enforcement agents historically under the control of courts, including sheriffs, deputies, bailiffs, and jailors — all things anathema to the Austinites and many Antifederalists, but deemed by leading Federalists “the life and fruit of the law” and, thereafter, quietly imported into the federal legal system in the Judiciary Act of 1789.<sup>55</sup> At the same time,

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<sup>51</sup> See ALISON L. LACROIX, *THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM* 165-66 (2010) (arguing that to maintain the appropriate balance between national and state levels of government, reformers in 1787 “envisioned an independent, national judicial power” that “contained both substantive and procedural, jurisprudential and jurisdictional, components”). LaCroix further contends that “the goal of separating the levels of government—with the dual effects of undoing past blurring and asserting national power—increasingly informed the Federalists’ federalizing policy after 1789” such that, by 1801, “jurisdiction had replaced sovereignty as the lodestar of American constitutional debate.” *Id.* at 209, 203.

<sup>52</sup> THE FEDERALIST NO. 15, *supra* note 7, at 149 (Alexander Hamilton) (emphasis added).

<sup>53</sup> See Jack N. Rakove, *The Origins of Judicial Review: A Plea for New Contexts*, 49 STAN. L. REV. 1031, 1045, 1047 (1997) [hereinafter *Origins of Judicial Review*].

<sup>54</sup> 4 ELLIOT’S DEBATES, *supra* note 10, at 155-56 (William R. Davie).

<sup>55</sup> 2 THE WORKS OF JAMES WILSON 552 (Robert McCloskey ed., 1967). “The great

the Federalists' conception of judicial coercion seems to have contemplated narrowing the jury's role in legal proceedings and enlarging the role of professional judges and lawyers.<sup>56</sup> The state courts would have a substantial part to play in implementing the judicial sanction under the Constitution. The Supremacy Clause obligated state judges to uphold the federal Constitution, treaties, and federal legislation against repugnant state exertions and reformers otherwise intended the state courts to continue overseeing much of the country's litigation in the first instance if only to minimize costs. Yet the Constitution also authorized the creation of a separate multi-tiered federal judiciary staffed with its own independent judges that would permit litigants, including the United States itself, to bypass the state governments in matters enumerated in Article III.<sup>57</sup> The new government could never rise to the task before it, Madison declared at the Federal Convention, without "[a]n effective judiciary establishment commensurate to the legislative authority," including "inferior tribunals . . . dispersed throughout the Republic."<sup>58</sup> Although as a concession to cost-sensitive skeptics, Article III, rather than requiring the establishment of inferior courts as per the Virginia Plan, left it to Congress to decide, most reformers could scarcely fathom the possibility of giving existing state courts exclusive original jurisdiction in cases raising important federal questions, particularly those

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men are going to get all we have," declared one leading Shaysite, "and I think it is time for us to rise and put a stop to it, and have no more courts, nor sheriffs, nor collectors, nor lawyers . . ." *The Spirit of the Times*, MASS. CENTINEL, Oct. 25, 1786, at 2. For Patrick Henry's diatribes against sheriffs during the ratification debates, see 3 ELLIOT'S DEBATES, *supra* note 10, at 57-58, 168. By creating federal marshals and deputies, and placing them under the administrative authority of the federal courts, the Judiciary Act of 1789 imported much of the English enforcement infrastructure into the federal legal system. Judiciary Act of 1789, ch. 20, § 27, 1 Stat. 87. Congress passed legislation in 1792 to clarify that federal marshals would have the same power in executing the laws of the United States that state sheriffs and their deputies had in executing state law — a reference, in part, to the sheriff's power to call on the *posse comitatus* for assistance in executing his duties. See Judiciary Act of 1793, ch. 29, § 9, 1 Stat. 265.

<sup>56</sup> See generally THE FEDERALIST NOS. 81, 82, 83, *supra* note 7 (Alexander Hamilton). The Judiciary Act of 1789 confined the jury's role in federal courts to trying facts. Judiciary Act of 1789, ch. 20, §§ 9, 12, 1 Stat. 73, 77, 80. It also gave federal judges the power to grant new trials. *Id.* § 17, 1 Stat. at 83.

<sup>57</sup> See U.S. CONST. art. III. Although the Judiciary Act of 1789 did not achieve this result with respect to federal question jurisdiction (*see infra* note 61), no sooner had the Act passed than Federalists began efforts to amend it to minimize concurrent jurisdiction in the state and federal courts and to create general federal question jurisdiction in the circuit courts, both of which the Judiciary Act of 1801 briefly accomplished. See LACROIX, *supra* note 51, at 194-95, 198-99, 204-13.

<sup>58</sup> 1 CONVENTION RECORDS, *supra* note 7, at 124.

involving offenses against the United States itself and those concerning the interests of more than one state or a foreigner.<sup>59</sup> No one ever disputed, furthermore, that the Supreme Court would exercise final appellate jurisdiction over state courts in matters of national concern.<sup>60</sup> The Judiciary Act of 1789, which by no means legislated to the limits of the Constitution, bore out much of this original understanding.<sup>61</sup> Yet irrespective of what Congress did or did not do in 1789, the Constitution itself required that *some* federal court have the opportunity to make final determinations in enumerated matters, including federal question cases, independent of the states.<sup>62</sup>

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<sup>59</sup> The Virginia Plan would have required Congress to establish inferior courts. 1 CONVENTION RECORDS, *supra* note 7, at 21. For the brief but important exchanges on this question during the Federal Convention, see 1 *id.* at 124-25; see also 2 *id.* at 46.

