



Our Anticompetitive Patriotism

Todd E. Pettys*

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* Professor of Law and Lauridsen Family Fellow, University of Iowa College of Law.

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"I must say I think patriotism is like charity — it begins at home," Henrietta declared.

"Ah, but where does home begin, Miss Stackpole?"¹

INTRODUCTION

After the 2004 national elections, in which President George W. Bush was elected to a second term and Republicans strengthened their majorities in both houses of Congress, there was a lot of talk about the possibility that disaffected Democratic voters might seek greener pastures in Canada. In the weeks following the election, for example, the Canadian government reported a nearly six-fold increase in the number of inquiries posted on its immigration website by potential émigrés residing in the United States.² Even after a couple of months had passed, Canadian immigration attorneys said they still were being "swamped" with queries from U.S. citizens.³ In a humorous effort to spare unhappy Democrats the trouble of moving, pundits published fanciful visions of newly drawn national boundaries, merging the Democrat-favoring "blue states" with Canada and leaving the Republican-favoring "red states" in a country of their own.⁴

Despite all of the post-election talk, no one genuinely expected a significant number of Democrats to migrate northward.⁵ No matter how

¹ HENRY JAMES, *THE PORTRAIT OF A LADY* 72 (Bantam Books 1983) (1881).

² Rick Lyman, *Some Bush Foes Vote Yet Again, with Their Feet: Canada or Bust*, N.Y. TIMES, Feb. 8, 2005, at A16; Barbara Yost, *Canada, Eh? Are Unhappy Americans Really Ready to Bolt North?*, ARIZ. REPUBLIC, Jan. 19, 2005, at E1; see also Bruce McCall, *Application for Permanent Canadian Residence*, NEW YORKER, Nov. 22, 2004, at 108 (presenting humorous application for Canadian residence).

³ Yost, *supra* note 2, at E1 (quoting immigration attorney in British Columbia).

⁴ Jeremy Rifkin, *Continentalism of a Different Stripe: Are Canadian Provinces and the Blue States in the U.S. Quietly Forging a Radical New North American Union?*, WALRUS, Mar. 2005, at 37 (stating that, immediately after 2004 elections, "maps began appearing all over the Internet, recasting the North American landscape into two distinct political and cultural regions, with Canada and the Northeast, upper Midwest, and West coast states all colored in blue, and the rest of the continental United States colored in red"); see also Beth Gorham, *Canada Scores Well in Blue States*, HAMILTON SPECTATOR, Dec. 26, 2004, at A3 ("[P]undits are still calling for a marriage of Canada and the so-called Democratic blue states that voted against Bush").

⁵ See Lyman, *supra* note 2, at A16 (providing anecdotes regarding individuals hoping to move to Canada, but stating that total number of departures will likely remain small); Yost, *supra* note 2, at E1 (stating that "despite threats to leave the country when a favored candidate loses, the actual number of American citizens obtaining permanent residency in Canada has remained constant at about 4,500 to 5,500 per year," with the "greatest spike in

disillusioned they might be with the country's leadership at a given moment in time, the overwhelming majority of Americans surely would find it extraordinarily difficult to leave the nation they call home.⁶ Although one might hypothesize scenarios in which Americans would find their country's domestic and foreign policies so objectionable that they would feel compelled to seek more favorable political climates elsewhere, those conditions are not easily reached. "Our country, right or wrong," Stephen Decatur declared nearly two centuries ago,⁷ expressing a sentiment that at least roughly describes the fundamental national commitment of a great many Americans today.

This determination to stay within the United States, even when one vigorously objects to the political agenda of its leaders, stands in stark contrast to the attitude citizens are encouraged to take when dealing with their state governments. One of federalism's principal advantages, the U.S. Supreme Court has told us, is that "it makes government more responsive by putting the States in competition for a mobile citizenry."⁸ When citizens remain in a state with numerous objectionable policies, they negate some of the benefits that are purportedly achieved when the states compete for residents. If an individual finds that her state's regulatory policies no longer suit her preferences, our federal system of government encourages her to examine her options in other jurisdictions and then "vote with her feet" by moving to a jurisdiction whose priorities she finds more attractive.⁹

recent history [occurring] during the Vietnam War, between 1970 and 1975, when the number rose to between 18,900 and 25,000 per year").

⁶ See, e.g., Bill Carbonaro, *Feeling Blue? Some Look to Canada*, N.Y. TIMES, Feb. 13, 2005, at 14 (arguing, in letter to editor, that "we are morally obligated to [remain in this country and] oppose our leaders when they pursue policies contrary to America's core values").

⁷ See ALEXANDER S. MACKENZIE, LIFE OF STEPHEN DECATUR 295 (1846) (recounting now-famous toast that Decatur offered at Virginia event in 1816). Decatur's formulation quickly worked its way into the country's political vocabulary. See, e.g., CONG. GLOBE, 42nd Cong., 2d Sess. 1287 (1872) (statement of Sen. Schurz) (responding to Sen. Carpenter by arguing that "the duty of a true patriot" is to behave in accordance with the view, "My country, right or wrong; if right, to be kept right; and if wrong, to be set right"); CONG. GLOBE, 42nd Cong., 2d Sess. 121 (Appendix 1872) (statement of Sen. Carpenter) (using phrase in debate concerning sale of arms to French agents).

⁸ Gregory v. Ashcroft, 501 U.S. 452, 458 (1991).

⁹ See Zobel v. Williams, 457 U.S. 55, 67-68 (1982) (Brennan, J., concurring) (noting that states may try to attract residents by offering attractive regulatory packages and that this "is a healthy form of rivalry"); MICHAEL S. GREVE, REAL FEDERALISM: WHY IT MATTERS, HOW IT COULD HAPPEN 133 (1999) ("Federalism's chief virtue . . . is citizen choice and state competition."); DAVID L. SHAPIRO, FEDERALISM: A DIALOGUE 78 (1995) ("The argument rooted in the value of competition among the states, especially when combined with the right of exit of capital or labor, remains at the heart of the economic case for federalism."); Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484,

As Justice Kennedy has observed, our nation's founders "split the atom of sovereignty" by giving citizens "two political capacities, one state and one federal."¹⁰ The fact that each state must worry far more than the federal government about losing citizens to competing jurisdictions, however, suggests that citizens have found it exceedingly difficult to split the atom of patriotism. We might feel great fondness for any number of states and localities in which we have lived, but the adjective "patriotic" appears reserved for describing that powerful set of attachments that we hold at the national level today. Indeed, many would say that patriotism is, by definition, focused on one's national identity.¹¹ If our jobs, families, or policy preferences call us to another state, we pack up our belongings and relocate, optimistically believing we can live happily elsewhere in the country.¹² But even if we become profoundly disenchanted with our nation's leaders, deeply ingrained patriotic commitments make it hard to imagine trying to establish a new home outside of America's borders.¹³

1498 (1987) (reviewing RAOUL BERGER, *FEDERALISM: THE FOUNDERS' DESIGN* (1987)) (arguing that "[a] consolidated national government . . . stifles choice and lacks the goad of competition"); Ronald McKinnon & Thomas Nechyba, *Competition in Federal Systems: The Role of Political and Financial Constraints*, in *THE NEW FEDERALISM* 3, 11-12 (John Ferejohn & Barry R. Weingast eds., 1997) ("In the same way as different types of individuals choose different shopping centers that provide varying mixes of products and services, under decentralization these individuals will choose (by deciding where to live) different types of communities that provide varying mixes of public services."); H. Geoffrey Moulton, Jr., *Federalism and Choice of Law in the Regulation of Legal Ethics*, 82 *MINN. L. REV.* 73, 131-32 (1997) ("Unlike a unitary national government, which reduces choice and is relatively unaffected by competition, state governments have an incentive to implement policies that not only maximize utility for a majority of voters already in the state but also serve to attract additional taxpayers."). This conception of regulatory variety echoes the more general view that Europeans have long held of America: that it is a place of tremendous variety, where one almost always can find (or create) a suitable environment for oneself. See PETER CONRAD, *IMAGINING AMERICA* 4-5 (1980).

¹⁰ *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

¹¹ See, e.g., MERLE CURTI, *THE ROOTS OF AMERICAN LOYALTY*, at viii (1946) (defining "patriotism" as "love of country, pride in it, and readiness to make sacrifices for what is considered its best interest," and asserting that modern notions of patriotism rest "on the assumption that, by and large, the unified nation is the highest value in civilization").

¹² Each year, approximately 40 million Americans move from one residence to another, and more than eight million of those citizens relocate across state lines. They move for a variety of reasons; some move to find better housing or better jobs, for example, while others move to accommodate changes within their families. See Todd E. Pettys, *The Mobility Paradox*, 92 *GEO. L.J.* 481, 489-90 (2004) (discussing mobility data provided by U.S. Census Bureau).

¹³ Of course, a variety of additional factors — cultural preferences, citizenship laws, a tendency to prefer that which is familiar, and so forth — also make it difficult to imagine leaving the United States.

At first blush, this arrangement seems unobjectionable. There are times when our country must call upon its citizens to make great sacrifices — sometimes even asking them to surrender their own lives. A powerful sense of national patriotism thus appears essential to the country's health and perpetuation. Moreover, beneficial competition between the states would be anemic at best if citizens patriotically proclaimed: "My *state*, right or wrong." For American federalism to work in the way that many believe it should, numerous citizens must send a state that is "wrong" the appropriate market signals by departing for states that are "right."¹⁴

When looked at from another perspective, however, the nation's monopolistic claim to citizens' patriotism is not as benign. Although competition among the states is important, it is not the only form of competition that lies at the heart of federalism's rationale. As I and others have pointed out elsewhere, the Framers intended our federal system of government to provoke an ongoing competition between the states and the federal government for citizens' devotion and for the regulatory power which that devotion often yields.¹⁵ The Framers believed that citizens would have a choice for each of the many areas in which the state and federal governments' regulatory powers overlap. Through the politicians they elected and the legislation they demanded, citizens could either centralize power in the hands of the federal government or diffuse power among state and local officials, depending on which level of government citizens believed could best be trusted to address the citizenry's particular concerns.¹⁶ Discussing the people's ability to choose between the two sovereigns, James Madison insisted that "the people ought not surely to be precluded from giving most of

¹⁴ See sources cited *supra* note 9.

¹⁵ See, e.g., Todd E. Pettys, *Competing for the People's Affection: Federalism's Forgotten Marketplace*, 56 VAND. L. REV. 329, 338-44 (2003) (describing Framers' vision of competition between state and federal governments for trust and regulatory power); Jack N. Rakove, *The Origins of Judicial Review: A Plea for New Contexts*, 49 STAN. L. REV. 1031, 1042 (1997) ("Federalism . . . involves a struggle or competition for the political allegiance and affections of a population that has consented to be ruled simultaneously by two levels of government."); cf. Lord Acton, *Nationality*, in 1 SELECTED WRITINGS OF LORD ACTON 409, 425 (J. Rufus Fears ed., Liberty Classics 1985) (1862) (praising virtues of "divided patriotism" and contending that "[t]he co-existence of several nations under the same State is a test, as well as the best security of [the people's] freedom").

¹⁶ See *United States v. Lopez*, 514 U.S. 549, 576-77 (1995) (Kennedy, J., concurring) ("[T]he Federal and State Governments are to control each other . . . and hold each other in check by competing for the affections of the people" (citing THE FEDERALIST NO. 46 (James Madison), and THE FEDERALIST NO. 51 (James Madison))); see also Pettys, *supra* note 15, at 333, 338-44 (describing competition between state and federal governments).

their confidence where they discover it to be most due.”¹⁷ Although citizens initially would be inclined to favor state and local governments, Madison argued, they likely would shift power to the federal government if the nation’s leaders offered “manifest and irresistible proofs of a better administration.”¹⁸ Therefore, in each area of regulatory concern that the Constitution does not exclusively commit to the care of one sovereign or the other, the states and the federal government are meant to hold one another in check.¹⁹ If either sovereign negligently handles its constituents’ affairs, the Framers intended to give citizens a powerful remedy — namely, the ability to strip power from the hands of the sovereign that has lost the people’s confidence and confer power upon the sovereign that appears more worthy of the people’s trust.

In this Article, I contend that the nation’s seemingly exclusive claim to citizens’ patriotism significantly shields the federal government from the competitive forces that the Framers believed would restrain Congress’s and the President’s ability to govern in objectionable ways. I argue that, because America is a nation-state built upon certain core convictions about public life, there are strong connections in this country between the entity about which people feel patriotic and the sovereign that people would like to govern many, or perhaps even most, of their important public affairs. I argue that American patriotism was constructed in a manner that led nineteenth- and twentieth-century Americans to shift a

¹⁷ THE FEDERALIST NO. 46, at 295 (James Madison) (Clinton Rossiter ed., 1961).

¹⁸ *Id.* Madison asked:

Was, then, the American revolution effected, was the American Confederacy formed, was the precious blood of thousands spilt, and the hard-earned substance of millions lavished, not that the people of America should enjoy peace, liberty, and safety, but that the government of the individual States . . . might enjoy a certain extent of power, and be arrayed with certain dignities and attributes of sovereignty? . . . [A]s far as the sovereignty of the States cannot be reconciled to the happiness of the people, the voice of every good citizen must be, Let the former be sacrificed to the latter.

THE FEDERALIST NO. 45, at 289 (James Madison) (Clinton Rossiter ed., 1961). Alexander Hamilton similarly believed that the people’s “confidence in and obedience to a government will commonly be proportioned to the goodness or badness of its administration.” THE FEDERALIST NO. 27, at 174 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Although he presumed that citizens initially would place great trust in their state leaders, he predicted that this would change if the federal government demonstrated “a much better administration” and if the states failed to “administer their affairs with uprightnes and prudence.” THE FEDERALIST NO. 17, at 119 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

¹⁹ Even when the Constitution *does* grant one sovereign exclusive power in a particular area, a sufficiently dissatisfied citizenry can exercise its power to amend the document. *See* U.S. CONST. art. V.

vast amount of their regulatory business to the federal government. This same patriotism now leads many Americans to be averse to shifting significant power back to the states, even when they believe the nation's leaders are governing irresponsibly. With respect to the intended competition between the states and the federal government, therefore, our patriotism has become strikingly anticompetitive. I conclude by suggesting that one means of reinvigorating governmental competition in the United States involves encouraging Americans to broaden their political affections beyond the nation's borders and to consider placing greater reliance on regulatory arrangements that require negotiation with others in the international community.

In Part I, I briefly describe the difficulties that confronted those in the late eighteenth century who were eager to fashion America as a nation-state and to pull citizens' loyalties to the national level. I point out that, while nation-states and the deep devotion they elicit seem commonplace today, they were not at all familiar to the early Americans. In light of the important historic differences between "nations" and "states," daunting challenges faced those Americans who wished to fuse the two together and to cause other Americans to see their country and their newly established federal government as the primary objects of their political devotion.

In Part II, I examine some of the ways in which modern Americans' quasi-religious devotion to their country was constructed. I argue that Americans' patriotic attachment to their nation owes its strength in large part to the fact that, in at least four principal ways, it borrows themes and motifs from Christianity, the religion that has always predominated in America. Specifically, proponents of American patriotism have ascribed a divinely ordained global mission to the United States, emphasized the importance of soldiers' blood sacrifices for their country, oriented the nation and its fate around a fundamental moral charter, and pointed to the federal government's power to address problems that appear beyond the reach of the states.

In Part III, I point out that the states have fallen far short of rivaling the nation's ability to engender a deep sense of devotion among the citizenry. I then argue that there are important connections between one's preferred source of government regulation and the object of one's patriotism. Because our patriotism is so strongly focused on the nation, the states are severely limited in their ability to place an effective check on the regulatory activities of the federal government. The federal government is thus significantly insulated from the competitive forces that the Framers believed would prevent it from abusing its power.

Finally, in Part IV, I suggest that modes of international governance may eventually emerge as the federal government's primary competitors for the people's regulatory business. Some Americans condemn as unpatriotic any suggestion that regulatory power should be shifted to the international domain. I argue, however, that in the years ahead, several of the same forces that gave rise to our strongly nation-focused patriotism may encourage a greater number of Americans to regard internationally negotiated agreements as an attractive alternative to unilateral regulatory action by America's leaders. If that proves true, we may find that American patriotism is not so anticompetitive after all.

I. ENVISIONING A NATION-STATE IN AN ERA OF LOCAL ATTACHMENTS

Patriotism for one's nation-state can resonate so powerfully in one's psyche that it can almost seem to be part of one's genetic heritage.²⁰ As Eric Hobsbawm and Terrence Ranger have observed, "modern nations and all their impedimenta generally claim to be the opposite of novel, namely rooted in the remotest antiquity, and the opposite of constructed, namely human communities so 'natural' as to require no definition other than self-assertion."²¹ To modern ears, the very term "nation-state" can seem redundant. If we accept Benedict Anderson's definition of a "nation" as an "imagined community" whose members feel "a deep, horizontal comradeship" with one another,²² it can seem only natural that the territorial borders of that community be coextensive with the jurisdictional borders of that community's government.²³ Far from being an essential component of the natural order, however, nation-states and

²⁰ See, e.g., SHAILER MATHEWS, PATRIOTISM AND RELIGION 9 (1918) ("Loyalty to a nation is not theoretical or voluntary. It is filial. Our nation is our *fatherland*. Perhaps that is why it is so difficult to take on a new patriotism. Love for step-parents is learned, not inherited.").

²¹ THE INVENTION OF TRADITION 14 (Eric Hobsbawm & Terence Ranger eds., 1983).