<sup>60</sup> See, e.g., THE FEDERALIST NO. 82, *supra* note 7, at 460 (Alexander Hamilton) (arguing that in cases of concurrent jurisdiction, an appeal would “naturally” and “certainly” lie from the state courts to the United States Supreme Court, for otherwise “the judicial authority of the Union may be eluded at the pleasure of every plaintiff or prosecutor” which would “essentially embarrass” the federal government).

<sup>61</sup> Section 25 authorized the Supreme Court to exercise final appellate jurisdiction over state high courts and to issue mandamus orders to state courts in designated cases involving conflicts between federal and state laws. See Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 85; see also *id.* §§ 9, 11, 1 Stat. 76-79 (creating inferior district and circuit courts). The Act granted exclusive original jurisdiction to district courts in admiralty and maritime cases, cases against consuls and vice-consuls, and over lesser crimes and offenses “cognizable under the authority of the United States”; to the circuit courts in all other federal crimes; and to the Supreme Court in suits between states, between a state and foreign states or citizens, and against public ministers. *Id.* §§ 9, 11, 13, 1 Stat. 76, 78-80. Subject to applicable amount-in-controversy thresholds in civil cases brought by the United States and diversity cases, the Act further granted concurrent jurisdiction to the district courts in civil cases commenced by the United States and those in which aliens sued under the law of nations or a treaty; to the circuit courts in civil cases commenced by the United States, diversity cases, and those naming aliens; and to the Supreme Court in cases in which citizens, either in-state or out-of-state, sued a state. See *id.* §§ 9, 11, 13, 1 Stat. 77, 78, 83. Finally, it created a small army of government attorneys, each “learned in the law,” to prosecute claims on behalf of the United States in the federal courts. *Id.* § 35, 1 Stat. 92-93. The Act did not provide for general federal question jurisdiction in the inferior courts, even as Article III required Congress to vest it in *some* federal court. See Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 215 (1985).

<sup>62</sup> See U.S. CONST. art. II, § 1, § 2 cl. 2; see also THE FEDERALIST NO. 82, *supra* note 7, at 460 (Alexander Hamilton) (“The evident aim of the plan of the convention is, that all the causes of the specified classes shall, for weighty public reasons, receive their original or final determination in the courts of the Union.”). See generally Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741, 750 (1984) (analyzing historical evidence in support of Hamilton’s claim).

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Judicial coercion had special application to individuals, and advocacy in favor of it operated in tandem with the Federalists' efforts to expand the federal government's coercive power beyond the states to the individuals comprising the union.<sup>63</sup> Indeed, evidence suggests that the Federalists intended *legislative power* under the Constitution to apply primarily, if not exclusively, to individuals.<sup>64</sup> Contrary to suggestions in recent scholarship, however, no Federalist meant to prohibit application of judicial coercion to the states.<sup>65</sup> To the contrary, after the defeat of the legislative veto in Philadelphia, controlling the states via judicial coercion formed one of the legal counterrevolution's primary objectives. Reformers sought to achieve it in three ways.

### 1. Judicial Power over State Courts

By its text, the Supremacy Clause bound all state courts to the Constitution, treaties, and duly enacted federal legislation notwithstanding contrary state laws or constitutions.<sup>66</sup> Article I also vested Congress with the power to reconstitute extant state courts as inferior federal tribunals by giving them jurisdiction to adjudicate federal claims.<sup>67</sup> Questions regarding state judges' independence, however, coupled with the specter of inconsistent judgments and interpretations, meant that reformers remained unwilling to rely on the state courts alone to enforce national supremacy. The Supremacy Clause's logic required a sanction on the state judges themselves. Responsibility for administering this sanction fell to the Article III judiciary. Article III mandated that a single Supreme Court sit atop a judicial hierarchy that, in litigation raising federal questions, made all other courts in the union, including state courts, *inferior* to the

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<sup>63</sup> Extending the federal government's reach to individuals had particular importance in two areas: taxation and federal crimes. See U.S. CONST. art. I, § 8, cls. 1, 6, 10, 17; *id.* art. III, § 3, cls. 1, 2.

<sup>64</sup> See Saikrishna Bangalore Prakash, *Field Office Federalism*, 79 VA. L. REV. 1957, 1980-81 (1993).

<sup>65</sup> See, e.g., Clark, *supra* note 34, at 1918 (arguing that "the Founders[]" opposed application of federal coercion to the states as contrary to the "nature of the union"). But see Lawrence G. Sager, *Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 51 (1981) (contending that judicial "superintendence" over the states won the day in Philadelphia).

<sup>66</sup> See U.S. CONST. art. VI, cl. 2.

<sup>67</sup> James E. Pfander, *Federal Supremacy, State Court Inferiority, and the Constitutionality of Jurisdiction-Stripping Legislation*, 101 NW. U. L. REV. 191, 198 (2007).



national high court and thereby subject to its supervisory authority, including discretionary authority to issue the prerogative writs with which King's Bench had traditionally enacted its supremacy over judicial inferiors in the English legal system.<sup>68</sup> The Court's broad appellate jurisdiction under Article III provided it with additional means by which to superintend the state courts under the Supremacy Clause. Namely, in cases wherein state high courts either upheld state laws against federal challenges or invalidated federal laws or treaties, the Court would possess authority to issue binding reversals on appeal by writ of error and, in appropriate circumstances, special mandates compelling state courts to award prescribed execution.<sup>69</sup>

Scholars disagree as to whether the founding generation embraced judicial supremacy — the idea that the Supreme Court's interpretation of the Constitution binds parties outside the case occasioning the interpretation.<sup>70</sup> In fact, whatever the controversies that arose in the

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<sup>68</sup> The Constitution's structural requirements of supremacy and state court inferiority limited Congress's Article III authority to make exceptions and regulations concerning the Supreme Court's appellate jurisdiction. Pfander, *supra* note 67, at 199-200; *see also id.* at 213-14 (discussing prerogative writs). *See generally* JAMES E. PFANDER, ONE SUPREME COURT: SUPREMACY, INFERIORITY, AND THE JUDICIAL DEPARTMENT OF THE UNITED STATES (2009).

<sup>69</sup> The Judiciary Act of 1789 memorialized this. *See* § 25, 1 Stat. at 85 (authorizing the Supreme Court to reverse state high courts and to issue mandamus orders to state courts in designated cases). During neither the Federal Convention nor the debates over the Judiciary Act did any one ever dispute that the Supreme Court would exercise final appellate jurisdiction over the state courts in cases where state law threatened federal interests. *See* Sager, *supra* note 65, at 51 (observing that "as the delegates to the Constitutional Convention made their peace on issue after issue, the Supreme Court's superintendence of state compliance with national law emerged as the fulcrum of the national government" and that, while debates occurred over whether the Supreme Court's appellate oversight would constitute a sufficient restraint on the states, the necessity of such oversight remained undisputed). Yet the Constitution's failure to expressly provide for the Supreme Court's appellate jurisdiction over state courts did open the way for alternative interpretations in the coming decades. *See* Alison LaCroix, *On Being "Bound Thereby,"* 27 CONST. COMMENT. 507, 507-08 (2011) (arguing that a textual gap between Article III and the Supremacy Clause has led to conflicting interpretations regarding the scope of the Supreme Court's appellate jurisdiction). For Hamilton's argument that appeals should lie from state courts to inferior federal courts, *see* THE FEDERALIST NO. 82, *supra* note 7, at 460-61 (Alexander Hamilton).

<sup>70</sup> The Supreme Court's holding in *Cooper v. Aaron* purported to confirm a broad view of this "basic constitutional proposition[]" and "settled doctrine." 358 U.S. 1, 17 (1958). Attorney General Edwin Meese's criticism of this holding in 1986 inaugurated the scholarly debate on this question. *See, e.g., Symposium: Perspectives on the Authoritativeness of Supreme Court Decisions*, 61 TUL. L. REV. 977 (1987) (publishing Attorney General Meese's speech and the opinions of legal scholars on the issue). Some scholars have laid history aside in addressing the merits of judicial supremacy.

1790s on this score, the record reveals ample evidence that reformers in 1787–1788 contemplated some form of judicial supremacy.<sup>71</sup> No real dispute existed at that time as to the Supreme Court’s interpretive supremacy over the constitutional validity of *state laws* in cases where those laws threatened federal interests.<sup>72</sup> Certainly Antifederalists such as Brutus felt sure that the Supreme Court would possess interpretive supremacy under the Constitution.<sup>73</sup> Perhaps no better evidence exists

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*See, e.g.,* Frederick Schauer & Larry Alexander, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1369 (1997) (“Our analysis is neither empirical nor historical”). Others have based their historical claims chiefly on the Constitution’s text. John Harrison, for example, argues that the framers must not have meant to invest the Supreme Court with interpretive supremacy because the text of the Constitution itself, according to Harrison, reveals “no traces” of such a principle. John Harrison, *Judicial Interpretive Finality and the Constitutional Text*, 23 CONST. COMMENT. 33, 34 (2006). Larry Kramer, on the other hand, notes the existence of an alternative theory of “departmentalism” in the founding era, but also observes that the late 1780s saw “the seeds of a more ambitious theory of judicial power . . . that would before long blossom into the modern idea of judicial supremacy.” LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 106, 128 (2004). Kramer places special emphasis on nascent Republicans’ rejection of this idea and their successes in ultimately sending it “into hibernation.” *Id.* at 143-44.