²² BENEDICT ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM 6-7 (rev. ed. 1991); cf. Ernest Renan, *What Is a Nation?*, in BECOMING NATIONAL: A READER 42, 53 (Geoff Eley & Ronald Grigor Suny eds., 1996) (stating that to be nation is to feel "a large-scale solidarity, constituted by the feeling of the sacrifices that one has made in the past and of those that one is prepared to make in the future"). By describing a nation as an "imagined" community, Anderson explains that he does not mean the community is fictitious or fabricated. ANDERSON, *supra*, at 6. Rather, he simply means that, within the community, most people will not have direct and personal contact with one another. "In fact," he writes, "all communities larger than primordial villages [. . .] (and perhaps even these) are imagined." *Id.*

²³ See generally ERNEST GELLNER, NATIONS AND NATIONALISM 1 (1983) (defining "modern nationalism" as "primarily a political principle, which holds that the political and the national unit should be congruent").

the fierce devotion they elicit are inventions of surprisingly recent origin.²⁴

As Anderson has explained, people in the West prior to the eighteenth century were ruled principally by monarchs, the borders between states “were porous and indistinct, and sovereignties faded imperceptibly into one another.”²⁵ Until the early nineteenth century, the concepts of “nation” and “government” were not even joined in western vocabularies; the word “nation” typically denoted persons with a common line of ethnic descent or a common geographic origin, rather than persons sharing a government within recognized boundaries.²⁶ Moreover, as Charles Beard noted, the relationships between countries were driven not by different citizenries seeking to further their own national self-interests, but rather by “the interest of each monarch in holding fast to the territories and privileges which he already possessed, in keeping a firm grip upon the activities of his subjects, in extending his domains at the expense of his neighbors, and in the aggrandizement and perpetuation of his house.”²⁷

²⁴ See WALTER BERNS, *MAKING PATRIOTS* 11 (2001) (stating that patriotism must “be cultivated because no one is born loving his country; such love is not natural, but has to be somehow taught or acquired”); GELLNER, *supra* note 23, at 49 (“[W]e must not accept the myth. Nations are not inscribed into the nature of things, they do not constitute a political version of the doctrine of natural kinds. Nor were national states the manifest ultimate destiny of ethnic or cultural groups.”); 2 KARL R. POPPER, *THE OPEN SOCIETY AND ITS ENEMIES* 51 (5th ed. 1966) (“The *principle of the national state*, that is to say, the political demand that the territory of every state should coincide with the territory inhabited by one nation, is by no means so self-evident as it seems to appear to many people to-day.”); cf. LEO TOLSTOY, *CHRISTIANITY AND PATRIOTISM* 10-11 (Paul Borger trans., Open Court Publ’g 1905) (1894) (“It is presumed that the sentiment of patriotism, in the first place, is always innate in all men, and secondly, that it is such a lofty sentiment, that, where it is absent, it should be cultivated. Neither the one nor the other presumption is correct.”); Acton, *supra* note 15, at 426 (“Where political and national boundaries coincide, society ceases to advance, and nations relapse into a condition corresponding to that of men who renounce intercourse with their fellow-men.”).

²⁵ ANDERSON, *supra* note 22, at 19.

²⁶ ERIC J. HOBBSBAWM, *NATIONS AND NATIONALISM SINCE 1780*, at 14-18 (1990); see also BENJAMIN AKZIN, *STATE AND NATION* 8-10 (1964) (stating that precise definitions of “nation” are elusive, though term usually is used to denote common ethnicity); JOHN A. ARMSTRONG, *NATIONS BEFORE NATIONALISM* 3-9 (1982) (conflating concepts of nationality and ethnicity); SAMUEL P. HUNTINGTON, *WHO ARE WE?: THE CHALLENGE TO AMERICA’S NATIONAL IDENTITY* 29 (2004) (stating that term “nation” did not begin to appear in European languages until mid 1700s).

²⁷ CHARLES A. BEARD, *THE IDEA OF NATIONAL INTEREST: AN ANALYTICAL STUDY IN AMERICAN FOREIGN POLICY* 9 (Quadrangle Paperbacks 1966) (1934). It was not until World War I that these dynastic arrangements finally fell far to the wayside and the modern

The United States provided the world with one of the first models for developing a modern nation-state,²⁸ though that model was not easily assembled. During the early and mid 1700s, the American colonists made no sustained effort to establish a distinct national identity of their own.²⁹ Indeed, as John Murrin explains, “[t]o the extent the settlers were self-conscious nationalists, they saw themselves as part of an expanding *British* nation and empire. Loyalty to colony meant loyalty to Britain.”³⁰ As the century wore on and the Crown increasingly fell into disfavor, the colonists began to believe they would fare better on their own. Yet this desire for independence was in no way tantamount to a belief that the colonies should themselves unite under a new, overarching government. Indeed, Britain’s leading competitors for the people’s loyalty were not the colonies as a unified whole, but rather the several colonies as individual objects of powerful local attachment.³¹ When the Americans declared their independence in 1776, for example, they did so as individual colonies, not as an undifferentiated group.³² Once the Revolutionary War began, the colonies continued to maintain strong and separate identities. General George Washington struggled to quell rivalries among the colonies’ troops, for example, repeatedly urging

nation-state became the international norm. See ANDERSON, *supra* note 22, at 22 (“As late as 1914, dynastic states made up the majority of the membership of the world political system.”). Charles Beard explains that, by World War I, monarchs’ interests were overwhelmed by the economic interests of nations: going to war might personally aggrandize the king but be utterly contrary to the economic interests of his subjects. BEARD, *supra* at 9-14.

²⁸ See ANDERSON, *supra* note 22, at 67, 81 (stating that, by 1840, United States and France were leading models of modern nation-states).

²⁹ See John M. Murrin, *A Roof Without Walls: The Dilemma of American National Identity*, in BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY 333, 339 (Richard Beeman et al. eds., 1987) (“[N]ative-born North Americans showed no interest in political union, much less independence. Every colony involved rejected the Albany Plan of Union of 1754 regardless of the manifest peril from New France.”).

³⁰ *Id.* at 338; see also Percy P. Boynton, *Changing Ideas of American Patriotism*, in 21 PUBLIC POLICY PAMPHLETS 1, 1 (Harry D. Gideonse ed., 1936) (“In Colonial days the only patriotism that could exist was, of course, the patriotism of the colonist for his mother-country or his ancestral land The provincial enthusiast . . . never considered any possible transfer of allegiance.”).

³¹ See CURTI, *supra* note 11, at 11-12.

³² See DAVID J. SIEMERS, THE ANTIFEDERALISTS: MEN OF GREAT FAITH AND FORBEARANCE, at viii (2003) (“In 1776, each individual state had declared independence; they did not declare independence as the collected ‘people of the United States.’”); see also DECLARATION OF INDEPENDENCE (1776), reprinted in DOCUMENTS OF AMERICAN HISTORY 100, 101 (Henry Steele Commager ed., 9th ed. 1973) (declaring colonies to be “Free and Independent States”).

them to set aside their mutual animosities and unite against the British.³³

The Americans' victory over Britain did not secure a deep new sense of nationhood.³⁴ Washington lamented how quickly people returned to their local attachments, condemning "again and again . . . the weakness of national sentiment and of genuine national interest."³⁵ Indeed, the United States in the 1780s consisted not of an integrated national polity, but rather "of a number of sections and subsections, each with a distinctive social structure, economy, and set of political objectives."³⁶ The Articles of Confederation, which fell far short of establishing a robust national government for the fledgling country and which allowed the states to impose economically damaging trade burdens on one another, were symptomatic of the extent to which the Americans viewed centralized government with great distrust.³⁷

Citizens' strong attachments to their locales powerfully shaped the debates between the Federalists and the Antifederalists throughout the period of the Constitution's framing and ratification. The Antifederalists believed citizens' loyalties would remain firmly linked to state and local governments.³⁸ They were convinced that the Constitution would disastrously establish "a national, not a federal, government, a

³³ See CURTI, *supra* note 11, at 19-20.

³⁴ See HUNTINGTON, *supra* note 26, at 113 ("The Revolution made colonists Americans, but it did not make them a nation."); CECILIA ELIZABETH O'LEARY, *TO DIE FOR: THE PARADOX OF AMERICAN PATRIOTISM* 15 (1999) (stating that, after Revolutionary War, most people turned their attention to their local lives and concerns, rather than to building national consciousness).

³⁵ CURTI, *supra* note 11, at 23; see, e.g., GEORGE WASHINGTON, *CIRCULAR TO STATE GOVERNMENTS* (June 8, 1783), reprinted in *GEORGE WASHINGTON: WRITINGS* 516 (John Rhodehamel ed., 1997) (telling state leaders that it is duty of "every true patriot" to favor "[a]n indissoluble Union of the States under one Federal Head" and to allow federal government to exercise powers it was delegated).

³⁶ JACKSON TURNER MAIN, *THE ANTI-FEDERALISTS: CRITICS OF THE CONSTITUTION, 1781-1788*, at 1 (1961); see also CURTI, *supra* note 11, at 21-71 (describing many of those sectional differences).

³⁷ See generally *ARTICLES OF CONFEDERATION* (1778), reprinted in *SOURCES AND DOCUMENTS ILLUSTRATING THE AMERICAN REVOLUTION, 1704-1788, AND THE FORMATION OF THE FEDERAL CONSTITUTION 178-86* (Samuel E. Morison ed., Oxford Univ. Press 1977) (1923) (stating, in Articles' first substantive provision, that "[e]ach state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States"); LEE EPSTEIN & THOMAS G. WALKER, *CONSTITUTIONAL LAW FOR A CHANGING AMERICA* 3-4 (3d ed. 1998) (providing concise overview of state of affairs under Articles of Confederation).

³⁸ See MAIN, *supra* note 36, at 184 ("[I]f the Antifederalists had dominated the Philadelphia Convention, the government of the nation would have continued to be a confederation of sovereign states, and . . . the democratic principle of local self-government would have been emphasized.").

consolidation of previously independent states into one, a transfer of sovereignty in which the states, once sovereign, would retain but a shadow of their former power."³⁹ They believed that, in the end, the differences between the states were too great ever to permit the country's citizens to unite under a strong national government and that citizens might never regard the proposed new government as truly their own.⁴⁰

The Federalists, meanwhile, worked hard to assure citizens that their primary interactions with government would continue to occur at the state and local level.⁴¹ Because state and local leaders would be responsible for regulating a far broader range of important matters than would their federal counterparts, state and local governments would likely always enjoy the greatest measure of the people's "affection, esteem, and reverence."⁴² The Constitution's defenders did insist, however, that the American people were destined to be joined as a nation:

Providence has been pleased to give this one connected country to one united people — a people descended from the same ancestors, speaking the same language, professing the same religion, attached to the same principles of government, very similar in their manners and customs, and who, by their joint counsels, arms, and efforts, fighting side by side throughout a long and bloody war, have nobly established their general liberty and independence. This country and this people seem to have been made for each other, and it appears as if it was the design of Providence that an inheritance so proper and convenient for a band of brethren, united to each other by the strongest ties, should never be split into a number of unsocial, jealous, and alien sovereignties.⁴³

³⁹ *Id.* at 120.

⁴⁰ See SIEMERS, *supra* note 32, at 11-13.

⁴¹ Madison stressed, for example, that "[t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." THE FEDERALIST NO. 45 (James Madison), *supra* note 18, at 292; *see also id.* at 292-94 ("The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people . . .").

⁴² THE FEDERALIST NO. 17 (Alexander Hamilton), *supra* note 18, at 120; *see also* THE FEDERALIST NO. 25, at 163-64 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (arguing that "in any contest between the federal head and one of its members, the people will be most apt to unite with their local government"); THE FEDERALIST NO. 46 (James Madison), *supra* note 17, at 194 ("Many considerations . . . seem to place it beyond doubt that the first and most natural attachment of the people will be to the governments of their respective States.").

⁴³ THE FEDERALIST NO. 2, at 38 (John Jay) (Clinton Rossiter ed., 1961); *see also* BEARD,

The claim that Americans were “one united people” poised to band together as a nation was surely premature. After all, America lacked many of the features that had defined nations in the past, such as shared traditions or an historically defined territory,⁴⁴ and the country’s record of unification under the Articles of Confederation was far from promising. As Charles Beard explained, the Federalists were engaged in a bit of puffery:

When [the Constitution] was framed in 1787, the American nation was a dream of seers rather than an actuality. . . . Leaders among the men who drafted our fundamental law, it is true, ardently desired to diminish the strength of state or local attachments and to fuse national political loyalties under one government, but they had to speak and act with caution. They could not command the allegiance of the masses.⁴⁵

The Federalist-Antifederalist debates thus presented the early Americans with a dilemma — a dilemma that Alexander Hamilton implicitly framed when, in the *Federalist Papers’* final paragraph, he wrote: “A Nation, without a National Government is . . . an awful spectacle.”⁴⁶ If Americans were to be joined as a nation, the Federalists argued, the tie most likely to hold them together would be an overarching government invested with significant powers. But citizens could not place their trust in an overarching government, the Antifederalists countered, if they were not already, and perhaps never could be, joined as a nation.

supra note 27, at 33 (stating that Framers believed America contained ingredients for national identity, including “a common language, literature, an intellectual heritage, a similarity of laws, and a certain community of economic relations”); THE FEDERALIST NO. 3, at 42 (John Jay) (Clinton Rossiter ed., 1961) (asserting that Americans are determined to be “firmly united under one federal government, vested with sufficient powers for all general and national purposes”).

⁴⁴ See HANS KOHN, AMERICAN NATIONALISM 3 (1957) (stating that Americans “established themselves as a nation without the support of any of those elements that are generally supposed to constitute a separate nation”); THOMAS L. PANGLE, THE SPIRIT OF MODERN REPUBLICANISM 278 (1988) (“The Declaration by which Americans made themselves independent marked the birth of the first nation in history explicitly grounded not on tradition, or loyalty to tradition, but on appeal to abstract and universal philosophic principles of political right.”).

⁴⁵ BEARD, *supra* note 27, at 32-33 (stating that Constitution itself contains no clear indication “that a nation was to be substituted for a federation of ‘sovereign’ states and that a loyalty to a distant center was to take the place of state loyalties”); MAIN, *supra* note 36, at 121 (stating that Federalists concealed their desire to create national government because they knew majority would oppose them).

⁴⁶ THE FEDERALIST NO. 85, at 527 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis added).

The Constitution was ultimately ratified, of course, even though a majority of the country's citizens may have been inclined toward the views of the Antifederalists.⁴⁷ The Constitution's ratification, however, did not magically erase the differences between the states or cause citizens to subordinate their state identities to a new, national identity.⁴⁸ Indeed, John Jay, Thomas Jefferson, Thomas Paine, and others were troubled by how tenaciously citizens continued to cling to their state loyalties.⁴⁹ Even such Revolutionary luminaries as John Adams, James Madison, and Jefferson routinely used the phrases "my country" and "my nation" to refer both to the United States *and* to their respective home states.⁵⁰

Nevertheless, there was an optimistic sense across the country that something momentous had occurred in the annals of nation-building. Murrin writes:

In the architecture of nationhood, the United States had achieved something quite remarkable. . . . Americans had erected their constitutional roof before they put up the national walls. Hovering there over a divided people, it aroused wonder and awe, even ecstasy. . . . This spirit of amazement, this frenzy of self-congratulation, owed its intensity to the terrible fear that the roof could come crashing down at almost any time. Indeed, the national walls have taken much longer to build.⁵¹

⁴⁷ Though possibly outnumbered, the Federalists were better organized than their opponents, they controlled most of the leading newspapers, they claimed a number of high-profile Revolutionary leaders among their members, they pushed hard for quick votes in key states, and they won last-minute support by promising to amend the Constitution with a Bill of Rights. See MAIN, *supra* note 36, at 249-56 (summarizing some of likely reasons for Federalists' victory); *id.* at 249 n.1 (stating that country was nearly equally divided between Federalist and Antifederalist camps, though latter likely held small majority); SIEMERS, *supra* note 32, at 3 (stating that there "were many [Antifederalists], perhaps even a majority nationwide").

⁴⁸ Consider just two examples. First, the Kentucky and Virginia Resolutions of 1798, drafted by Jefferson and Madison, respectively, in response to the widely despised Alien and Sedition Acts of the same year, claimed that a state had a right to decide for itself whether a federal law would be enforced within its borders. See KENTUCKY AND VIRGINIA RESOLUTIONS OF 1798, reprinted in DOCUMENTS OF AMERICAN HISTORY, *supra* note 32, at 178-79, 182. Second, during the War of 1812, state militia often failed to unite against the British. Curti writes, for example, that "New England governors refused to allow militia to cross state boundaries, even when the foe was at the door and when military defeat seemed in the immediate offing." CURTI, *supra* note 11, at 151.

⁴⁹ See CURTI, *supra* note 11, at 25-26.

⁵⁰ See *id.* at 23; HUNTINGTON, *supra* note 26, at 114.

⁵¹ Murrin, *supra* note 29, at 347.

How, then, did we build those national walls so effectively? Powerful state attachments and identities were once the norm, and membership in an American nation was once merely an aspiration. How did we get to the point where moving from state to state in accordance with our regulatory preferences is trumpeted as one of federalism's virtues and our nation-focused patriotism provides us with our primary political identity?

II. BUILDING A QUASI-RELIGIOUS DEVOTION TO AMERICA

It was not until the late nineteenth and early twentieth centuries that the United States finally appeared on the world stage as a genuine nation-state, with citizens' state and local political attachments largely subordinated to their national identities. This shift in citizens' affections had many causes, not all of which can be covered in a single article. Economic forces, for example, certainly played a role in drawing citizens' loyalties from their states to their country.⁵² The causal factors on which I shall focus here, however, concern the ways in which American patriotism has built upon Christian themes and imagery.

Since the United States' founding more than two centuries ago, Christianity has always been the predominant religion in this country.⁵³ In a 2001 survey, for example, researchers found that more than seventy-

⁵² Prior to the advent of efficient means of interstate communication and travel, economies were largely local in nature. As technologies improved, however, Americans increasingly came to believe that their long-run interests would best be served through economic unity rather than economic division. See CURTI, *supra* note 11, at 113. Although it took a few generations for Americans to see themselves in this way, the Constitution was designed with economic union in mind. In explaining its Dormant Commerce Clause jurisprudence, for example, the U.S. Supreme Court has said that the Framers believed "that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979); see also *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935) ("The Constitution was framed . . . upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division."). The Court believes that, by limiting states' ability to erect trade barriers against one another, it "has advanced the solidarity and prosperity of this Nation." *H.P. Hood & Sons v. Du Mond*, 336 U.S. 525, 535 (1949). Of course, citizens' willingness to think of themselves as a single economic community should not be overstated. Much of the Court's Dormant Commerce Clause jurisprudence would be nonexistent, for example, if the states never enacted protectionist legislation.