<sup>71</sup> Federalists, for example, often referred to the judges’ power to “declare” the laws they deemed unconstitutional “null & void.” *See, e.g.,* James Madison, Journal of James Madison (Aug. 28, 1787), in 2 CONVENTION RECORDS, *supra* note 7, at 440. Their constitutional logic committed them to the proposition that “one court paramount to the rest” had to exist, “possessing a general superintendence and authorized to settle and declare in the last resort a uniform rule of justice.” THE FEDERALIST NO. 22, *supra* note 7, at 182 (Alexander Hamilton). “Some such tribunal,” wrote Madison, “is clearly essential to prevent an appeal to the sword, and a dissolution of the compact . . . .” THE FEDERALIST NO. 39, *supra* note 7, at 258 (James Madison); *see also* THE FEDERALIST NO. 82, *supra* note 7, at 460 (Alexander Hamilton) (observing that, in matters of national concern, an appeal from the state courts would “naturally lie to that tribunal [the Supreme Court] which is destined to unite and assimilate the principles of national justice and the rules of national decisions”).

<sup>72</sup> In this respect, the Supreme Court had no rival within the federal government. As invoked by its exponents in and after 1788, the alternative theory of “departmentalism,” which asserted that each of the departments of government had equal authority to interpret the Constitution in the ordinary course of business — “the legislature by enacting the laws, the executive by vetoing them, the judiciary by reviewing them” — applied only to *federal* legislation. KRAMER, *supra* note 70, at 109. Few, if any, suggested that either the President or Congress (let alone the state governments) had an authority equal or superior to the Supreme Court’s with respect to determining the constitutionality of state laws and decrees under the Supremacy Clause. *See generally id.* at 106-10, 114, 124 (discussing the evolution of the theory that all three branches possess equal interpretive authority).

<sup>73</sup> *See* Essays of Brutus, in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 46, at 420 (“The opinions of the supreme court, whatever they may be, will have the force of law; because there is no power provided in the constitution that can correct their errors, or control their adjudications.”).

of early understandings regarding judicial supremacy than the response to the Supreme Court's decision in *Chisholm v. Georgia* in 1793, which Congress, the states, and their constituents opposed not by attempting to overrule the Court's interpretation, but by amending the Constitution itself. For present purposes, however, we need not go so far, for with regard to federal questions the logic of the Supremacy Clause, together with the structural requirements of supremacy and state court inferiority under Article III and Article I respectively, all but established the Supreme Court's interpretive supremacy, if not over Congress or the President, then over *state courts*, and this alone would bring the coercion of law to bear on state governments to a degree never before seen in 1787.

## 2. Article III Jurisdiction over the States

Article III granted the federal courts jurisdiction over the states in suits between states, between a state and a foreign nation or citizen, and in state-citizen diversity cases — all matters that, based on the status of the parties alone, triggered national concerns. Furthermore, presumably the United States itself could sue states in federal court and nothing in Article III immunized the states from suits by individuals in federal question and admiralty cases.<sup>74</sup> Article III also contained an express grant of original jurisdiction to the Supreme Court “[i]n *all cases* . . . in which a State shall be Party.”<sup>75</sup>

Some controversy existed during the ratification debates over whether state-citizen diversity jurisdiction under Article III would permit individuals to hail states into federal court in ordinary contract cases.<sup>76</sup> Edmund Randolph, who served on the committee that drafted

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<sup>74</sup> See U.S. CONST. art. III, § 2, cl. 1.

<sup>75</sup> U.S. CONST. art. III, § 2, cl. 2 (emphasis added).

<sup>76</sup> Protective of state sovereignty, Antifederalists during the ratification debates objected to Article III's state-citizen diversity clause on the ground that it would permit individuals to subject the states to judicial coercion in ordinary contract cases. Eager to get the Constitution ratified, some Federalists assuaged their opponents by suggesting that traditional doctrines of sovereign immunity would apply to bar contract claims notwithstanding Article III. See, e.g., 3 ELLIOT'S DEBATES, *supra* note 10, at 533 (recording Madison's argument that “[i]t is not in the power of individuals to call any state into court”); *id.* at 555 (stating Marshall's argument that “[i]t is not rational to suppose that the sovereign power should be dragged before a court”); THE FEDERALIST NO. 81, *supra* note 7, at 455 (Alexander Hamilton) (arguing that non-consenting states should not have to appear in suits by individuals for recovery of debt because of the “nature of sovereignty”). Elsewhere, however, Madison seemed to assume the federal courts would exercise jurisdiction over the states. See 5 MADISON WRITINGS, *supra* note 12, at 27 (referring to appeals “ag[ainst] a State” by individuals

Article III's jurisdictional provisions, confirmed the propriety of broad federal jurisdiction over the states in these matters.<sup>77</sup> Article III's text, granting jurisdiction in cases "between a State and Citizens of another State," squares with Randolph's understanding.<sup>78</sup> Significantly, the period from 1787 to 1789 saw numerous attempts by the Antifederalists to introduce an express jurisdictional prohibition on state-citizen diversity cases brought by individuals, all of which failed.<sup>79</sup> A common objection to federal jurisdiction over such cases asserted that enforcing a judicial decree against a state would require military action. Yet no one apparently voiced this concern with respect to jurisdiction over cases between states. In the early 1790s, moreover, both Maryland and New York complied with federal subpoenas issued in suits brought by out-of-state individuals.<sup>80</sup> In the New York case, a jury ultimately rendered a verdict for the plaintiff at trial and the state satisfied the judgment without constitutional objection.<sup>81</sup> If any doubt remained, in 1793 the Supreme Court in *Chisholm v. Georgia*, in a 4-to-1 seriatim decision, declared it the law of the land that state-citizen diversity jurisdiction applied to suits against states.<sup>82</sup> All of the Justices on the *Chisholm* Court had stumped for ratification, and one, James Wilson, served with Randolph on the committee that drafted the state-citizen diversity clause.<sup>83</sup>

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and suggesting that federal courts could enter "Judicial decree[s]" against states).