⁵³ See Bill McKibben, *The Christian Paradox: How a Faithful Nation Gets Jesus Wrong*, HARPER'S, Aug. 2005, at 32 (stating that America is "a place saturated in Christian identity"). See generally RELIGION AND AMERICAN POLITICS: FROM THE COLONIAL PERIOD TO THE 1980S (Mark A. Noll ed., 1990) (presenting seventeen essays on topic signified by book's title).

six percent of America's adults identified themselves as adherents of the Christian faith.⁵⁴ Admittedly, that label means different things to different people. Moreover, scholars question the extent to which Americans actively practice the religion they claim to follow.⁵⁵ There can be no doubt, however, that the Christian tradition has deep roots in the nation's culture and history. Images of the Roman cross have long been ubiquitous in American society, from churches, to jewelry, to entertainment. Indeed, one scholar goes so far as to assert that "[t]he crucifixion is *the* central image of the Western psyche."⁵⁶ Nearly all American adults have at least a passing acquaintance with the Christian stories of Christmas and Easter. Christian carols play in the background as we do our holiday shopping. Christian leaders play prominent roles in our elections. Politicians regularly quote from the Bible — the same Bible we often find in our hotel drawers. The death of a Pope and the election of his successor dominate the nation's media for weeks. In short, it is impossible to live in the United States without finding oneself regularly exposed to manifestations of the Christian faith.

One of the chief reasons that American patriotism is as powerful as it is today is that it builds upon aspects of Christianity that have long resonated with the American public. To put it another way, the United States has won many citizens' unyielding loyalty by deploying some of the same powerful archetypes that draw so many Americans to associate themselves with Christianity.⁵⁷ In some cases, national and religious

⁵⁴ U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2004-2005, at 55 (2004) (stating that 159.51 million of America's 207.98 million adults identify themselves as Christian).

⁵⁵ See, e.g., N.J. Demerath III, *Excepting Exceptionalism: American Religion in Comparative Relief*, 558 ANNALS AM. ACAD. POL. & SOC. SCI. 28, 36 (1998) (stating that studies indicate "that actual levels of church attendance are less than half of those that are so widely cited" and that this might be because people are reluctant to tell pollsters that they are not doing what they believe they ought to be doing). *But cf.* Miriam Galston, *Civic Renewal and the Regulation of Nonprofits*, 13 CORNELL J.L. & PUB. POL'Y 289, 333-34 (2004) ("[T]here is data showing that the level of religious engagement in the United States, measured by beliefs, practices, or a combination, has remained quite stable for at least five decades. Some commentators, in fact, see an upswing in religious observance."); Robert D. Putnam, *Community-Based Social Capital and Educational Performance*, in MAKING GOOD CITIZENS: EDUCATION AND CIVIL SOCIETY 58, 61 (Diane Ravitch & Joseph P. Viteritti eds., 2001) (stating that, between early 1960s and late 1990s, Americans' "active involvement in religious organizations, as measured by church attendance, for example, fell between 25 percent and 50 percent").

⁵⁶ EDWARD F. EDINGER, *THE CHRISTIAN ARCHETYPE: A JUNGIAN COMMENTARY ON THE LIFE OF CHRIST* 97 (1987).

⁵⁷ I am not using the term "archetypes" to refer to the alleged contents of the innate "collective unconscious" that Carl Jung so famously posited. See C.G. Jung, *Archetypes of the Collective Unconscious*, in THE ARCHETYPES AND THE COLLECTIVE UNCONSCIOUS 3, 3-4 (2d

leaders have intentionally constructed a vision of the American nation-state that expressly seeks to locate the United States within the Christian story. In other cases, many Americans' deep attachment to some of Christianity's central themes and images has caused them to construct a national patriotism that emphasizes some of those same themes and images. As a result, patriotism and Christianity have become mutually reinforcing for many Americans. I shall identify four principal points of contact between American patriotism and the Christian tradition: (1) believing that a select group of people has been divinely charged with an important global mission, (2) ascribing central importance to the self-sacrificial shedding of blood, (3) believing that one's well-being depends in part upon the faithfulness of one's people to a moral code, and (4) giving one's loyalty to the sovereign perceived to be best able to meet the people's needs.

A. *The New Israel*

Politicians, poets, and preachers have long claimed that God created the United States in order to serve important global purposes. During the Revolutionary Era, many perceived a divine hand in the people's political affairs, believing that "God had chosen America, with its unique origins, commitment to liberty, and material prosperity, to usher in a New World."⁵⁸ President George Washington, for example, urged Americans to see themselves "as the Actors on a most conspicuous Theatre, which seems to be peculiarly designated by Providence for the display of human greatness and felicity."⁵⁹ Religious leaders taught their

ed. 1968) (providing brief summary of Jung's theory). Rather, I am arguing that American patriotism is built, in large part, around certain Christian patterns of thinking about the world.

⁵⁸ MELINDA LAWSON, PATRIOT FIRES: FORGING A NEW AMERICAN NATIONALISM IN THE CIVIL WAR NORTH 6 (2002); see also A. OWEN ALDRIDGE, THOMAS PAINE'S AMERICAN IDEOLOGY 66 (1984) (stating that early Americans were convinced that God created America as crucial step in "the glorious renovation of the world"). Some believed that the country's divinely ordained destiny was even inscribed in the country's geographic features. See, e.g., THOMAS PAINE, COMMON SENSE (1776), reprinted in THE WRITINGS OF THOMAS PAINE 69, 89 (Moncure D. Conway ed., 1969) ("Even the distance at which the Almighty hath placed England and America is a strong and natural proof that the authority of the one over the other, was never the design of Heaven."); ALBERT K. WEINBERG, MANIFEST DESTINY: A STUDY OF NATIONALIST EXPANSIONISM IN AMERICAN HISTORY 43 (Quadrangle Paperbacks 1963) (1935) (stating that many Americans in early 1800s subscribed to "geographical predestination," believing "that nature or the natural order of things destined natural boundaries for nations in general and the United States, the nation of special destiny, in particular").

⁵⁹ WASHINGTON, *supra* note 35, at 517.

congregations that God had sent the United States to point the way toward a world free from the wars and divisions that had dominated life in the West for generations.⁶⁰ By the end of the nineteenth century, textbooks across the country sent schoolchildren a clear message: "America has been chosen by God as his agent."⁶¹

These themes continue to flourish today. Samuel Huntington writes that one of the central elements of modern American identity "is the belief that Americans are God's 'chosen' . . . people, that America is the 'new Israel,' with a divinely sanctioned mission to do good in the world."⁶² Consider, for example, President George W. Bush's recent State of the Union addresses. As part of his effort to reinforce public support for the ongoing military operations in Iraq, the President told the country in January 2003:

The liberty we prize is not America's gift to the world, it is God's gift to humanity. We Americans have faith in ourselves, but not in ourselves alone. We do not know — we do not claim to know all the ways of Providence, yet we can trust in them, placing our confidence in the loving God behind all of life, and all of history. May He guide us now. And may God continue to bless the United States of America.⁶³

The President returned to those themes in January 2004:

America is a nation with a mission, and that mission comes from our most basic beliefs. . . . Our aim is a democratic peace — a peace founded upon the dignity and rights of every man and woman. America acts in this cause with friends and allies at our side, yet we understand our special calling: This great republic will lead the cause of freedom. . . .

⁶⁰ See CURTI, *supra* note 11, at 48-49, 62-63, 66-67; see also JOHN F. WILSON, PUBLIC RELIGION IN AMERICAN CULTURE 29-34 (1979) (stating that many Americans have believed God sent them to model a perfect, democratic society and that "ancient Israel provides the dominant model for a community bearing this burden of historical destiny").

⁶¹ RUTH MILLER ELSON, GUARDIANS OF TRADITION: AMERICAN SCHOOLBOOKS OF THE NINETEENTH CENTURY 299 (1964).

⁶² HUNTINGTON, *supra* note 26, at 104. See generally FYODOR DOSTOEVSKY, DEMONS 252 (Richard Pevear & Larissa Volokhonsky trans., Vintage Books 1994) (1872) ("If a great nation does not believe that the truth is in it alone . . . , if it does not believe that it alone is able and called to resurrect and save everyone with its truth, then it at once ceases to be a great nation . . .").

⁶³ President George W. Bush, State of the Union Address (Jan. 28, 2003), available at <http://www.whitehouse.gov/news/releases/2003/01/20030128-19.html>; see also *id.* ("Once again, we are called to defend the safety of our people, and the hopes of all mankind. And we accept this responsibility.").

The momentum of freedom in our world is unmistakable — and it is not carried forward by our power alone. We can trust in that greater power who guides the unfolding of the years. And in all that is to come, we can know that His purposes are just and true. May God continue to bless America.⁶⁴

By ascribing a divine mission to the United States, national leaders are able to make a powerful appeal to those millions of Americans who identify with the Judeo-Christian tradition. Both Judaism and Christianity were founded on the belief that God works for the benefit of humanity through people whom God has chosen for the task: Judaism teaches that God established the Jewish nation as a means of blessing the world,⁶⁵ while Christianity teaches that God sent Jesus for humanity's redemption and that God continues to interact with the world through the Church.⁶⁶ By claiming that God has uniquely charged it with the task of showing the world the way to peace and freedom, the United States thus not only places itself in the rarest of company, but also makes a claim that many Americans can find virtually impossible to resist: loyalty to God demands nothing less than loyalty to America. After all, if the Christian American believes that God created the United States in order to play vital functions in the world, then he or she can "hardly be lukewarm to his [or her] country."⁶⁷ According to this view, to be ambivalent about the United States is to be ambivalent about God and God's plans for the world.

By tracing its origins to God, the United States joins an ancient tradition of ascribing divine origins to the central figures of one's religious, political, or philosophical life. Christians, for example, have long claimed that Jesus was not merely human, but was fathered by God himself.⁶⁸ Others made similar claims in the ancient world.⁶⁹ The

⁶⁴ President George W. Bush, State of the Union Address (Jan. 20, 2004), available at <http://www.whitehouse.gov/news/releases/2004/01/20040120-7.html>; see also *id.* (stating that "I believe that God has planted in every human heart the desire to live in freedom" and that "[b]ecause of American leadership and resolve, the world is changing for the better").

⁶⁵ See *Genesis* 12:1-3 (describing God's promises to Abraham, father of Jewish people); *Isaiah* 49:6 ("I will give you as a light to the nations, that my salvation may reach to the end of the earth.").

⁶⁶ See *John* 3:16 ("For God so loved the world, that He gave His only begotten Son, that whoever believes in Him should not perish, but have eternal life."); WOLFHART PANNENBERG, *THE APOSTLES' CREED* 145 (1972) (stating that Christians "acknowledge[] the church as the field of activity of the Spirit of Christ").

⁶⁷ CURTI, *supra* note 11, at 55.

⁶⁸ The Apostles' Creed, for example, affirms a belief "in Jesus Christ [the Father's] only Son our Lord, who was conceived by the Holy Ghost [and] born of the Virgin Mary." PAUL

philosophers Plato and Apollonius, for example, were said to have been fathered by Apollo and Proteus, respectively;⁷⁰ Pythagoras claimed to trace his origins to Hermes;⁷¹ Romulus was rumored to be the son of Mars;⁷² and Alexander the Great's mother was believed to be a descendant of Hercules, with some believing that Alexander's father was a god who appeared to Alexander's mother in the form of a snake.⁷³ The United States has adapted this ancient tradition to the nation-state, ascribing divine origins to America itself and contending that God created it and equipped it for a vital global mission.

B. *The Shedding of Blood for the Union*

Although it was an important initial step in building a robust national patriotism, the belief that God created the United States to fulfill a global mission was not sufficient to cause citizens to shift their deepest political loyalties from their states and locales to their country. To be sure, there were occasional periods of sustained national patriotism during America's early years, prompted largely by military successes and economic prosperity.⁷⁴ But there also was a widespread sense that citizens' professions of devotion to their country were more aspirational than descriptive. In the early 1800s, "[t]he country was weak, and the people knew it."⁷⁵ Americans who wished to promote national patriotism had few national accomplishments to cite. "If they probed the

T. FUHRMAN, AN INTRODUCTION TO THE GREAT CREEDS OF THE CHURCH 33 (1960).

⁶⁹ See Frances Young, *Two Roots or a Tangled Mass?*, in *THE MYTH OF GOD INCARNATE* 87, 89 (John Hick ed., 2d ed. 1993) (stating that, in early centuries following Jesus' life, "the notion of divine paternity was by no means peculiar to Christian circles"); see also *id.* at 101 ("[M]iraculous birth stories, legends of extraordinary disappearance at death, acts of salvation and healing, deification and appearances from on high were not infrequently associated with [people of exceptional power or status] in the pagan world.").

⁷⁰ See *id.* at 89, 92.

⁷¹ See 2 *DIOGENES LAERTIUS, LIVES OF EMINENT PHILOSOPHERS* 323-25 (R.D. Hicks trans., Harvard Univ. Press 1950) (n.d.).

⁷² See *PLUTARCH, THE LIVES OF THE NOBLE GRECIANS AND ROMANS* 25-26 (John Dryden trans., Modern Library 1979) (n.d.).

⁷³ See *id.* at 801-02.

⁷⁴ The War of 1812, for example, prompted a surge of both economic prosperity and national patriotism, which endured until a national depression in 1819 sparked a "resurgence of agrarian, democratic, and states' rights thought." RICHARD E. ELLIS, *THE UNION AT RISK: JACKSONIAN DEMOCRACY, STATES' RIGHTS, AND THE NULLIFICATION CRISIS* 6 (1987). National patriotism again surged in the 1820s, prompted by the deaths of many veterans of the Revolutionary War and the deaths of both Thomas Jefferson and John Adams on July 4, 1826. See JOHN BODNAR, *REMAKING AMERICA: PUBLIC MEMORY, COMMEMORATION, AND PATRIOTISM IN THE TWENTIETH CENTURY* 23 (1992).

⁷⁵ GEORGE STUYVESANT JACKSON, *EARLY SONGS OF UNCLE SAM* 76 (1933).

depths of national tradition where most patriots find inspiration," George Stuyvesant Jackson observed, "they struck bottom almost at once, because not very long ago their country had been a province, for the most part loyal to England, now one of their most hated enemies."⁷⁶

The country's lack of cohesion was laid bare in the years leading up to the Civil War. In 1832, the South Carolina legislature declared that certain federal tariffs were unconstitutional and thus "null, void, and no law" within South Carolina's borders.⁷⁷ President Andrew Jackson responded by "appeal[ing] to the understanding and patriotism of the people," arguing that the Union would dissolve if each state were free to decide which federal laws would be enforceable.⁷⁸ South Carolina rejected Jackson's plea for unity, insisting that "[t]he primary and paramount allegiance of the citizens of this state, native or adopted, is of right due to this state."⁷⁹ Similarly, in his 1851 *Disquisition on Government*, John C. Calhoun vehemently argued that the states had neither surrendered their sovereignty nor created "one great community or nation"⁸⁰ and that the people thus owed their primary allegiance to their states:

There is, indeed, no such community, *politically* speaking, as the people of the United States, regarded in the light of, and as constituting one people or nation. There never has been any such, in any stage of their existence. . . . The whole, taken together, form a federal community; — a community composed of States united by a political compact; — and not a nation composed of individuals united by, what is called, a social compact.⁸¹

⁷⁶ *Id.* at 77; *see also id.* (stating that the national government early Americans "sought to glorify hardly existed").

⁷⁷ SOUTH CAROLINA ORDINANCE OF NULLIFICATION (Nov. 24, 1832), *reprinted in* DOCUMENTS OF AMERICAN HISTORY, *supra* note 32, at 261-62. *See generally* CHAUNCEY S. BOUCHER, THE NULLIFICATION CONTROVERSY IN SOUTH CAROLINA 1-45 (Greenwood Press 1968) (1916) (discussing events leading up to South Carolina's declaration).

⁷⁸ PRESIDENT ANDREW JACKSON, PROCLAMATION TO THE PEOPLE OF SOUTH CAROLINA (Dec. 10, 1832), *reprinted in* DOCUMENTS OF AMERICAN HISTORY, *supra* note 32, at 262-64.

⁷⁹ SOUTH CAROLINA'S REPLY TO PRESIDENT JACKSON'S PROCLAMATION (Dec. 20, 1832), *reprinted in* DOCUMENTS OF AMERICAN HISTORY, *supra* note 32, at 268-69.

⁸⁰ JOHN C. CALHOUN, A DISQUISITION ON GOVERNMENT AND A DISCOURSE ON THE CONSTITUTION AND GOVERNMENT OF THE UNITED STATES 121-31 (Richard K. Cralle ed., Lawbook Exch. 2002) (1851).

⁸¹ *Id.* at 162; *see also id.* at 122 (arguing that if the Constitution had required citizens to shift their allegiance from their states to their country, there would have had to have been "a thorough and radical revolution, both socially and politically; a revolution much more radical, indeed, than that which followed the Declaration of Independence"). The country's textbooks portrayed the North and the South "as distinctive enough to make up

As the reader well knows, South Carolina's and Calhoun's views were neither isolated nor inconsequential. Within weeks of Abraham Lincoln's election to the presidency in 1860, South Carolina seceded from the Union, followed quickly by Alabama, Florida, Georgia, Louisiana, Mississippi, and Texas.⁸² By March 1861, the seceding states had ratified a new constitution — the Constitution of the Confederate States of America — and had elected Jefferson Davis as their president.⁸³ One month later, Confederate forces opened fire on the Union's Fort Sumter in South Carolina, and the Civil War was underway.⁸⁴

Although those in the North were fighting to save the Union, they were not uniformly animated by a self-sacrificial love of their country. Some of those fighting on the side of the North, for example, "had little liking for the high patriotic verbalism of zealous civilians," with one soldier writing that "whoever announces that he enlisted because he loved his country is sure to become the target for the shafts of ridicule."⁸⁵ Recognizing the need to boost the Northerners' morale, Edward Everett Hale penned his now-famous story *The Man Without a Country*, encouraging his readers to foster within themselves an unyielding love of America.⁸⁶

The country did not enter the war as a nation, but it certainly was beginning to emerge as one by the time the war ended.⁸⁷ Approximately

separate nationalities." ELSON, *supra* note 61, at 185.

⁸² See ROBERT COOK, *CIVIL WAR AMERICA: MAKING A NATION, 1848-1877*, at 115-16 (2003).

⁸³ See DANIEL FARBER, *LINCOLN'S CONSTITUTION* 13 (2003); see also CONSTITUTION OF THE CONFEDERATE STATES OF AMERICA (Mar. 11, 1861), reprinted in *DOCUMENTS OF AMERICAN HISTORY*, *supra* note 32, at 376.

⁸⁴ See FARBER, *supra* note 83, at 15. When Lincoln called for a strong military response to the attack on Fort Sumter, states in the upper South — Virginia, Tennessee, North Carolina, and Arkansas — also left the Union. See *id.* at 15-16.

⁸⁵ CURTI, *supra* note 11, at 163.

⁸⁶ See EDWARD EVERETT HALE, *THE MAN WITHOUT A COUNTRY* (Houghton Mifflin Co. 1923) (1863). In this fictional account, an angry Philip Nolan declares that he wishes he "may never hear of the United States again." *Id.* at 8. Nolan is sentenced to spend the rest of his life on a Navy vessel, and those around him are given strict orders never to make any reference to the United States in their conversations with him. *Id.* at 11, 15-16. As the years pass, Nolan develops a deep love of his country, urging one visitor, for example, to "never look at another flag, never let a night pass but you pray God to bless that flag." *Id.* at 49.

⁸⁷ See HUNTINGTON, *supra* note 26, at 119 ("The American nation was born in the war and came into full being in the decades after the war. So also did American nationalism, patriotism, and the unqualified identification of Americans with their country."); KOHN, *supra* note 44, at 105 (stating that Civil War "questioned and at the same time completed the crystallization of American nationalism"); LAWSON, *supra* note 48, at 3 (stating that by end of Civil War, "a 'Union' of states had become a 'nation' of Americans"); Craig S. Lerner, *Saving the Constitution: Lincoln, Secession, and the Price of Union*, 102 MICH. L. REV.

620,000 Americans sacrificed their lives on the country's battlefields⁸⁸ — an unfathomable loss, to which those who survived quickly ascribed a quasi-religious significance. The soldiers who died were praised as Christ-like figures who, by sacrificially shedding their own blood, had bound Americans together as a nation. In a speech at Yale College in 1865, for example, Horace Bushnell praised the soldiers' sacrifices in language that closely mirrors the language Christians use when describing Jesus' crucifixion:

Our dead have a distinctive right of honor in the simple fact that they were the victims in that great sacrifice of blood which has opened for us a new chapter of life. They have bled for us, and from that shedding of blood have come for us great remissions and redemptions. In this blood of our slain our unity is cemented and sanctified. The sacrifices in the fields of the Revolution united us but imperfectly. We had not bled enough to merge our colonial distinctions, and let out the State-rights doctrine, and make us a proper nation. And so, what argument could not accomplish, sacrifice has achieved. . . . The pitch of our lives is raised. We perceive what it is to have a country and a public devotion.⁸⁹

After his assassination at the hands of an enemy of the Union,⁹⁰ President Lincoln, who himself had praised the nation-building sacrifice of those who died at Gettysburg,⁹¹ was similarly held up as a martyr whose death would strengthen the nation.⁹²

1263, 1266 (2004) (stating that the almost total absence of post-Civil War debate about states' right of secession "testifies to the extent to which the regime that has emerged from Lincoln's presidency is not quite the one that entered it").

⁸⁸ See COOK, *supra* note 82, at 5.

⁸⁹ MARY BUSHNELL CHENEY, *LIFE AND LETTERS OF HORACE BUSHNELL* 486 (Arno Press, Inc. 1969) (1880); see also *id.* at 487 ("By the blood of their sacrifice these dead have consecrated our free institutions. They are no longer mere human creations, but God's ordinances.").

⁹⁰ See FRANCIS WILSON, *JOHN WILKES BOOTH: FACT AND FICTION OF LINCOLN'S ASSASSINATION* 25-80 (1929) (providing engaging description of Booth's reasons for assassinating President Lincoln).

⁹¹ See ABRAHAM LINCOLN, *GETTYSBURG ADDRESS* (Nov. 19, 1863), reprinted in *THIS FIERY TRIAL: THE SPEECHES AND WRITINGS OF ABRAHAM LINCOLN* 183, 183-84 (William E. Gienapp ed., 2002) (stating that fallen soldiers consecrated battlefield with their lives and that "from these honored dead we take increased devotion to that cause for which they gave the last full measure of devotion . . .").

⁹² On the occasion of Lincoln's death, for example, George Bancroft wrote:

To th[e] Union Abraham Lincoln has fallen a martyr. His death, which was meant to sever it beyond repair, binds it more closely and more firmly than ever. . . . The grave that receives the remains of Lincoln, receives the costly sacrifice to

America's poets readily perceived the new sense of nationhood that the Civil War soldiers' deaths had created. In 1864, Ralph Waldo Emerson wrote: "Before the War, our patriotism was a firework, a salute, a serenade, for holidays and summer evenings, but the reality was cotton thread and complaisance. Now the deaths of thousands and the determination of millions of men and women show [that] it [is] real."⁹³ The following year, James Russell Lowell described the sensation of finding himself a member of an emerging nation:

If we have not hitherto had that conscious feeling of nationality, the ideal abstract of history and tradition, which belongs to older countries, compacted by frequent war and united by memories of common danger and common triumph, it has been simply because our national existence has never been in such peril as to force upon us the conviction that it was both the title-deed of our greatness and its only safeguard. But what splendid possibilities has not our trial revealed to ourselves! What costly stuff whereof to make a nation! Here at last is a state whose life is not narrowly concentrated [sic] in a despot or a class, but feels itself in every limb; a government which is not a mere application of force from without, but dwells as a vital principle in the will of every citizen.⁹⁴

The centrality of the soldier to America's newfound patriotism was reflected in the country's post-Civil War pageantry. In May 1865, for the first time in the country's history, veterans joined their commanding officers in the nation's capital at the close of the war in order to march together one final time, rather than immediately disperse to their homes. As they did so, the American flag "and the men who carried it into battle emerged as the most important symbols of the enduring power of the

the Union; the monument which will rise over his body will bear witness to the Union; his enduring memory will assist during countless ages to bind the states together, and to incite to the love of our one undivided, indivisible country.

GEORGE BANCROFT, *THE DEATH OF LINCOLN* (April 1865), reprinted in *AMERICAN PATRIOTISM* 647, 652-53 (Selim H. Peabody ed., 1881). Just as Lincoln's star was rising in the annals of American patriotism, the star of Thomas Jefferson — a president who had championed the cause of localism — was falling. See PETER KARSTEN, *PATRIOT-HEROES IN ENGLAND AND AMERICA* 96-99 (1978).

⁹³ Ralph Waldo Emerson, Journal Entry (Oct. 30, 1864), in *10 JOURNALS OF RALPH WALDO EMERSON* 79 (Edward Waldo Emerson & Waldo Emerson Forbes eds., 1914).

⁹⁴ JAMES RUSSELL LOWELL, *ESSAY ON RECONSTRUCTION* (1865), reprinted in *5 THE WRITINGS OF JAMES RUSSELL LOWELL* 210, 211-12 (1890); see also *id.* at 213 ("Loyalty has hitherto been a sentiment rather than a virtue; it has been more often a superstition or a prejudice than a conviction of the conscience or of the understanding. Now for the first time it is identical with patriotism . . .").

nation-state.”⁹⁵ The Grand Army of the Republic, established in 1866, became an important force in shaping the new American patriotism, sponsoring frequent military parades, as well as vast encampments where thousands of Americans flocked to mingle with soldiers in and around their tents.⁹⁶ In 1873, New York became the first state to declare Memorial Day a legal holiday,⁹⁷ a soldier-celebrating occasion that continues to serve as an important annual touchstone for American patriotism.

Echoing the role that Jesus’ death has played in drawing many Americans to Christianity, the image of soldiers sacrificing their lives for the United States remains perhaps the most powerful call to national patriotism. If so many have given their lives so that we can live freely in America, we ask ourselves, how can we feel anything but deep devotion to our country?⁹⁸

C. *The Nation’s Moral Charter*

The moral principles on which America was founded were another important cluster of factors attracting citizens’ loyalties to the national level. Again, to say that America is a nation is to say that it is a community whose members feel “a deep, horizontal comradeship” with one another.⁹⁹ A community, in turn, is formed when people assemble themselves around a core set of shared values.¹⁰⁰

The United States articulated its central community-building values at its very inception when it became the first of the world’s countries to declare its own existence by reference to certain moral convictions about public life: that all men and women “are created equal,” that all people

⁹⁵ O’LEARY, *supra* note 34, at 30-31. Military activities and reflections played a significant role in uniting the North and South in the decades after the war ended. O’Leary writes that waging war against the Native Americans in the late 1800s helped the North and South to reconcile with one another by uniting against a common enemy. *Id.* at 115-16. Moreover, beginning in 1884, *Century Magazine* launched a popular series devoted to letting veterans from both sides tell their stories. *Id.* at 119.

⁹⁶ *See id.* at 35-48, 55-56.

⁹⁷ *See* JANE M. HATCH, *THE AMERICAN BOOK OF DAYS* 503 (3d ed. 1978).

⁹⁸ For a general discussion of the role of self-sacrifice in fostering patriotism and nationalism in ancient and modern societies, see ANTHONY D. SMITH, *CHOSEN PEOPLES* 218-53 (2003).

⁹⁹ ANDERSON, *supra* note 22, at 7.

¹⁰⁰ *See* KENNETH L. KARST, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* 190 (1989) (“The heart of community . . . is not so much the cool calculation of interests as the ‘moral cohesion’ of shared values.”); James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 823 (1992) (“The existence of such [shared] values is a necessary condition for the emergence of a community . . .”).

possess “certain inalienable Rights, [and] that among these are Life, Liberty, and the Pursuit of Happiness.”¹⁰¹ When he memorialized the soldiers who died at Gettysburg, President Lincoln encapsulated the canonical story of America’s ideological origins in his immortal opening sentence: “Four score and seven years ago our fathers brought forth on this continent, a new nation, conceived in Liberty, and dedicated to the proposition that all men are created equal.”¹⁰²

Belonging to this national community provides many Americans with an important dimension of their individual identities. After interviewing numerous Americans, for example, Robert Bellah and his co-authors found “a widespread and strong identification with the United States as a national community.”¹⁰³ Kenneth Karst has similarly observed that “membership in the national community helps to provide a sense of wholeness, not only for the society but also for the citizen’s sense of self.”¹⁰⁴ Today, more than anything else, it is a commitment to principles of equality and freedom — principles that stand at the heart of what

¹⁰¹ DECLARATION OF INDEPENDENCE (1776), *supra* note 32, at 100; *see also* KOHN, *supra* note 44, at 8 (stating that America built its sense of nationhood around “an idea which singled out the new nation among the nations of the earth,” namely, the idea of liberty); PANGLE, *supra* note 44, at 278 (stating that America was “the first nation in history explicitly grounded . . . on appeal to abstract and universal philosophic principles of political right”).

¹⁰² LINCOLN, *supra* note 91, at 184. Lincoln played a powerful role in further building the nation’s identity around principles of freedom and equality. During the war, for example, Lincoln bolstered the energies of those fighting for the North by persuading them that the war was not primarily about whether a state had the power to secede from the Union, but rather about eradicating slavery and thereby giving fuller life to America’s core moral convictions. Lincoln himself initially saw the war as primarily about secession and only secondarily about slavery. In a widely circulated letter to Horace Greeley, for example, President Lincoln explained that his ultimate goal was to save the Union:

My paramount object in this struggle *is* to save the Union, and is *not* either to save or to destroy slavery. If I could save the Union without freeing *any* slave I would do it, and if I could save it by freeing *all* the slaves I would do it What I do about slavery, and the colored race, I do because I believe it helps to save the Union

Id. at 135; *see also* O’LEARY, *supra* note 34, at 25 (“The North’s overwhelming urge was to preserve the nation, not to abolish slavery.”). The following January, however, President Lincoln shifted the war’s emphasis by issuing the Emancipation Proclamation, declaring that slaves in designated areas were now free and would be accepted into “the armed service of the United States.” *See* LINCOLN, *supra* note 91, at 152; *see also* O’LEARY, *supra* note 34, at 26 (“For many antislavery reformers, the Emancipation Proclamation endowed the conflict with moral dimensions.”). By the time of his second inaugural address, the story of the war had clearly changed: President Lincoln told the country that everyone had always understood that the question of whether slavery would be allowed to persist was at the crux of the North-South divide. *See* LINCOLN, *supra* note 91, at 220.

¹⁰³ ROBERT N. BELLAH ET AL., *HABITS OF THE HEART* 250 (1996).

¹⁰⁴ KARST, *supra* note 100, at 184; *see also id.* at 173-77.

Gunnar Myrdal called the “American Creed”¹⁰⁵ — that affords a person true membership in that community.¹⁰⁶

Because Americans have defined themselves by reference to compelling moral principles — principles that render certain behaviors praiseworthy and other behaviors condemnable — citizens have good reason to believe that they have a powerful stake in the extent to which the nation is faithful to its convictions. We saw an early manifestation of this belief in the late 1800s and early 1900s, when the United States was itself popularly regarded as an organic and morally autonomous person.¹⁰⁷ Many Americans believed that it was through their associations with this freedom- and equality-seeking nation that individual citizens could themselves achieve their highest moral fulfillment.¹⁰⁸ One need not ascribe actual moral personhood to nation-

¹⁰⁵ See GUNNAR MYRDAL, *AN AMERICAN DILEMMA* 3-9 (20th anniversary ed. 1962) (coining term “American Creed,” and describing that creed’s centrality in American public life); see also *id.* at 8 (“For practical purposes the main norms of the American Creed as usually pronounced are centered in the belief in equality and in the rights to liberty.”).

¹⁰⁶ See BERNIS, *supra* note 24, at 50 (stating that our adherence to these principles is what makes us “one people”); HUNTINGTON, *supra* note 26, at 46 (“Americans, it is often said, are a people defined by and united by their commitment to the political principles of liberty, equality, democracy, individualism, human rights, the rule of law, and private property embodied in the American Creed.”).

¹⁰⁷ In 1918, an American writer put it this way: “We have come to see that our nation is more than a group of people existing under one government within definite boundaries. It is ourselves, yet more than ourselves. It is a glorious super-person, possessed of virtues, power, ideals, daring and sacrifice.” MATHEWS, *supra* note 20, at 4; see also O’LEARY, *supra* note 34, at 51 (stating that, in late 1800s, many Americans “moved away from an older conception of the Union as a ‘legal creation of contractual rights and obligations’ towards one that identified the nation as a living entity with a body and soul”); cf. ELSON, *supra* note 61, at 285 (“In nineteenth-century schoolbooks, . . . a nation inherits character and personality . . .”). The view that the United States is a morally autonomous person arose in part from the political philosophy of Hegel, who believed that each of the world’s sovereign states was “a moral being, capable of making moral choices.” FERNANDO R. TESÓN, *HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY* 53 (1988); see also O’LEARY, *supra* note 34, at 52 (associating America’s “organic nationalism” with Hegel). In his characteristically inscrutable prose, Hegel wrote:

The state is the realized ethical idea or ethical spirit. It is the will which manifests itself, makes itself clear and visible, substantiates itself. It is the will which thinks and knows itself, and carries out what it knows, and in so far as it knows. . . . The state is absolutely rational. This substantive unity is its own motive and absolute end. In this end freedom attains its highest right. This end has the highest right over the individual, whose highest duty in turn is to be a member of the state.

G.W.F. HEGEL, *PHILOSOPHY OF RIGHT* 240 (S.W. Dyde trans., Prometheus Books 1996) (1896).

¹⁰⁸ See CURTI, *supra* note 11, at 177 (“The identification of the nation with moral

states,¹⁰⁹ however, in order to believe that one's well-being rests in part upon the faithfulness of one's nation to its central moral convictions. Our status as freedom- and equality-valuing Americans provides us with an important aspect of our identities. The nation's behavior can thus cause us to feel either pride and a sense of belonging or shame and a sense of alienation, depending upon how we believe the nation's conduct squares with the principles on which our national community was founded.

Moreover, within the Christian tradition, there are many citizens who believe that God's treatment of America depends upon the country's faithfulness to its moral charter. With respect to the issue of slavery, for example, Thomas Jefferson wrote: "I tremble for my country when I reflect that God is just; that his justice cannot sleep forever."¹¹⁰ In the years leading up to the Civil War, abolitionists similarly argued that God would refuse to bless a nation that allowed slavery to persist.¹¹¹ As the Civil War later neared its end, President Lincoln told the country that the war might have been God's retribution for slavery's evils.¹¹² This

principle, moral will, moral struggle and regeneration, led to the conviction that only through the nation can the individual realize his own moral freedom."); see also O'LEARY, *supra* note 34, at 51 (stating that, beginning in 1880s, many believed that nation was "capable of offering its citizens moral regeneration"); *id.* at 52 (stating that many Americans believed "that the fullest expression of self-hood and freedom could best be realized through loyalty to ever larger collectivities of the family and nation-state").