<sup>77</sup> 3 ELLIOT'S DEBATES, *supra* note 10, at 573 (recording Randolph's argument that "any doubt respecting the construction that a state may be plaintiff, and not defendant, is taken away by the words *where a state shall be a party*"). For Randolph's participation on the Committee of Detail, see generally William Ewald, *The Committee of Detail*, 28 CONST. COMMENT. 197 (2012).

<sup>78</sup> U.S. CONST. art. III, § 2, cl. 1.

<sup>79</sup> See William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033, 1047-54 (1983). New York's ratification stipulation, for example, sought to remove jurisdiction over cases "by any person against a state." 1 ELLIOT'S DEBATES, *supra* note 10, at 329. The Annals of Congress report no commentary on this question during the debates over the Judiciary Act of 1789. Section 13 of the Act, however, affirmed lower court jurisdiction over cases "between a state and citizens of other states." Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 80.

<sup>80</sup> See Maeva Marcus & Natalie Wexler, *Suits Against States: Diversity of Opinion in the 1790s*, 1993 J. SUP. CT. HIST. 73, 75-78.

<sup>81</sup> *Id.* at 78.

<sup>82</sup> See *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 479 (1793). The single dissenting judge, Justice Iredell, did not go so far as to hold that the Constitution itself barred suit, only that the Judiciary Act of 1789 did not permit the exercise of federal jurisdiction over an *assumpsit* action against a state. *Id.* at 449.

<sup>83</sup> For Wilson's role on the Committee of Detail, see generally Ewald, *supra* note 77.

Ratification of the Eleventh Amendment shortly thereafter effectively reversed *Chisholm*. The Amendment's interpretive prohibition, however, confined itself to the scenario presented by that case — private actions filed against a state by an out-of-state individual.<sup>84</sup> It thus left intact constitutional authority for federal question and admiralty jurisdiction in litigation against states brought by in-state or out-of-state individuals.<sup>85</sup> In a number of contentious 5-to-4 decisions, the modern Supreme Court has rejected the proposition that Article III permits federal question or admiralty jurisdiction for these purposes. Advanced over fierce dissents and with little attention to the relevant constitutional text, the Court's jurisprudence in this area grafts common law traditions of sovereign immunity applicable to English monarchs onto original understandings of state sovereignty within the structure of the American union, with the result that the states now enjoy constitutional immunity from private suits in both federal courts and their own courts.<sup>86</sup> The approach grossly underestimates American innovations vis-à-vis English jurisprudence on the question of sovereignty. Both the spirit and text of the Constitution contradict the Court's suggestion that the Federalists meant for the states to retain some essential, inalienable kernel of sovereign prerogative immune from federal judicial coercion, irrespective of the substantive legal logic of divided sovereignty embraced by reformers and rendered judicially cognizable under Article III.<sup>87</sup>

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<sup>84</sup> U.S. CONST. amend. XI (prohibiting jurisdiction for "any suit in law or equity" commenced against a state by an out-of-state citizen or foreigner); see Fletcher, *supra* note 79, at 1060-63 (arguing that the Eleventh Amendment touched neither federal question nor admiralty jurisdiction, and that its framers meant simply to limit construction of Article III's state-citizen diversity clause to cases brought by a state).

<sup>85</sup> The conclusion squares with Chief Justice John Marshall's views. See *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 849, 857-58 (1824); *Cohen v. Virginia*, 19 U.S. (6 Wheat.) 264, 382-83 (1821).

<sup>86</sup> See, e.g., *Alden v. Maine*, 527 U.S. 706 (1999) (justifying states' categorical immunity from suits by individuals based on common law traditions of sovereign immunity purportedly endorsed by leading framers and holding that Congress lacks power under Article I to subject a non-consenting state to private suits in either federal or state court). Cf. *id.* at 756 (recognizing that Congress may abrogate state sovereign immunity pursuant to its enforcement power under the Fourteenth Amendment). Consonant legal scholarship asserting a founding-era commitment to an anti-coercive principle vis-à-vis the states (see generally Clark, *supra* note 34, at 1918), raises historical difficulties because it fails to address the central conceptual distinctions drawn by leading Federalists between the coercion of arms and the coercion of law, and between legislative *power* and judicial *coercion*.

<sup>87</sup> To support its position, the Court relies heavily on *The Federalist No. 81* wherein Alexander Hamilton suggested that the states would enjoy traditional

### 3. Judicial Review and the Coercion of the Constitution

Finally, quite independent of whether Article III granted jurisdiction over the states in suits by individuals, the Supremacy Clause gave the federal judiciary coercive power over the states in one additional way: the power to declare state laws contrary to the Constitution, federal law, and treaties null and void. Here the federal courts could apply the coercion of law to the states *through* individuals.

The Federalists conceived of judicial review specifically as a legal sanction, a coercive enforcement mechanism that would avoid resort to military force. In *An Economic Interpretation*, Beard argued that the judicial check on popular legislation represented the new system's "keystone" and, indeed, "the most unique contribution to the science of government which has been made by American political genius."<sup>88</sup> Beard anachronistically focused on the Court invalidating acts of Congress, which few Federalists considered a live option.<sup>89</sup> As leading constitutional historians now recognize, judicial review's original purpose under the federal Constitution lay not primarily in enforcing constitutional limits on federal power, let alone protecting sovereign states from federal overreach, which became a moot issue in Philadelphia after the "Great Compromise." Rather, the Federalists contemplated the judicial negative, like the legislative negative it replaced, applying specifically to state law for the purpose of

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immunity from private debt suits. See *Alden*, 527 U.S. at 716-17 (citing Hamilton); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1995) (same). *The Federalist No. 81*, however, contains an important proviso that refers the reader back to *The Federalist No. 32*, also written by Hamilton. See THE FEDERALIST NO. 81, *supra* note 7, at 455 (Alexander Hamilton) (alluding to a previous essay discussing the "circumstances . . . necessary to produce an alienation of State sovereignty"). In *No. 32*, Hamilton described three cases in which the Constitution would effectuate an alienation of state sovereignty so as to permit the federal government to subject a state to suit by individuals: (i) where the Constitution expressly granted exclusive authority (*e.g.*, Congress's exclusive power over the seat of government); (ii) where the Constitution both delegated a power to the national government and prohibited the states from exercising it (*e.g.*, the power to tax imports and exports); and (iii) where recognizing a particular prerogative in the states would "totally contradict[]" an authority granted to the union. THE FEDERALIST NO. 32, *supra*, at 220-21 (Alexander Hamilton). In those areas in which the federal government exercised authority concurrently with the states, moreover, the Supremacy Clause implied that sovereignty would lie with the federal government in cases of conflict.

<sup>88</sup> BEARD, *ECONOMIC INTERPRETATION*, *supra* note 1, at 162-63.

<sup>89</sup> See KRAMER, *supra* note 70, at 77 (observing that the council of revision's defeat "left uncertain what role, if any, judicial review was expected to play when it came to federal legislation" and that, according to the delegates, the executive veto along with federalism, bicameralism, and an enlightened legislative elite, would "best [] prevent the enactment of unwise and unconstitutional federal legislative measures").

defending federal constitutional supremacy.<sup>90</sup> In this limited respect, furthermore, the Supreme Court could claim complete interpretive supremacy over the President, Congress, and the state governments.<sup>91</sup>

Individual rights did not figure prominently into this vision of judicial review, unless we mean private creditor rights threatened by popular government at the state and local levels. Yet if reformers displayed sensitivities for contract rights under siege in the states, their vision for constitutional government self-consciously stifled the most fundamental right of all in a republic: the right to self-government.<sup>92</sup> Suffice it to say that when the Federalists spoke of protecting rights in 1787–1788, they meant the exertion of judicial coercion over *state governments* and not the protection of the American people (let alone states) from federal power.<sup>93</sup> In coercing

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<sup>90</sup> See LACROIX, *supra* note 51, at 162 (“When they adopted it in late August, the delegates intended the Supremacy Clause [and thus judicial review] to do what Madison intended the negative to do,” viz., check the state legislatures); Rakove, *Origins of Judicial Review*, *supra* note 53, at 1047 (arguing that “[u]ndisputably, judicial review, conceived as a mechanism of federalism, was palpably and unequivocally a fundamental element of the original intention of the Constitution with the Supremacy Clause as its trumpet” and “this was the dimension of judicial review that mattered most”); see also 5 MADISON WRITINGS, *supra* note 12, at 26–27 (noting that the theory adopted by the Convention held “that the Judicial authority, under the new system will keep the States within their proper limits and supply the place of a negative on their laws”); THE FEDERALIST NO. 80, *supra* note 7, at 445 (Alexander Hamilton) (discussing judicial power and emphasizing its purpose of “enforcing” the Constitution’s “restrictions on the authority of the State legislatures”).

<sup>91</sup> See *supra* note 72 and accompanying text.

<sup>92</sup> The stifling of self-government would occur on two levels. First, the Constitution would exclude the people from direct participation in day-to-day government at the federal level. See, e.g., THE FEDERALIST NO. 10, *supra* note 7, at 126 (James Madison) (arguing for the superiority of a “republic” wherein the people would elect a “small number of citizens” to govern them, over a “democracy”); THE FEDERALIST NO. 63, *supra*, at 373 (James Madison) (observing that the “principle of representation” across an extended sphere would result in “the total exclusion of the people in their collective capacity, from any share” in the government) (emphasis omitted); see also THE FEDERALIST NO. 78, *supra*, at 438, 440 (Alexander Hamilton) (emphasizing the judiciary’s “complete independence” from popular majorities). Second, under the Supremacy Clause and Article 1 Section 10, the federal government would possess constitutional authority to overrule popular majorities at the state level. See U.S. CONST. art. VI, cl. 2; art. I § 10, cl. 1.