¹⁰⁹ The Hegelian understanding of the personhood of nation-states, see *supra* note 107, makes implausible ontological claims. See TESÓN, *supra* note 107, at 71 ("The analogy of state to individual fails because words such as 'freedom,' 'autonomy' and 'equal liberty' are used with a different (and unclear) meaning when they are predicated of nation-states than when they are predicated of individuals."). Hegelian theory also helps to provide cover for those who believe that intervention by the world community is never justified when totalitarian regimes abuse their citizens. Tesón writes, for example, that Hegel believed that, "[j]ust as persons' moral choices deserve respect from others, so state choices deserve respect from foreigners." *Id.* at 53; see also POPPER, *supra* note 24, at 31 (stating that Hegel posited that state possesses "absolute moral authority . . . , which overrules all personal morality, all conscience" and that this view "links Platonism with modern totalitarianism"); TESÓN, *supra* note 107, at 57 ("Hegel's theory embodies the classic assumptions of the most aggressive forms of nationalism: States may not challenge other states' treatment of their own subjects, but they may wage war to achieve national glory — to further the 'national spirit.'").

¹¹⁰ Thomas Jefferson, *Notes on the State of Virginia*, in THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 187, 279 (Adrienne Koch & William Peden eds., 1944).

¹¹¹ See Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 NW. U. L. REV. 1106, 1132 (1994). See generally JOHN T. NOONAN, JR., THE BELIEVER AND THE POWERS THAT ARE 168-78 (1987) (describing massive religious movement to abolish slavery prior to Civil War).

¹¹² In his Second Inaugural Address, Lincoln stated:

religious orientation (controversially) manifests itself today in numerous other policy domains as well, such as abortion and same-sex marriage.¹¹³

If we shall suppose that American Slavery is one of those offences which, in the providence of God, must needs come, but which, having continued through His appointed time, He now wills to remove, and that He gives to both North and South, this terrible war, as the woe due to those by whom the offence came, shall we discern therein any departure from those divine attributes which the believers in a Living God always ascribe to Him? Fondly do we hope — fervently do we pray — that this mighty scourge of war may speedily pass away. Yet, if God wills that it continue, until all the wealth piled by the bond-man's two hundred and fifty years of unrequited toil shall be sunk, and until every drop of blood drawn with the lash, shall be paid by another drawn with the sword, as was said three thousand years ago, so still it must be said "the judgments of the Lord, are true and righteous altogether."

ABRAHAM LINCOLN, SECOND INAUGURAL ADDRESS (1865), reprinted in *THIS FIERY TRIAL*, *supra* note 91, at 221.

¹¹³ See, e.g., Adelle M. Banks & Itir Yakar, *Thousands of Christians Rally for Traditional Marriage*, RELIGION NEWS SERVICE, Oct. 15, 2004, available at http://www.beliefnet.com/story/154/story_15440.html (quoting Southern Baptist leader as saying that "[i]f we allow same-sex marriage to be foisted upon us by an imperial judiciary in the United States, God will not bless this nation"); Sarah C. Campbell, *Floods, Violence Will Punish America for Abortions, "Rescue" Founder Says*, COM. APPEAL (Memphis, Tenn.), July 13, 1993, at A5 (reporting that Randall Terry, founder of Operation Rescue, told crowd that "God will punish Americans for allowing legal abortions by sending floods, violence, and economic collapse that will split the nation"); Marjorie Hyer, *Broadcasters Savor Reagan Victory: Convention Focuses on Political Success, Abortion, Pornography, School Prayer*, WASH. POST, Feb. 9, 1985, at B6 (reporting that then-Senator Jesse Helms told convention of religious broadcasters that "God is not likely to bless this country until we protect the most innocent of human creation"); Karen Lee Ziner, *Antigay Remarks Bring Apology from Lawmaker*, PROVIDENCE J. (R.I.), Mar. 20, 2004, at A3 (reporting that participant in rally against same-sex marriage said that "God cannot bless this country and its people that is [sic] the greatest exporter of pornography, allows over 60,000 pornographic sites on the Internet available [sic] to children, and kills 4,500 babies a day through abortions"). During an appearance on Pat Robertson's 700 Club television program a few days after the September 11 tragedy, the Reverend Jerry Falwell made similar comments regarding the terrorist attacks:

The abortionists have got to bear some burden for this because God will not be mocked. And when we destroy 40 million little innocent babies, we make God mad. I really believe the pagans, and the abortionists, and the feminists, and the gays and the lesbians who are actively trying to make that an alternative lifestyle, the ACLU, People for the American Way — all of them who have tried to secularize America — I point the finger in their face and say, "You helped this happen."

John F. Harris, *God Gave U.S. "What We Deserve," Falwell Says*, WASH. POST, Sept. 14, 2001, at C3; cf. Natasha Koreck & Scott Fornek, *Keyes Likens Abortion to Terrorism*, CHI. SUN-TIMES, Aug. 17, 2004, at 6 (reporting that Republican candidate for U.S. Senate "said that the Sept. 11 terrorist attacks were a 'warning' from God to 'wake up' and stop 'the evil' of abortion").

In short, many Americans perceive that they have much at stake in how rigorously the nation adheres to the moral principles on which it was founded. Our individual well-being depends, in part, upon ensuring that the nation faithfully implements the American Creed. As a result, we work hard to shape the nation's moral character in a manner we believe to be true to the country's founding principles. Focusing our attention on the nation's conduct, in turn, only deepens our sense of identification with the nation itself.

D. The Plea-Answering Sovereign

A fourth factor that has played an important role in pulling citizens' loyalties from their states and locales to their country has been the federal government's provision of greatly coveted benefits to citizens. In the early and mid 1800s, the federal government struck the smallest of profiles in citizens' daily lives, as nearly all important governmental services were provided by state and local officials.¹¹⁴ As a result, citizens' loyalties and affections remained firmly attached to their states and locales, while "their relationship to their national polity was characterized by distance and distrust."¹¹⁵ The state of affairs prompted Alexis de Tocqueville to write:

The sovereignty of the Union is a work of art. That of the states is natural; it exists on its own, without striving, like the authority of the father in a family. Men are affected by the sovereignty of the Union only in connection with a few great interests. . . . But state sovereignty enfolds every citizen and in one way or another affects every detail of daily life. To it falls the duty of guaranteeing his

¹¹⁴ See LAWSON, *supra* note 58, at 5 ("With the exception of national elections and trips to the post office, most Americans had almost no contact or interaction with their national government."); ROBERT H. WIEBE, *THE OPENING OF AMERICAN SOCIETY: FROM THE ADOPTION OF THE CONSTITUTION TO THE EVE OF DISUNION* 353 (1984) ("Jefferson at his most insular could scarcely have found fault with [the federal government's] apparatus in the early [eighteen-] forties: no bank, no military worth mentioning, no taxes that a growing majority of citizens could remember paying its officials."); Harry N. Scheiber, *Redesigning the Architecture of Federalism — An American Tradition: Modern Devolution Policies in Perspective*, 14 *YALE J. ON REG.* 227, 234-35 (1996) (stating that prior to 1861, "family law, criminal law, business organization law, labor law (including slavery), inheritance, local government organization, education at all levels, even much of the relationship of religious organizations to the state, and other areas of social and economic ordering . . . all were largely or entirely in the hands of state governments").

¹¹⁵ LAWSON, *supra* note 58, at 10; see also WIEBE, *supra* note 114, at 354 ("[Citizens'] firm loyalties began at home and extended from the community through its surrounding areas no farther than the state, the most distant unit that actually fed their enterprises and influenced their local environments.").

property, liberty, and life; it has a constant influence on his well-being or the reverse. State sovereignty is supported by memories, customs, local prejudices, and provincial and family selfishness; in a word, it is supported by all those things which make the instinct of patriotism so powerful in the hearts of men. How can one question its advantages?¹¹⁶

That pattern, however, gradually changed. As the American frontier pushed westward, for example, the federal government conveyed vast swaths of land to the pioneers. Merle Curti suggests that “[n]othing played a more significant role in the development of loyalty to the national government than this fact.”¹¹⁷ The federal government became increasingly involved in other dimensions of Americans’ lives in the mid 1800s as well, such as by helping to build the roads, railways, and canals that drew Americans closer together.¹¹⁸

In the years immediately following the Civil War, one thing that many citizens desired was protection from the very state governments that they had formerly held in such high regard, and the federal government responded. The Fourteenth and Fifteenth Amendments gave citizens new equal protection, due process, and voting rights¹¹⁹ and gave Congress the power to enact legislation aimed at enforcing those rights against recalcitrant state actors.¹²⁰ Congress quickly exercised its newly delegated powers by enacting civil rights legislation, much of which continues to provide protection against discriminatory state action today.¹²¹ Congress then conferred federal-question jurisdiction on the

¹¹⁶ ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 167 (J.P. Mayer ed., George Lawrence trans., Perennial Classics 1969) (1850).

¹¹⁷ CURTI, *supra* note 11, at 119.

¹¹⁸ *See id.* at 115; *see also id.* at 114 (stating that, in 1830s and 1840s, “the sphere in which the central government operated was growing larger,” thereby “reinforc[ing] or w[inning] the loyalty to the nation of various groups that profited or hoped to profit from its undertakings”).

¹¹⁹ *See* U.S. CONST. amend. XIV, § 1 (declaring that no state may “deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws”); U.S. CONST. amend. XV, § 1 (declaring that no state may deny citizens right to vote “on account of race, color, or previous condition of servitude”).

¹²⁰ *See* U.S. CONST. amend. XIV, § 5 (giving Congress power to enforce amendment’s provisions); U.S. CONST. amend. XV, § 2 (same); *see also* LAWSON, *supra* note 58, at 11 (stating that ratification of Fourteenth Amendment elevated role of federal government, especially in eyes of those who now saw states as entities from which citizens needed protection).

¹²¹ *See, e.g.*, Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1983 (2000)); Civil Rights Act of 1870, ch. 114, § 1, 16 Stat. 140 (codified as amended at 42 U.S.C. § 1971 (2000)). For a brief overview of these statutes’ origins, see Todd E.

federal district courts to ensure that those civil rights would be enforced.¹²² When the states again failed to tackle the people's problems, federal officials extended their reach further, enacting the Interstate Commerce Act of 1887¹²³ and the Sherman Anti-Trust Act of 1890.¹²⁴ The federal government yet again enhanced its status when it adopted a wide range of New Deal initiatives in the face of the Great Depression.¹²⁵ In the 1960s and 1970s, the federal government established sweeping new programs concerning education, the environment, and welfare.¹²⁶ The lesson that millions of Americans drew from the rapidly expanding federal role in their lives was clear: it was the federal government, and not the states, that listened to their pleas and took on their toughest regulatory problems.

This perception and the resulting nation-focused devotion that ensued are reminiscent of the origins of the monotheism that so many Americans now accept and take for granted.¹²⁷ When the monotheism of the Judeo-Christian tradition first began to take shape approximately 3000 years ago, one of the driving forces was the belief that, although there were competing deities, there was only one god with the power to meet the people's needs. As Karen Armstrong writes, the Israelites slowly came to the conclusion that "political catastrophe as well as victory revealed the God who was becoming the lord and master of history. He had all the nations in his pocket."¹²⁸ The more that the Israelites came to see the world in this way, the more securely they fastened their loyalties to the sovereign they regarded as preeminent. In the familiar story of David and Goliath, for example, the Philistine giant

Pettys, *The Intended Relationship Between Administrative Regulations and Section 1983's "Laws,"* 67 GEO. WASH. L. REV. 51, 54-63 (1998).

¹²² See Act of March 3, 1875, ch. 137, 18 Stat. 470 (codified as amended at 28 U.S.C. § 1331 (2000)).

¹²³ See Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379 (codified as amended in scattered sections of 49 U.S.C.).

¹²⁴ See Sherman Anti-Trust Act of 1890, ch. 647, 26 Stat. 209 (codified as amended at 15 U.S.C. §§ 1-7 (2000)).

¹²⁵ See Pettys, *supra* note 15, at 350; see also CURTI, *supra* note 11, at 243 (stating that, during Great Depression and New Deal, federal government came to aid of millions, doing what states and philanthropies had failed to do, "and in doing so gave new life to the economics of national loyalty"). This era also saw the creation of the National Park Service, charged with preserving the nation's parks for future generations of all Americans. See National Park Service Organic Act, Pub. L. No. 64-235, 39 Stat. 535 (1916) (codified as amended at 16 U.S.C. §§ 1-4 (2000)).

¹²⁶ See Michael S. Greve, *Against Cooperative Federalism*, 70 MISS. L.J. 557, 577 (2000).

¹²⁷ See generally *Exodus* 20:3 ("You shall have no other gods before me."); *Isaiah* 45:22 ("[T]here is no other God besides Me . . .").

¹²⁸ KAREN ARMSTRONG, *A HISTORY OF GOD* 43 (1993).

curses David in the name of the Philistines' gods. When David invokes the name of Israel's god, Goliath is promptly slain.¹²⁹ Similarly, in what one scholar has called "one of the most dramatic scenes in the Old Testament,"¹³⁰ the prophet Elijah challenges the followers of Baal to pit their god's powers against those of Yahweh. When Yahweh prevails, the Israelites pledge their loyalty to the deity that they perceive to be powerful and responsive.¹³¹

Similarly, American citizens gradually pledged their loyalty to the government that they perceived to be most powerful and responsive. Although one would not want to push the analogy too far — the states, after all, do remain sovereign and continue to provide the people with many important regulatory services — there still is an analogy to be drawn. As citizens came to perceive that the federal government was succeeding where the states had failed, they further shifted their loyalties from the state to the national level.¹³²

¹²⁹ See *1 Samuel* 17:21-50; see also *id.* at 5:1-11 (telling story in which Israel's God triumphs over Dagon, one of Philistines' gods).

¹³⁰ SHASHI BALA, *THE CONCEPT OF MONOTHEISM* 24 (1993).

¹³¹ The Old Testament tells the story as follows:

And Elijah came near to all the people and said, "How long will you hesitate between two opinions? If the Lord is God, follow Him; but if Baal, follow him. . . . I alone am left a prophet of the Lord, but Baal's prophets are 450 men. Now let them give us two oxen; and let them choose one ox for themselves and cut it up, and place it on the wood, but put no fire under it; and I will prepare the other ox, and lay it on the wood, and I will not put a fire under it. Then you call on the name of your god, and I will call on the name of the Lord, and the God who answers by fire, He is God." And all the people answered and said, "That is a good idea."

[Baal's followers then prayed for hours to their god, but to no avail. Elijah then soaked his own pile of wood with water.] Then it came about at the time of the offering of the evening sacrifice, that Elijah the prophet came near and said, . . . "Answer me, O Lord, answer me, that this people may know that Thou, O Lord, art God. . . ." Then the fire of the Lord fell, and consumed the burnt offering and the wood and the stones and the dust, and licked up the water that was in the trench. And when all the people saw it, they fell on their faces; and they said, "The Lord, He is God; the Lord, He is God."

1 Kings 18:21-39.

¹³² See WILLIAM H. RIKER, *FEDERALISM: ORIGIN, OPERATION, SIGNIFICANCE* 105 (1964) (stating that, during this period, there was a "gradual transfer of patriotism from state to nation"); see also Keith E. Whittington, *Dismantling the Modern State? The Changing Structural Foundations of Federalism*, 25 *HASTINGS CONST. L.Q.* 483, 500 (1998) (asserting that in the early and mid twentieth century "[s]tates lost much of their moral authority as representatives of the people, and popular allegiance shifted to the national government").

III. PATRIOTISM'S ANTICOMPETITIVE EFFECTS

Given all of the compelling forces at play, it is not difficult to understand why loving one's nation seems almost instinctive for Americans. Citizens' deep sense of attachment to the United States is built upon many powerful influences, including a belief that America is destined to play a unique and vital role in global affairs, a belief that Americans' unity and freedom have been purchased with soldiers' blood, the placement of compelling moral principles at the heart of the nation's identity, and a perception that the federal government has often been able to address public problems that exceed the states' own problem-solving abilities. Together, these factors, and surely others as well, act as a powerful magnet for drawing citizens' attention, energy, and loyalty to the national level.

Of course, proponents of national patriotism have not passively waited for feelings of national loyalty to stir in each citizen's heart. Although early efforts to inculcate a love of America were coordinated almost entirely at the local level,¹³³ in the late 1800s and early 1900s federal, state, and local leaders began to work together to foster a deeply rooted sense of national identification.¹³⁴ In the 1890s, for example, those responsible for the content of the nation's textbooks redoubled their efforts to teach schoolchildren that their primary political loyalties must rest with their country.¹³⁵ During that same era, many states passed laws requiring that an American flag be hung in each school and that children salute it each morning.¹³⁶ The Pledge of Allegiance, written in 1891, was gradually integrated into the nation's patriotic rituals,¹³⁷ as was the National Anthem, formally adopted in 1931.¹³⁸ Both Flag Day¹³⁹ and

¹³³ See RICHARD M. FRIED, *THE RUSSIANS ARE COMING! THE RUSSIANS ARE COMING! PAGEANTRY AND PATRIOTISM IN COLD-WAR AMERICA* 8-9 (1998) (stating that nation's patriotic rituals were coordinated on decentralized basis prior to World War I).

¹³⁴ See BODNAR, *supra* note 74, at 249 (noting surge in federal promotion of patriotism during and after World War I); O'LEARY, *supra* note 34, at 221-22, 227-42 (describing federal efforts to promote loyalty to nation).

¹³⁵ See ELSON, *supra* note 61, at 283 (stating that nineteenth-century textbooks taught children that "patriotism requires that one should be willing to lose not only family and friends but life itself for one's country"); *id.* at 290 (stating that textbooks from that era taught children that "[t]o rebel against the American government is the greatest crime"); *cf.* HOBBSAWM, *supra* note 26, at 91-92 (stating that leaders of nation-states have often used schools to invent national traditions and to foster attachment "to country and flag").

¹³⁶ See CURTI, *supra* note 11, at 190-91 (stating that New Jersey and North Dakota enacted such laws in 1890 and that many other states quickly followed suit); O'LEARY, *supra* note 34, at 150-54 (describing "schoolhouse flag movement").

¹³⁷ See O'LEARY, *supra* note 34, at 3.

¹³⁸ See *id.*

Armed Forces Day¹⁴⁰ were established in 1949 in the wake of World War II — a war that, “for many Americans, . . . was both the expression of and the stimulant to the most intense nationalism ever experienced.”¹⁴¹ Of course, the most venerable of Americans’ patriotic celebrations occurs on July 4th, when the nation annually marks its independence.¹⁴² These and comparable developments all have helped to instill in citizens a strong sense of loyalty to the American nation.