<sup>93</sup> For an analysis of James Madison’s theories of rights in 1787–1788 that comports with this interpretation, see Jack N. Rakove, *The Madisonian Theory of Rights*, 31 WM. & MARY L. REV. 245, 251–66 (1990); see also *id.* at 266 (observing that “the unlimited national veto on state laws was the crucial proposal for the protection of rights that Madison favored in 1787 and 1788”).

the states, moreover, the federal judiciary would in effect coerce the people themselves.<sup>94</sup>

The argument made by scholars that judicial review under the Constitution naturally flowed from the Revolutionary-era ideological shift from legislative to “popular sovereignty” may or may not help to explain state courts’ initial stabs at reviewing legislation in the 1780s.<sup>95</sup> The continuing existence of the states within the union, however, meant that judicial review at the federal level emerged from a whole different set of considerations. For most Federalists, the relevant shift in terms of sovereignty consisted not in the shift from legislative to popular sovereignty, but from state sovereignty to federal sovereignty.<sup>96</sup> Indeed, contrary to the evocative assertions often made in the constitutional scholarship, with one notable exception not a single Federalist in 1787–1788 ever endorsed the position that *sovereignty* would rest in the people themselves under the Constitution.<sup>97</sup> The Federalists’ chief aim lay not in giving voice to a sovereign people but in establishing a sovereign federal government vis-à-vis the states and the people. They instituted judicial review under the Supremacy Clause as a final and binding mechanism by which to defend federal sovereignty from incursions by the states through the coercion of law.

One final move remained, however, for the coercion of law to bring its full force to bear on the people and states within the new constitutional framework. This consisted in insulating its designated

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<sup>94</sup> See THE FEDERALIST NO. 46, *supra* note 7, at 297 (James Madison) (“[T]he first and most natural attachment of the people will be to the governments of their respective States.”).

<sup>95</sup> See, e.g., William R. Casto, *James Iredell and the American Origins of Judicial Review*, 27 CONN. L. REV. 329, 330 (1995) (arguing that judicial review derived from the idea that sovereignty resided in the people); Gerald Leonard, *Iredell Reclaimed: Farewell to Snowiss’s History of Judicial Review*, 81 CHI.-KENT L. REV. 867, 881-82 (2006) (noting that the change in the locus of sovereignty, from the legislature to the people, gave rise to judicial review); Gordon S. Wood, *The Origins of Judicial Review Revisited, or How the Marshall Court Made More Out of Less*, 56 WASH. & LEE L. REV. 787, 793-94 (1999) (asserting that the power of judicial review resulted from “fundamental changes” in ideas regarding government and law, namely that the “legislators were not really sovereign . . . . In America[,] real and ultimate sovereignty rested with the people themselves . . .”).

<sup>96</sup> See THE FEDERALIST NO. 9, *supra* note 7, at 122 (Alexander Hamilton) (noting that equal representation in the Senate made the states “constituent parts” of the newly created “national sovereignty” in government); THE FEDERALIST NO. 42, *supra*, at 277 (James Madison) (implying the need for “sovereignty in the Union”).

<sup>97</sup> The exception is James Wilson whose anti-Publican constitutionalism proves the rule. Aaron T. Knapp, *Law’s Revolutionary: James Wilson and the Birth of American Jurisprudence*, 29 J.L. & POL. 189, 226-27 (2014) [hereinafter *Law’s Revolutionary*].



administrators — federal judges — from popular or governmental influence or manipulation. Madison had argued that representative filtration across an extended sphere would remove the federal government from the people without rendering it “independent of the society itself.”<sup>98</sup> The judicial department established by Article III, however, presented a special case. Although 1701’s Act of Settlement had made some measure of judicial independence a live institutional option for post-Revolutionary Americans, most state constitutions provided for popular checks on judges through judicial elections, fixed terms, and/or summary removal by the legislature. Not a single state went so far as the Constitution to create a separate executive-appointed department of law whose officials would serve for life on good behavior with guaranteed pay subject only to the dimly understood impeachment mechanism.<sup>99</sup> The Constitution, according to the Antifederalist Brutus, had positioned the United States Supreme Court to become “independent of heaven itself.”<sup>100</sup>

Publius could not quite deny the assertion. Only “complete independence,” Hamilton wrote, from the states, from the other departments of the federal government, *and* from the people themselves, along with the judges’ uncommon “skill in the laws,” could render the federal courts able to serve their special roles as “faithful guardians of the Constitution.”<sup>101</sup> While in *The Federalist No. 78* Hamilton insinuated an equation between “the people themselves” and the “Constitution,”<sup>102</sup> in fact the Federalists drew a strict distinction between the two for, as Hamilton himself emphasized in the same essay, “[u]ntil the people have, by some solemn and authoritative act, annulled or changed the established form, it is binding upon themselves collectively, as well as individually.”<sup>103</sup> WE

<sup>98</sup> See THE FEDERALIST NO. 51, *supra* note 7, at 322 (James Madison).

<sup>99</sup> See GERHARD CASPER, *SEPARATING POWER: ESSAYS ON THE FOUNDING PERIOD* 136-38 (1997).

<sup>100</sup> 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 46, at 437-38.

<sup>101</sup> THE FEDERALIST NO. 78, *supra* note 7, at 438, 441-42 (Alexander Hamilton).

<sup>102</sup> *Id.* at 438 (“No legislative act, therefore, contrary to the Constitution, can be valid. To deny this would be to affirm . . . that the representatives of the people are superior to the people themselves . . .”).

<sup>103</sup> See *id.* at 440. Article V erected a fairly high bar for amendments intended to ensure they would occur infrequently, if ever, and the Federalists anticipated elites rather than the people themselves driving the process. Only one Federalist contemplated the people amending the Constitution outside Article V procedures: James Wilson. See Knapp, *Law’s Revolutionary*, *supra* note 97, at 243-51. *But see* Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 485 (1994) (suggesting that framers other than Wilson envisioned amendments outside of Article V).

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THE PEOPLE'S Constitution would exist above and apart from the people themselves and, interpreted by an independent judiciary, would at last replace WILL with LAW as the foundational principle of American constitutionalism.

#### CONCLUSION

Whatever their other achievements, the Antifederalist opposition did little to hamper the Federalists' counterrevolutionary vision of coercion through the judiciary under the Constitution. In the decade after ratification, however, those Federalist counterrevolutionaries wearing robes and proceeding under the first Judiciary Act's auspices faced formidable challenges from the ascendant Jeffersonians who carried forward the old jurisprudence of consent and its resistance to an independent legal elite.<sup>104</sup> The Virginia and Kentucky Resolutions made unexpected if portentous attempts to preempt federal judicial supremacy through individual state action based on a "compact theory" of union that harkened back to the Articles of Confederation. The "Revolution of 1800" saw the Jeffersonian vision gaining substantial political clout. Against these mounting headwinds, the Federalist judges' strident enforcement of the Sedition Act ensnared the fledgling Article III judiciary in an institutional crisis from which it — and, indeed, the legal counterrevolution itself — might never have recovered had it not been for the transformative reign of John Marshall.

Marshall angled to withdraw the Supreme Court from the political thicket. Yet if politics in the early national period forced the Court to dial back the controversial rationale of sovereign self-defense employed by early Federalist judges to justify both judicial review of state law and a federal common law of crimes,<sup>105</sup> the experience clarified the virtues of an independent judiciary and, in so doing, politically legitimized the establishment of the plenary judicial power so crucial to the coercion of law under the Constitution. As it happened, the Court did not employ its independence *from* the Jeffersonians *against* the Jeffersonians by striking down federal legislation in favor of individual or states' rights. Rather, it vigorously defended what little federal legislation the Jeffersonians in Congress

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<sup>104</sup> See generally RICHARD E. ELLIS, *THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC* (1971) (analyzing early national struggles between the Federalists and Jeffersonians on questions of judicial power).

<sup>105</sup> See *United States v. Worrall*, 28 F. Cas. 774 (C.C.D. Pa. 1798), reprinted in FRANCIS WHARTON, *STATE TRIALS OF UNITED STATES DURING THE ADMINISTRATIONS OF WASHINGTON AND ADAMS* 198 (1849).

let slip, all the while creating for itself an independent constitutional jurisdiction that it exercised in ways consistently adverse to the countervailing democratic localism and states' rights philosophies brandished by Jefferson and his political descendants. As a historical matter, the essential features of the Marshall Court's institutional independence and interpretive supremacy therefore lay not in its relationship to the other departments of the federal government, but in its independence from and supremacy over the states and, by proxy, the people. The Constitution, to be sure, bound the federal government. In its original conception, however, the *coercion of law* did not.<sup>106</sup>

But if the Marshall Court gave Federalist jurisprudence a dependable citadel in the judiciary and in some measure bore the legal counterrevolution's torch straight into the Jacksonian period, it by no means proceeded unopposed. Jacksonians and, later, Lincolnians registered new and powerful political challenges to the Supreme Court's claimed independence and supremacy. In Marshall's wake, Southern slave interests increasingly commandeered American constitutional politics and thereafter rights-talk in both the North and South raised the debate over slavery to a momentous pitch. Chief Justice Roger Taney quietly moved the Supreme Court into alignment with the southern section and in *Dred Scott v. Sandford*, that terrible case that would live on forever in infamy, WILL once again triumphed over LAW in American constitutional culture.

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<sup>106</sup> Other mechanisms existed to enforce the Constitution against the federal government, namely, the electoral and political processes (including the executive veto), the amendment process, and extra-constitutional action by the people and the states, on which see KRAMER, *supra* note 70, at 77, 83-92.