A. *The States’ Comparative Inability to Engender Patriotism*

Unwilling to cede citizens’ political affections entirely to the nation, the states have tried to win back a share of patriotism for themselves. As nationalistic patriotism was on the rise in the early twentieth century, for example, many states adopted state songs singing the states’ own praises.¹⁴³ Many of these songs focus on the states’ natural beauty, such as the prairies and cornfields in Indiana and Iowa,¹⁴⁴ the mountains in Colorado and Montana,¹⁴⁵ and the hills in South Dakota.¹⁴⁶ Other states’ songs praise the states’ valorous role in the nation’s history, as in Illinois (“Not without thy wondrous story, Illinois, Illinois/Can be written the nation’s glory, Illinois, Illinois.”),¹⁴⁷ Massachusetts (“For Lexington and Concord, and the shot heard ‘round the world/All hail to Massachusetts, we’ll keep her flag unfurled.”),¹⁴⁸ and Pennsylvania (“Where brave men fought the foe of freedom, Tyranny decried/’Till the bell of

¹³⁹ See HATCH, *supra* note 97, at 553-54 (explaining that, prior to its formal adoption by Congress in 1949, June 14th had been at least sporadically celebrated as Flag Day as early as 1877, when Congress ordered that the American flag be flown over all public buildings on that date).

¹⁴⁰ See *id.* at 454 (explaining that Congress declared third Saturday in May to be Armed Forces Day in 1949, in part to celebrate 1947 decision to create Department of Defense, which brought Army, Navy, and Air Force together into coordinated unit).

¹⁴¹ HUNTINGTON, *supra* note 26, at 137.

¹⁴² By the early 1800s, the anniversary of the Declaration of Independence was widely celebrated each year across the country. See ROBERT J. MYERS, *CELEBRATIONS: THE COMPLETE BOOK OF AMERICAN HOLIDAYS* 188 (1972). The holiday acquired still greater prominence when both Thomas Jefferson and John Adams died on that day in 1826 (the Declaration of Independence’s 50th anniversary) and when John Monroe died on that day in 1831. See *id.* at 199-200.

¹⁴³ See generally JOHN HLADCZUK & SHARON SCHNEIDER HLADCZUK, *STATE SONGS: ANTHEMS AND THEIR ORIGINS* (2000) (providing texts and histories of states’ official songs).

¹⁴⁴ See *id.* at 61 (Indiana); *id.* at 66 (Iowa).

¹⁴⁵ See *id.* at 34 (Colorado); *id.* at 103 (Montana).

¹⁴⁶ See *id.* at 169.

¹⁴⁷ *Id.* at 59.

¹⁴⁸ *Id.* at 89-90.

independence filled the countryside.”).¹⁴⁹ Perhaps the most tellingly quaint of all the states’ songs are those that pledge the kind of devotion that one ordinarily associates only with the nation, as in Alabama (“Strong-armed miners, sturdy farmers, loyal hearts whate’er we be/Alabama, Alabama, We will aye be true to thee!”),¹⁵⁰ Arkansas (“Arkansas, Arkansas, I salute thee/From thy shelter no more I’ll roam.”),¹⁵¹ North Dakota (“We will serve thee all our days, North Dakota, North Dakota.”),¹⁵² South Carolina (“South Carolina! We pledge to thee our love and loyalty!”),¹⁵³ Tennessee (“Tennessee, that gave us birth, to thee our hearts bow down. For thee our love and loyalty [s]hall weave a fadeless crown.”),¹⁵⁴ and Texas (“Mother of Heroes! We come your children true, Proclaiming our allegiance/Our Faith, Our Love for you.”).¹⁵⁵

Of course, the states’ efforts to foster affection for themselves have not been limited to the adoption of state songs; they have taken more substantive steps as well. When it became clear to many in the 1950s and 1960s that the states had “lost their confidence, and the people their faith in the states,”¹⁵⁶ for example, the states worked hard to regain the people’s trust, such as by improving their tax systems, professionalizing their staffs, and strengthening their governors’ powers.¹⁵⁷ Despite these and other initiatives, and despite the states’ continuing involvement in numerous important areas of our lives, when we compare the country’s and the states’ respective successes in engendering patriotism, we find that there is, in fact, little comparison: the states clearly have fallen far short of rivaling the nation’s ability to instill in the citizenry a deep sense of devotion. Indeed, even to talk about developing a patriotic identification with the states still calls to mind the troublesome sub-

¹⁴⁹ *Id.* at 151-52.

¹⁵⁰ *Id.* at 3.

¹⁵¹ *Id.* at 23.

¹⁵² *Id.* at 137.

¹⁵³ *Id.* at 165.

¹⁵⁴ *Id.* at 172.

¹⁵⁵ *Id.* at 187.

¹⁵⁶ TERRY SANFORD, *STORM OVER THE STATES* 21 (1967); see also *id.* at 22-38 (attributing states’ decline to many factors, including neglected cities, environmental concerns that transcended state boundaries, ill-advised tax policies, stifling state constitutions, weak governorships, and state legislators who were too quick to succumb to lobbyists).

¹⁵⁷ See ALICE M. RIVLIN, *REVIVING THE AMERICAN DREAM: THE ECONOMY, THE STATES & THE FEDERAL GOVERNMENT* 102-07 (1992); John Shannon & James E. Kee, *The Rise of Competitive Federalism*, 9 *PUB. BUDGETING & FIN.* 5, 13-16 (1989).

national attachments that were associated with secessionism and civil war.¹⁵⁸

The absence of state-focused patriotism is starkly evident in the arguments that some make today in support of shifting greater regulatory responsibilities from the federal government to the states. Those who advocate the devolution of regulatory power do not do so because they believe (as the Antifederalists believed) that citizens' primary political loyalties lie with the states. Rather, they believe that freedom is enhanced when each citizen is presented with as many as fifty different state regulatory regimes from which to choose and is able to move to the jurisdiction that best suits his or her own particular preferences.¹⁵⁹ The expectation that a citizen will vote with his or her feet by moving to the jurisdiction whose regulations he or she finds most attractive *requires* that the citizen not feel the same kind of unshakeable loyalty to his or her state as most Americans feel for their country. After all, whether one is talking about state governments in the public sphere or commercial enterprises in the private sphere, two sellers can hardly be in competition if all of the potential customers already have sworn their irrevocable allegiance to one seller or the other.

Therein lies a critical problem. Although the absence of state-focused patriotism is essential for competition among the states to flourish, the states' inability to compete with the nation for citizens' patriotism poses a serious threat to the dynamics of the intergovernmental competition that America's founders envisioned. Those who championed the new Constitution argued that competition between the states and the federal government would be one of federalism's chief benefits because it would enable the two sovereigns to place a vital check on one another. Given the significant overlap in state and federal regulatory powers, there would be numerous areas in which citizens could shift power back and forth between the two sovereigns, depending on which sovereign had won a greater share of the people's trust and devotion at any given moment in time.¹⁶⁰ The problem posed by patriotism today is that the bonds that join the nation and its citizens are now so powerful that, to a significant extent, the federal government is shielded from the competitive forces that the founding generation believed would help

¹⁵⁸ See *supra* notes 77-86 and accompanying text (discussing secessionism and the Civil War).

¹⁵⁹ See *supra* notes 8-9 and accompanying text (citing authorities).

¹⁶⁰ See *supra* notes 15-19 and accompanying text (discussing this competition).

keep the federal government finely attuned to the needs and desires of the citizenry.

To understand why this is so, one needs to reflect on the link between (a) the object of one's patriotism and (b) the level of government at which one would prefer to see regulatory power exercised. One might initially assume that there are no significant connections between the two, given that the nation (about which one might feel deeply patriotic) is not identical to the federal government (from which a "patriot" might feel deeply alienated, depending on the kinds of initiatives the government is pursuing at a given moment in time). As I noted at the outset, Democrats might be profoundly dissatisfied with the composition and activities of the federal government today, and yet a strong sense of patriotism is undoubtedly among the forces that keep them from seeking more amenable regulatory climates in other countries.¹⁶¹

Although they might not be immediately obvious, there *are* important connections between the degree to which citizens feel patriotic about America and the extent to which citizens would prefer to take their important regulatory business to the federal government. Those connections ultimately have their roots in what it means to say that America is a nation-state. Americans perceive a direct relationship between the geographical boundaries of the political community of which they are patriotic members and the geographic boundaries of the government to which they wish to assign significant responsibility for the community's important affairs. Indeed, as I shall explain, preserving America's status as a nation-state *demand*s that the federal government maintain a significant level of involvement in Americans' lives.

B. The Link Between Nationhood, Patriotism, and Regulatory Power

1. The Early Indications of a Connection

The link between nationhood, patriotism, and regulatory power began to manifest itself in the 1780s, even though the United States was then still many years away from becoming a true nation-state. In the late 1700s, many Americans were nervous about surrendering political control to authorities outside their own state and local communities. The Antifederalists, in particular, were persuaded that citizens' and communities' freedom to determine their own fates could be maintained only through local control. The broader one extended the geographical

¹⁶¹ See *supra* notes 2-7 and accompanying text.

reach of a government's powers, they argued, the greater the number of distinct communities that the government would control. The greater the number of distinct communities, the greater the likelihood that the government would be confronted with conflicting demands. These conflicting demands, the Antifederalists argued, would greatly increase the likelihood that one community would be forced to make dissatisfying sacrifices to satisfy the demands of another.¹⁶² After all, the states' economies and societies were largely separate from one another at that time, particularly in the country's rural interior.¹⁶³ The Antifederalists, who predominantly resided in those rural areas,¹⁶⁴ saw no reason to believe that America's states and regions would ever share numerous governmental objectives. The Antifederalists thus narrowly defined the political communities of which they were members. Indeed, as I noted earlier, they believed that the differences between the states were so significant that Americans could never join together as a nation and accept the new federal government as their own.¹⁶⁵

Unlike the Antifederalists, the Federalists tended to be concentrated in the coastal centers of commerce.¹⁶⁶ Largely immersed in the business of the country's urban areas, the Federalists believed that the country's economy would become increasingly interconnected and that many citizens' property and business interests would thus benefit from the stability and centralization that the Constitution could bring.¹⁶⁷ As a

¹⁶² See MAIN, *supra* note 36, at 129 ("[W]ithin a large territory the various regions would strive against one another; different climates, products, interests, manners, habits, laws, would lead to discord. How legislate uniformly for a land so diverse? A law which suited one part might oppress another. Therefore the major functions of government must be exercised at the local or state levels . . ."). The Antifederalists also believed that, through local control, constituents could keep a closer eye on their representatives than they could if those representatives were in the nation's capital. See *id.* at 127-30.

¹⁶³ See *supra* note 36 and accompanying text.

¹⁶⁴ See SIEMERS, *supra* note 32, at 3.

¹⁶⁵ See *supra* notes 38-40 and accompanying text.

¹⁶⁶ See SIEMERS, *supra* note 32, at 3. The pattern is similar to today's familiar political map, with the "blue states" tending to be concentrated along the west and northeast coasts and the "red states" tending to be concentrated in the nation's interior.

¹⁶⁷ After noting the Federalists' concentration on the coast and the Antifederalists' concentration inland, David Siemers explains:

This "coastal versus inland" pattern is not a fluke. The Constitution promised to solidify the nation's economic health. Such an upturn would spur commerce. The nation's major commercial centers were its coastal cities and the areas immediately around them. People in these areas recognized that the Constitution would likely benefit their local economy. Away from the coast, the economy tended to be dominated by small farms, which would not immediately benefit from more commercial activity. In these areas, fears over losing local

result, even though the Federalists still felt attached to their own locales, they found it comparatively easy to imagine that economic and cultural factors eventually would lead Americans to regard themselves as a unified community — a nation. Citizens would then find themselves far more willing than the Antifederalists predicted to allow the federal government to wield significant regulatory power.¹⁶⁸

To a large degree, therefore, the Federalist-Antifederalist debates turned on the different ways the two camps defined the boundaries of the communities in which Americans were likely to live. Those who narrowly defined those boundaries were strongly predisposed toward local control; those who imagined that America's entire citizenry would one day see itself as a united community were far more willing to permit the federal government to exercise significant powers. There was one thing on which the Federalists and the Antifederalists thus implicitly agreed: there is a correlation between the geographic scope of one's perceived community and the geographic reach of one's preferred government. The reasons for that correlation, however, would not become readily apparent until America finally became a nation.

2. Nationhood and the Preference for Federal Regulation

Americans have said from the outset that what binds them together is, above all else, their common commitment to the values of freedom and equality articulated in the Declaration of Independence.¹⁶⁹ Those values reside at the heart of the global mission that many Americans believe their country has been specially charged to fulfill.¹⁷⁰ Yet the mere declaration of those values in 1776 was not enough to render citizens of the United States a national community. Americans did not begin to perceive a deep sense of communal attachment to one another until several generations later, when the country weathered an unthinkable costly civil war.¹⁷¹ One of the chief lessons drawn by those who emerged

political control trumped any hope of economic benefit.

Id.; see also MAIN, *supra* note 36, at 4-7 (stating that property holders tended to be Federalists, while many of those less well-off tended to be Antifederalists). See generally CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES 17 (Transaction Publishers 1998) (1913) (positing that the Constitution "was not the product of an abstraction known as 'the whole people,' but of a group of economic interests which must have expected beneficial results from its adoption").

¹⁶⁸ See *supra* notes 41-43 and accompanying text.

¹⁶⁹ See *supra* notes 101-106 and accompanying text.

¹⁷⁰ See *supra* notes 58-64 and accompanying text.

¹⁷¹ See *supra* notes 87-94 and accompanying text.

victorious from that bloody conflict was that equality and freedom are not self-executing moral principles. Rather, the implementation of those values depends upon the action of patriots — people who are willing to do what it takes to vindicate the nation's fundamental precepts whenever they are being ignored. As Mark Tushnet has noted in another context, "to be an American is to orient your *political action* toward realizing the principles of the Declaration [of Independence]."¹⁷² Soldiers provided Americans with the ultimate example of that willingness to take action on behalf of equality and freedom and thereby helped to instill in Americans the solidarity that is constitutive of a nation: those soldiers were willing to sacrifice their own lives so that other Americans could realize their rights of freedom and equality.¹⁷³

The battlefield, however, is not the only forum in which the patriot can take action aimed at better securing freedom and equality for all Americans. Immediately after the Civil War ended, those who perceived an irreconcilable conflict between racial inequality and America's core values shifted their energies from the battlefield to Congress. In making that shift, they began to forge what has become, in the succeeding century and a half, a powerful link between federal legislative action and Americans' patriotic perception of their nationhood. In the years after the war, the law-making institutions of the federal government became Americans' primary means of establishing uniform, nation-building standards regarding fundamental matters of concern. After the Civil War Amendments established basic new rights concerning involuntary servitude, citizenship, due process, equality, and suffrage, Congress enacted numerous statutes aimed at enforcing those rights and broadened the jurisdiction of the federal courts to ensure that those rights would not be empty promises.¹⁷⁴ Later, as industrialization swept the country and citizens found that low wages, poor working conditions, and inadequate retirement security threatened their ability to live free and satisfying lives, the national community again translated its values

¹⁷² Mark Tushnet, *Federalism as a Cure for Democracy's Discontent?*, in *DEBATING DEMOCRACY'S DISCONTENT* 307, 315 (Anita L. Allen & Milton C. Regan, Jr. eds., 1998) (emphasis added).

¹⁷³ Of course, the seceding states based their secession on a claim of freedom, too — the freedom to go their own way as separate political communities. *See supra* notes 77-81 and accompanying text. That claim of freedom was forced to succumb to the claim that the Union must remain whole and that one of the Union's chief values — equality — was being intolerably breached by the South's acceptance of slavery.

¹⁷⁴ *See supra* notes 119-122 and accompanying text (describing these developments).

into action through the federal government, this time in the form of the New Deal initiatives.¹⁷⁵

The pattern is now deeply ingrained in our political culture: when citizens feel compelled to take action on matters relating to the national community's core values, their strong preference is to turn to the one sovereign that has the ability to reach the entire community — the federal government. As a result, "there are currently few areas, if any, which the political culture treats as outside the range of appropriate federal governance."¹⁷⁶ Whether the issue is abortion, physician-assisted suicide, medical marijuana, stem-cell research, educational standards, corporate malfeasance, pensions, crime and public safety, health-care delivery, environmental destruction, gun ownership, or any one of a host of other matters that citizens believe bear on America's fundamental principles, we are now accustomed to fighting a significant portion of our legislative battles in Congress.¹⁷⁷ Indeed, we often appear willing to settle for action at the state level only when the objectives we hope to achieve plainly lie beyond the federal government's delegated powers or when we have received a hostile reception from the politicians currently in power in Washington.¹⁷⁸

A critical question thus arises: if patriotic citizens want to secure freedom and equality for themselves and their fellow Americans, why don't they focus their efforts primarily at the state or local level? In the years after the Civil War, of course, the answer was clear: state actors were often complicit in the mistreatment of African Americans, so federal intervention was needed to bring recalcitrant state actors into line. When the states failed to address dire economic conditions that clearly transcended state boundaries in the early 1900s, federal legislation again seemed to many to be the obvious choice. But if one believes that state actors today are just as eager as their federal

¹⁷⁵ See *supra* notes 123-126 and accompanying text (describing these developments); see also Robert Post, *Federalism in the Taft Court Era: Can It Be "Revived"?*, 51 DUKE L.J. 1513, 1637 (2002) (arguing that Great Depression "effectively legitimated the federal government as the authentic voice of a genuine national democratic will").

¹⁷⁶ William P. Marshall, *Federalization: A Critical Overview*, 44 DEPAUL L. REV. 719, 733 (1995) (providing quoted language, but not tying described phenomenon to nationhood or patriotism).

¹⁷⁷ See Gardner, *supra* note 100, at 829 ("[A]t this stage in our national life, Americans tend to focus on and debate issues concerning fundamental values primarily on a national level."); William Marshall, *American Political Culture and the Failures of Process Federalism*, 22 HARV. J.L. & PUB. POL'Y 139, 146 (1998) ("[I]t has become commonplace to believe that issues of national consequence should be addressed by federal laws.").

¹⁷⁸ See Pettys, *supra* note 12, at 493-96 (briefly documenting extent to which we now fight our important battles in Congress rather than in state legislatures).

counterparts to make freedom and equality a reality for all Americans, why don't citizens try more frequently to implement the nation's core values on a more decentralized basis? What is it that so often drives citizens to prefer federal solutions?¹⁷⁹

Although a measure of decentralization is certainly compatible with America's nationhood, a significant degree of centralization is essential to the strong sense of national community that so many Americans covet. "Freedom" and "equality" are highly abstract terms, susceptible to vastly divergent interpretations.¹⁸⁰ To be a true national community built upon shared values,¹⁸¹ Americans must try to achieve at least a rough consensus, as frequently as possible, about what America's abstractly stated values actually entail, about the specific reach of individuals' freedoms, and about the specific nature and implications of individuals' equality. That consensus can be most directly approached through the mechanisms of the federal government. Because it stands as the only sovereign in the country that can listen to all of the nation's diverse voices, the federal government tries to craft standards that the national community will find compatible with its values. Our federal government thus serves the nation in the same way that Dominique Schnapper has said many national governments serve their nations in modern-day nation-states: the government continually works to refine the nation's values, thereby ever further integrating the nation's people into a "community of citizens."¹⁸²

Both the federal government and the individual citizen have much at stake in building and preserving this national community. The federal

¹⁷⁹ In addition to the patriotism-related factors I point to here, I have argued elsewhere that citizens' mobility plays a significant role in leading citizens to prefer federal, rather than state or local, regulation. *See id.* at 501-18.

¹⁸⁰ To see how divergent those interpretations can be, one need only remember that voting rights for women were finally secured only in the last century. *See* THE CONCISE HISTORY OF WOMAN SUFFRAGE *passim* (Mari Jo Buhle & Paul Buhle eds., 1978) (collecting primary sources). Similarly, the nation's public schools were pushed toward desegregation only in the last half-century. *See* RICHARD KLUGER, SIMPLE JUSTICE *passim* (2d ed. 2004) (providing detailed description of desegregation battle).

¹⁸¹ *See supra* notes 99-106 and accompanying text (discussing importance of shared values in building community).

¹⁸² DOMINIQUE SCHNAPPER, COMMUNITY OF CITIZENS: ON THE MODERN IDEA OF NATIONALITY 40, 42 (S  verine Ros  e trans., Transaction Publishers 1998) (1994); *see also id.* at 23 (stating that it is nation's overarching government that serves as "the objective, political expression of the [nation's] identity"); *id.* at 39 (stating that democratic nation-state's cohesiveness must be "sustained by the desire of individuals to live together, to respect a certain number of values and common norms, and to act collectively"); *id.* at 95 ("It is the state and political institutions which give form to the nation: they maintain the distinctness of the public domain as the site for the transcendence of particularisms.").

government sometimes must call upon citizens to make sacrifices on behalf of their country — sacrifices that citizens may be willing to make only if they feel a deep solidarity with one another. When the country is at war, for example, the government must ask some of its citizens to risk their own lives and must ask those soldiers' families and friends to endure the risks their loved ones are taking. The link between one's willingness to make those extraordinary sacrifices and one's patriotic attachment to the nation is clear.¹⁸³ As for the individual citizen, a patriotic feeling of membership in the national community provides an important component of many Americans' sense of individual identity.¹⁸⁴ Like any other important aspect of our individual identity, this sense of national membership is not something that we would easily forsake. Relatedly, it is important to many Americans that they not feel alienated from the national community. Alienation is precisely what Americans may feel when the federal government regulates (or when it stands by and permits individual states and localities to regulate) in ways they find incompatible with the nation's fundamental values.¹⁸⁵

Today's angst about the apparent ideological divide between "blue states" and "red states" reflects the distress that Americans feel when the national community's cohesiveness appears threatened by an inability to reach agreement on value-laden matters.¹⁸⁶ Neither camp wants to retreat to smaller political communities and simply allow those sub-national communities to pursue their own unique visions of the common

¹⁸³ See, e.g., LAWSON, *supra* note 58, at 7 (stating that, during Civil War, federal government quickly learned that strong sense of patriotism was required in order to persuade citizens to die for Union).

¹⁸⁴ See *supra* notes 103-104 and accompanying text.

¹⁸⁵ Cf. Pettys, *supra* note 12, at 516-18 (describing alienation as externality that citizen suffers when states other than her own regulate in ways that she finds morally objectionable).

¹⁸⁶ See, e.g., Ralph Z. Hallow, *Americans Deeply Split over Politics*, WASH. TIMES, Jan. 7, 2004, at A5 (reporting that pollsters were finding that "[t]he views in the red states and the blue states are so divergent that they can be considered as two nations"); Joel Kotkin, *Red, Blue and . . . So 17th Century*, WASH. POST, Mar. 28, 2004, at B1 (stating that, much like what occurred in England in 1600s, "the United States today is becoming two nations" with "contrasting and utterly incompatible worldviews"); Donald Lambro, *Economy Making Americans Cranky*, WASH. TIMES, May 7, 2005, at A1 (quoting pollster John Zogby as saying that "we are still split apart, we are ideologically and culturally two nations"); David Mehegan, *Reading into the Red and Blue State of Our Country*, BOSTON GLOBE, Nov. 10, 2004, at C1 (quoting one researcher as stating that "[m]iddle-class Americans, in their heart of hearts, are desperate that we once again become one nation"). For a partisan account of the divide, see THOMAS FRANK, *WHAT'S THE MATTER WITH KANSAS?* 13-27 (2004) (arguing that conservatives have fostered image of red state residents as humble, loyal, hard-working, reverent, good-natured people and of blue-state residents as arrogant, self-centered, irreverent elitists who lack practical working skills).

good. Rather, both camps are determined to ensure that, on issues they regard as vital, their own particular convictions are reflected in the policies of the national community to which they feel, and wish to continue to feel, so patriotically devoted. Consider, as just one of scores of possible examples, the recently published aspirations of a "blue state" labor lawyer. He argues that, given the current composition of the federal government, Democrats should abandon their efforts to secure better wages and protections for workers from the federal government and focus instead on trying to win state-level victories in the "blue states."¹⁸⁷ Yet he candidly reveals his ultimate nation-focused objectives:

Isn't it a little lopsided to govern from a few states, even if they are New York, California, and a few others? Yes. But there are three payoffs for America. First, if we can build up union membership, just in the Blue States, then there is bigger labor. And a bigger labor can fight more battles in the Red States. Second, if we can rule in the Blue States, we can show people in the Red States what they are missing out on. . . . Finally, it might teach us how to appeal to people's interests the next time we go out for the presidency, in 2008.¹⁸⁸

In short, our desire to retain a strong sense of membership in the American nation gives rise to a powerful impulse to focus our policy-shaping energies on the institutions of the federal government. It is chiefly through those institutions that the national community is able to maintain its own cohesiveness by translating its norms of freedom and equality into action. As a result, Americans of all political persuasions seek federal standards on matters they deem vital to the nation's identity. Although there are respects in which the states and the federal government still actively compete with one another for governmental power,¹⁸⁹ the days of the states' predominance have long since passed. Even when citizens are profoundly dissatisfied with the federal government's regulatory priorities, they often do not contemplate a long-term devolution of power to state and local governments. Instead, they pin their hopes on the possibility that the next round of federal elections will yield a crop of politicians who are more receptive to the unhappy citizens' desires.

¹⁸⁷ See Thomas Geoghegan, *Take It to the Blue States: Maybe Labor Should Give Up on Washington in Favor of Friendlier Terrain*, NATION, Nov. 29, 2004, at 14.

¹⁸⁸ *Id.*

¹⁸⁹ See Pettys, *supra* note 15, at 345-53 (describing ways in which this competition manifests itself).

Consequently, if we share the Framers' conviction that, in numerous areas, there should be a vigorous competition for governmental power, we have a serious problem on our hands. If our national patriotism has become so strong that it is now anticompetitive — if the states have lost their ability to pose a serious competitive threat to the federal government — what will prevent the federal government from exercising a virtual monopoly on the people's regulatory affairs? Though it might initially seem at odds with American patriotism, we may find in the years ahead that at least part of the answer lies in regulatory arrangements that transcend the country's borders.

IV. SEARCHING FOR NEW COMPETITORS

A. Opportunities for Regulatory Competition in the International Domain

At the beginning of this Article, I noted the semi-serious talk about the possibility that those unhappy with America's current leadership might relocate in Canada.¹⁹⁰ If it were to occur, such international mobility might foster competition among countries similar to the competition that is said to occur among the fifty American states, with each doing its best to attract residents. Yet the likelihood that any one country (such as oft-mentioned Canada) could entice a significant number of Americans to change their country of residence seems exceedingly improbable. Although it may appear attractive in a handful of ways, neither Canada nor any other foreign country is in a good position to make a serious claim to Americans' deepest political affections. Foreign countries lack frequent opportunities to intervene in Americans' lives and impress upon them the reasons why they ought to transfer their political allegiance away from the United States. It is difficult to imagine how any country could pry numerous Americans free from the deep devotion they have developed over the past century and a half to the American nation-state.

As the Framers recognized when they envisioned competition between the states and the federal government, however, competition between regulatory regimes does not always require citizens to "vote with their feet" by moving to the jurisdiction they find most appealing. Citizens also can reveal their preferences regarding competing regulatory arrangements in the manner the Framers anticipated — by electing politicians who share those citizens' views about the most

¹⁹⁰ See *supra* notes 2-4 and accompanying text.

desirable loci and exercises of power and by lobbying for regulatory arrangements that reflect those views.¹⁹¹ Once we look at governmental competition from that perspective, we can begin to see how international regulatory arrangements may eventually emerge as the federal government's primary competitive threat.

The competitive relationship between the federal government and the international community today is analogous to the competitive relationship between the American states and the federal government from the late 1700s to the late 1800s. When the United States was first founded, nearly all significant regulatory power resided with the states. The people always knew, however, that American federalism gave them a choice: either they could allow power to remain with the states or, if they grew disenchanted with the performance or capacities of the state governments, they could seek a broader range of regulatory services from the federal government — a government in which each state had an important voice,¹⁹² but over which no state could exercise unilateral control. Today, a tremendous amount of regulatory power resides with the federal government. As is already becoming clear, however, the people have another choice: either they can allow power to remain with the federal government or, if they grow disenchanted with the performance or capacities of the federal government, they can seek a broader range of regulatory services through the various available forms of international governance — forms of governance in which the United States has an important voice, but over which it does not exercise unilateral control.

With increasing frequency, Americans have been wrestling with the choice between (a) relying upon the federal government to serve the public by acting unilaterally and (b) demanding that the federal government pursue the people's objectives by negotiating cooperatively with others in the international community. Consider, among countless other examples, President Woodrow Wilson's promotion of the League of Nations in 1919 and the Senate's rejection of the plan the following year;¹⁹³ the U.S.-led creation of the United Nations in 1945 and the

¹⁹¹ See *supra* notes 15-19 and accompanying text (describing Framers' vision of competition between states and federal government).

¹⁹² See *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 848-49 (1995) (Thomas, J., dissenting) (identifying several key ways in which states have voice in federal government, including state-by-state procedure prescribed for amending Constitution, state-by-state election of Senators and Representatives to serve in Congress, and use of state-based electoral college when choosing President).

¹⁹³ See generally RUTH B. HENIG, *THE LEAGUE OF NATIONS* 2-15 (C.M.D. Crowder & L. Kochan eds., 1973) (providing brief overview of President Wilson's decision to promote

current debates about the extent to which the United States should work through the U.N. to achieve its objectives in the Middle East and elsewhere;¹⁹⁴ the formation of the North Atlantic Treaty Organization (“NATO”) in 1949 and the currently strained relationships within NATO caused by the American-led invasion of Iraq;¹⁹⁵ and the United States’ controversial entry into the North American Free Trade Agreement,¹⁹⁶ its refusal to submit its citizens to the jurisdiction of the International Criminal Court,¹⁹⁷ and its refusal to join the Kyoto Protocol on global warming.¹⁹⁸ In these and many other arenas, Americans have debated the relationship between their patriotism, their peace and prosperity, and their interactions with the rest of the world.

These debates gain strength with each passing year, as economic, technological, cultural, and environmental developments — the same kinds of developments that drew America’s states closer together in the late 1800s and early 1900s and created a demand for greater federal control — now draw the world’s countries ever closer together. If we are concerned about the effects of global warming in the United States, for example, we can either keep control of America’s environmental policies

League of Nations at January 1919 Paris Peace Conference and of United States Senate’s refusal to ratify President Wilson’s proposal in March 1920).

¹⁹⁴ See also *infra* notes 213-14 and accompanying text (using 2004 presidential campaign to provide illustration of debate about role of international approval in designing American foreign policy). See generally STEPHEN C. SCHLESINGER, *ACT OF CREATION: THE FOUNDING OF THE UNITED NATIONS passim* (2003) (providing engaging account of U.N.’s origins).

¹⁹⁵ See also Catherine Collins, *Once-Warm Relations a Casualty of War*, CHI. TRIB., Mar. 25, 2005, at C5 (reporting on still-strained relationship between United States and Turkey following Turkey’s refusal in March 2003 to allow American troops to launch attack against Iraq from Turkish soil); Christopher Marquis, *The Reach of War: Diplomacy; As Bush Confers with NATO, U.S. Is Seen Losing Its Edge*, N.Y. TIMES, June 28, 2004, at A8 (reporting on strained U.S.-NATO relationships as result of war in Iraq). See generally MORTON A. KAPLAN, *THE RATIONALE FOR NATO 3-13* (1973) (providing brief overview of NATO’s origins).

¹⁹⁶ See Calvin D. Siebert & Mahmood A. Zaidi, *Employment, Trade, and Foreign Investment Effects of NAFTA*, 5 MINN. J. GLOBAL TRADE 333, 333 (1996) (“Despite the recent adoption of NAFTA by the United States, NAFTA will probably remain politically controversial for the next several years.”).

¹⁹⁷ See Charles M. Sennott & Susan Milligan, *Bush to Seek EU’s Embrace During European Trip But Rifts Persist in Relationship, Analysts Warn*, BOSTON GLOBE, Feb. 20, 2005, at A6 (reporting that among issues dividing United States and Europe is acceptance of “the International Criminal Court to prosecute crimes against humanity”).

¹⁹⁸ See Eli Sanders, *Seattle Leads U.S. Cities Joining Kyoto Protocol*, INT’L HERALD TRIB., May 16, 2005, at 2 (reporting that some U.S. cities intend to meet Kyoto standards, while White House contends that adherence to Kyoto Protocol would result “in a loss of five million jobs in United States and could raise energy prices”); Sennott & Milligan, *supra* note 197, at A6 (reporting that Kyoto agreement is point of contention between United States and Europe).

entirely within the discretion of American politicians or elect leaders who are willing to work with other countries through mechanisms such as the Kyoto Protocol. If we believe that the prices of American farm goods are being pushed too low by international competition, we can either unilaterally install protectionist programs or negotiate trade agreements that seek to address the issue. If we do or do not greatly value the cooperation of NATO members, the United Nations Security Council, or other international alliances before launching a military assault against another country, we can elect leaders who share our views.¹⁹⁹ The point is not that unilateralism or internationalism is always the better choice; the point is that Americans often have a choice between those two options.

The vast range of areas in which Americans can make that choice becomes apparent when one considers the breadth of the treaty power.²⁰⁰ In *Missouri v. Holland*,²⁰¹ the U.S. Supreme Court indicated that there were few limits on the kinds of issues that treaties could address.²⁰² Indeed, although there are dissenting voices,²⁰³ the general consensus among scholars today is that, "unlike statutes, treaties have no defined subject matter, which means that the treaty-makers can enter into an international agreement on any matter, regardless of whether the Constitution grants control over it to another branch."²⁰⁴ With that

¹⁹⁹ Cf. David Held, *The Decline of the Nation State*, in *BECOMING NATIONAL: A READER*, *supra* note 22, at 407, 409-10 (stating that military alliances such as NATO constrain country's ability to do what it wants militarily, because country must worry about maintaining those alliances).

²⁰⁰ See U.S. CONST. art. II, § 2, cl. 2 ("[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur"); U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the land").

²⁰¹ 252 U.S. 416 (1920).

²⁰² See *id.* at 432-34. For a critique of *Holland* and the scope of the treaty power, see Nicholas Q. Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867 *passim* (2005).

²⁰³ See, e.g., Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 394-95 (1998) (arguing that, if federalism limits on federal power are judicially enforceable, no special exception should be made for exercises of treaty power); Rosenkranz, *supra* note 202, at 1875 (arguing that "*Missouri v. Holland* is flatly wrong; treaties cannot expand the legislative power of Congress").

²⁰⁴ John C. Yoo, *Laws as Treaties?: The Constitutionality of Congressional-Executive Agreements*, 99 MICH. L. REV. 757, 838 (2001); see also Bradley, *supra* note 203, at 422-33 (describing "orthodox" view that there are neither Tenth Amendment nor subject-matter limits on treaty power); Richard A. Epstein, *Smoothing the Boundary Between Foreign and Domestic Law: Comments on Professors Dodge, Golove, and Stephan*, 52 DEPAUL L. REV. 663, 667 (2002) ("The treaty power imposes no specific subject matter limitation on the President

exceptionally broad power in mind, scholars have suggested that treaties be used to implement a wide range of domestic regulations that might otherwise lie beyond the federal government's enumerated powers. Catherine MacKinnon contends, for example, that existing treaty provisions would be sufficient to sustain federal legislation providing women with a civil remedy when they suffer acts of gender-motivated violence.²⁰⁵ Before the Supreme Court decided *City of Boerne v. Flores*,²⁰⁶ Gerald Neuman argued that the treaty power could be used to broaden the scope of Americans' religious freedoms.²⁰⁷ Another scholar argues that the treaty power could be used to abrogate the states' sovereign immunity for infringements of federal intellectual property rights.²⁰⁸ Another contends that certain controversial provisions of federal law regarding endangered species and the environment might be invalid under the Court's recent Commerce Clause jurisprudence, but could be sustained under an exercise of the treaty power.²⁰⁹

Given the spectrum of areas in which international regulatory arrangements may be deployed, the federal government today can rarely act with confidence that it has a permanent monopoly on the people's regulatory business, no matter how dominant it has become with respect to the states. If the American public becomes unhappy with the unilaterally devised strategies of its own government, it can elect politicians who will place greater emphasis on negotiating regulatory agreements with other countries. The fifty American states, therefore, are no longer the federal government's only available competitors. The more that the modern age brings the world's countries into contact with one another, the more the federal government will likely find itself

or Senate."); Rosenkranz, *supra* note 202, at 1878 ("[T]here is broad consensus that treaties are not limited to the subject matter of the legislative powers enumerated in Article I, Section 8").

²⁰⁵ See Catharine A. MacKinnon, *Disputing Male Sovereignty: On United States v. Morrison*, 114 HARV. L. REV. 135, 166-68 (2000) (discussing Court's declaration in *United States v. Morrison*, 529 U.S. 598, 617-19 (2000), that Congress exceeded its powers under Commerce Clause when it attempted to provide civil remedy for victims of gender-motivated violence).

²⁰⁶ *City of Boerne v. Flores*, 521 U.S. 507, 529-36 (1997) (holding that Congress exceeded its powers under Section 5 of Fourteenth Amendment when it enacted legislation aimed at restoring religious-freedom rights that Court previously had negated).

²⁰⁷ See Gerald L. Neuman, *The Global Dimension of RFRA*, 14 CONST. COMMENT. 33, 41-54 (1997).

²⁰⁸ See Peter S. Menell, *Economic Implications of State Sovereign Immunity from Infringement of Federal Intellectual Property Rights*, 33 LOY. L.A. L. REV. 1399, 1460-64 (2000).

²⁰⁹ See Katrina L. Fischer, *Harnessing the Treaty Power in Support of Environmental Regulation of Activities that Don't "Substantially Affect Interstate Commerce": Recognizing the Realities of the New Federalism*, 22 VA. ENVTL. L.J. 167, 201-13 (2004).

competing with institutions and alliances that are international in scope.

But would patriotic Americans ever truly be willing to demand that the federal government negotiate an increasing number of regulatory arrangements with other countries? After all, if our nation-focused patriotism has severely hampered the states' ability to compete with the federal government, why would not that same patriotism blunt the international community's competitiveness as well?

B. Patriotism and the Attraction to International Governance

Many insist that our political attachments should remain focused wholly upon the United States. Former Speaker of the House Newt Gingrich argues, for example, that one of the gravest threats to America's future is that, under the sway of liberal-minded opinion-shapers, "America will lose the patriotic sense of itself as a unique civilization."²¹⁰ Gingrich thus contends that Congress should prescribe standards for a patriotic education and that local schools' receipt of federal funds should be conditioned upon meeting those standards.²¹¹ Conservative radio talk-show host Laura Ingraham sarcastically excoriates people she terms "the elites," arguing that they "are no longer Americans first. They are 'citizens of the world.' Their brains are too big to be contained within national borders. They are too advanced for patriotism, which they view as a vestige of an antiquated and barbaric culture that they have left behind."²¹² These same themes arose in the 2004 presidential campaign. During the first presidential debate, Senator John Kerry stated:

The president always has the right and always *has* had the right [to launch a] pre-emptive strike. . . . No president through all of American history has ever ceded, and nor would I, the right to pre-empt in any way necessary to protect the United States of America. But if and when you do it, . . . you've got to do it in a way that passes the test. That passes the global test where your countrymen, your people understand fully why you're doing what you're doing. And you can prove to the world that you did it for legitimate reasons.²¹³

²¹⁰ NEWT GINGRICH, *WINNING THE FUTURE: A 21ST CENTURY CONTRACT WITH AMERICA*, at xii (2005).

²¹¹ *See id.* at 95.

²¹² LAURA INGRAHAM, *SHUT UP & SING: HOW ELITES FROM HOLLYWOOD, POLITICS, AND THE UN ARE SUBVERTING AMERICA* 3 (2003); *see also id.* at 274 (arguing that "the elites" believe nation-states are outdated).

²¹³ *Transcript of the Candidates' First Debate in the Presidential Campaign*, N.Y. TIMES, Oct.

In his ensuing campaign speeches, President Bush seized on Senator Kerry's choice of words. On the campaign trail in Pennsylvania, Bush stated: "Senator Kerry last night said that America has to pass some sort of 'global test' before we can use American troops to defend ourselves." He delivered a similar message in New Hampshire: "The use of troops to defend America must never be subject to a veto by countries like France."²¹⁴

Those who favor internationalism do often find themselves facing express or implied accusations that they are unpatriotic — that they are not "putting America first." Those accusations suggest that our American patriotism is not only anticompetitive with respect to the fifty American states, but that it is anticompetitive with respect to competitors that transcend the nation's borders as well. The "America first" species of patriotism, however, is itself in competition with another form of patriotism — one that places an emphasis on working cooperatively with the international community to achieve common objectives. Indeed, many Americans may find in the years ahead, as some have already found, that several of the very same forces that gave rise to Americans' nation-focused patriotism are now gradually pushing them toward a patriotism that places great value on internationally negotiated agreements.

1. Building Global Alliances Based Upon Principles of Freedom and Equality

Americans' patriotism and national identity are strongly built upon a commitment to freedom and equality,²¹⁵ rather than upon more familiar nation-building devices, such as a common ethnicity or a common geographic origin.²¹⁶ As a result, Americans are primed to build political affiliations with other peoples who share a commitment to those same principles. Indeed, the core of the global mission that Americans have claimed for themselves is a desire to spread the values of freedom and equality around the world.²¹⁷ The more successful the United States is in

1, 2004, at A20.

²¹⁴ Jim VandaHei & Dana Milbank, *Candidates Resume Debate on the Stump*, WASH. POST, Oct. 2, 2004, at A8.

²¹⁵ See *supra* notes 99-113 and accompanying text (discussing America's devotion to these principles).

²¹⁶ See *supra* note 26 and accompanying text (noting common nation-building devices).

²¹⁷ See *supra* notes 58-73 and accompanying text (discussing America's sense of global mission); see also A. POWELL DAVIES, *AMERICAN DESTINY* 116 (1942) ("The faith which makes us Americans is the faith which can give the world the unity it needs. It is not an

achieving that mission, the less significant the nation's geographic borders may become in defining the limits of Americans' political attachments.²¹⁸ The more we perceive that others share our most basic political and moral convictions, the more likely we will be to see ourselves as part of a worldwide community — as citizens both of the United States and of the world.

To the extent that Americans do extend their feelings of solidarity beyond America's borders, many will be attracted to regulatory arrangements that reflect their broadened sense of solidarity, just as they were drawn to federal regulation once they began to see themselves as members of a national community.²¹⁹ Writing shortly before his death, for example, Senator Alan Cranston argued that Americans should consider transferring a greater share of governmental power to international bodies that are equipped to tackle problems that transcend national boundaries,²²⁰ just as nineteenth- and twentieth-century Americans looked to the federal government for help when they began to confront domestic problems that transcended state borders. Senator Cranston suggested that the time had come to add

one more layer of citizenship — world citizenship — to the national and lesser layers among which sovereignty is presently dispersed. This would at long last enable individuals to act upon and embrace not only their traditional national citizenship, patriotism, and allegiance, but also their global citizenship, their planetary patriotism, their allegiance to humanity.²²¹

exclusive faith: it is the faith which shuts no one out. We are not nationalists; we are Americans.”).

²¹⁸ See BERNES, *supra* note 24, at 5 (stating that, if everyone in world subscribed to values declared in Declaration of Independence “and if the character of a country were determined . . . by the philosophical principles on which it is founded, every country would be a liberal democracy and America would lose its distinctiveness and, along with it, any greater claim on the affections and loyalties of its people”).

²¹⁹ See, e.g., DAVIES, *supra* note 217, at 27 (“Distance is annihilated, communication is instant and universal, the entire human race is in proximity, a single, vast, reluctant community.”); *id.* at 28 (“ . . . the old, outworn arrangements are not good enough; human life must be reorganized — this time on a world basis”).

²²⁰ See ALAN CRANSTON, *THE SOVEREIGNTY REVOLUTION* 53-54 (2004).

²²¹ *Id.* at 67. Lawrence Kohlberg's stages of moral development may be relevant here. At stages three and four, loyalty to one's own family, group, or nation “is perceived as valuable in its own right.” LAWRENCE KOHLBERG, *THE PHILOSOPHY OF MORAL DEVELOPMENT* 18 (1981). At stage five, a person begins to make “a clear effort to define moral values and principles that have validity and application apart from the authority of the groups or people holding these principles and apart from the individual's own identification with these groups.” *Id.* At the sixth and final stage, a person makes moral

Senator Cranston was hardly the first to see the world in this way. While promoting his plans for the League of Nations, for example, President Wilson urged Americans to recognize that the United States was not the only country that valued freedom and equality.²²² Martha Nussbaum has called for Americans to regard themselves as cosmopolitan “citizens of the world” whose primary obligation is to honor the equality of all of the world’s people.²²³ Betty Jean Craige argues that, rather than fostering a patriotism that insists upon distinctions between “us” and “them,” we should foster a patriotism marked by “political holism.” Such a perspective favors international cooperation over international antagonism and promotes an “allegiance to transnational laws and principles.”²²⁴ Thomas Pangle contends that we ought “to love our country while at the same time purifying or rarifying our ardor by cultivating an awareness that our country may not be the best, certainly not the best conceivable, political order.”²²⁵ Even as early as the Civil War era, Ralph Waldo Emerson argued that the individual, and not the nation, is paramount and that Americans’ patriotic devotion to their country should be predicated upon the role that America plays “in the universal struggle for the well-being and the growth of men and women individually and of humanity collectively.”²²⁶

Of course, alliances built among the world’s freedom- and equality-loving people are unlikely ever totally to supplant the deep political attachments underlying the American nation-state. The current divide between “red states” and “blue states”²²⁷ and the recent unhappy fate of

judgments based upon principles that emphasize “logical comprehensiveness, universality, and consistency. . . . At heart, these are universal principles of justice, of the reciprocity and equality of human rights, and of respect for the dignity of human beings as individuals.” *Id.* at 19.

²²² See CURTI, *supra* note 11, at 230-31; *cf.* SCHNAPPER, *supra* note 182, at 35 (“The ideology of liberty and the postulated equality of individuals which lies at the heart of the idea of the democratic nation has a universal horizon.”).

²²³ See MARTHA C. NUSSBAUM WITH RESPONDENTS, FOR LOVE OF COUNTRY: DEBATING THE LIMITS OF PATRIOTISM 6-7 (Joshua Cohen ed., 1996) [hereinafter NUSSBAUM] (praising Diogenes the Cynic for his statement that he was a “citizen of the world,” and encouraging Americans to see themselves in same way); *see also id.* at 132-33 (stating that the “basic act of world citizenship” is to “recognize humanity and respond to its claim” and that “[t]o count people as moral equals is to treat nationality, ethnicity, religion, class, race, and gender as morally irrelevant”) (internal quotation omitted).

²²⁴ BETTY JEAN CRAIGE, AMERICAN PATRIOTISM IN A GLOBAL SOCIETY 2-3, 124-25 (1996).

²²⁵ PANGLE, *supra* note 44, at 279; *see also id.* at 278 (“[T]his nation is founded on the contention that patriotism must express more than simply loyalty to what is one’s own, that it must also express loyalty to what is good.”).

²²⁶ CURTI, *supra* note 11, at 203.

²²⁷ *See supra* notes 186-188 and accompanying text (discussing divide between red and

the European Constitution at the hands of French and Dutch voters²²⁸ reveal just how difficult it is for large populations to achieve a detailed, community-building consensus on a significant number of issues. National (and sub-national) communities will surely persist no matter how eagerly the United States and like-minded countries take advantage of opportunities for international regulatory arrangements.²²⁹ Nevertheless, even Americans who are deeply devoted to their country can recognize that there may be many times when they prefer to pursue governmental arrangements that reflect the bonds they feel with others in the world. They may find themselves more attracted to other countries' regulatory priorities and visions of equality and liberty than they are to the priorities and visions proposed by their own politicians. Consequently, Americans are not obliged to cede a regulation-making monopoly to their own federal leaders. Rather, when they believe it would better serve their interests, they can demand that their politicians enter into negotiations with countries and international institutions for which the American people feel a strong affinity.

2. Strengthening Bonds Through the Sacrifices of American Soldiers

The second patriotism-shaping force with the capacity to pull Americans' political affections beyond the country's borders comes into play when American soldiers sacrifice their lives for the benefit of people living in other countries. The loss of 620,000 Americans in the Civil War played a profoundly important role in drawing citizens' loyalties from the state to the federal level. Citizens perceived those soldiers as having died in order to preserve the Union and to make freedom and equality a reality for a greater number of Americans. Americans, in turn, were

blue states).

²²⁸ See Douglas Davis, *The Fall of Europe*, JERUSALEM POST, June 5, 2005, at 15 ("The rejection of the proposed European constitution this week has plunged the European Union into its most serious crisis since the Treaty of Rome was signed in 1957. The vote has also dealt a savage blow to the Franco-German vision of ever-closer economic and political integration."); J.F.O. McAllister, *The Naysayers of Europe*, TIME, June 13, 2005, at 12 (reporting on rejection of European Constitution by voters in France and Netherlands).

²²⁹ See Benjamin R. Barber, *Constitutional Faith*, in NUSSBAUM, *supra* note 223, at 30, 33-34 (arguing that cosmopolitanism fails to grip "the heart, the viscera, the vitals of the body"); Gertrude Himmelfarb, *The Illusions of Cosmopolitanism*, in NUSSBAUM, *supra* note 223, at 72, 77 (arguing that declaring oneself a citizen of the world, rather than a citizen of a nation, unrealistically requires one "to try to transcend not only nationality but all the actualities, particularities, and realities of life that constitute one's natural identity"); Michael W. McConnell, *Don't Neglect the Little Platoons*, in NUSSBAUM, *supra* note 223, at 78, 79-81 (arguing that local moral attachments are essential and that international moral communities are likely to be "too bloodless to capture the moral imagination").

quick to tether their loyalties to those same principles and to confer greater powers upon the government that was positioned to enact laws reaching *all* of the people for whom those soldiers died.²³⁰ Similarly, as American soldiers sacrifice their lives not only to protect the United States from aggression, but also to improve the lives of those living elsewhere, we may find the scope of our political affections expanding accordingly. After all, we may ask ourselves, if American soldiers are willing to die on behalf of those in distant countries, shouldn't we be willing to build peacetime affiliations with those same people as well?

The war in Iraq provides an interesting (and ongoing) case study. When President Bush first led the nation into that conflict, his Administration's publicly stated rationale was that the war was necessary in order to prevent Saddam Hussein from using weapons of mass destruction against the United States, either directly or by providing those weapons to terrorists.²³¹ That justification for war made a direct appeal to our patriotic desire to preserve the security and freedom of our own nation. Once officials discovered that there were no weapons of mass destruction to be found in Iraq, the Bush Administration's primary justification for the war shifted. The Administration now contends that the war is necessary because it is in the long-term best interest of the world to spread the cause of freedom and democracy in the Middle East.²³² That rationale makes a very different patriotic appeal, encouraging us to see our soldiers as engaged in an effort to fulfill America's self-proclaimed global mission by spreading our fundamental values to other regions of the world.²³³ The shift in justificatory emphases is significant. Although the war's initial rationale encouraged us to look inward to our own national security, the war's current rationale encourages us to see ourselves as living in

²³⁰ See *supra* notes 87-94 and accompanying text. President Lincoln said at Gettysburg: "[F]rom these honored dead we take increased devotion to that cause for which they gave the last full measure of devotion." Lincoln, *supra* note 91, at 184.

²³¹ See President George W. Bush, State of the Union Address (Jan. 29, 2002), available at <http://www.whitehouse.gov/news/releases/2002/01/20020129-11.html> (arguing that, as part of "axis of evil," Iraq is pursuing weapons of mass destruction that could be used against United States and its allies).

²³² See President George W. Bush, State of the Union Address (Feb. 2, 2005), available at <http://www.whitehouse.gov/news/releases/2005/02/20050202-11.html> ("Our aim [in the Middle East] is to build and preserve a community of free and independent nations, with governments that answer to their citizens, and reflect their own cultures. And because democracies respect their own people and their neighbors, the advance of freedom will lead to peace.").

²³³ See *supra* notes 58-73 and accompanying text (discussing America's perceived global mission).

solidarity with all who would benefit from the spread of democracy, freedom, and equality in the Middle East.

We are led, therefore, to an ironic possibility. The Bush Administration was criticized by many who believed the President rushed into a military campaign before securing the participation of a greater number of America's traditional allies.²³⁴ Later events, however, forced the President to change his emphasis when justifying the war. By shifting from focusing on an immediate threat to America's security to stressing a long-term desire to build democracies in the Middle East, the President seized upon a building-block of patriotism that, when strengthened by the blood of American soldiers, may lead many Americans to feel an even greater solidarity with people abroad and, correspondingly, an even greater desire to pursue America's objectives through diplomacy and international cooperation.

3. Responding to a Global Economy

Finally, the increasing interdependence of the world's economies may eventually lead citizens in the United States and elsewhere to deemphasize their national identities and see themselves as part of an interconnected whole.²³⁵ As one scholar has observed, the global economy "in many ways serves to limit or undermine the power or scope of national political authorities" and is "unquestionably eroding the capacity of the state to control its own economic future."²³⁶ Just as the emergence of a national economy in the United States was among the forces that led to a desire for increased federal regulation,²³⁷ some scholars believe that the economy's globalization will lead many countries to rely ever more heavily on international institutions and agreements.

²³⁴ See Elaine Sciolino, *The Great Divide: The U.S. and Europe Stretch to Close It*, N.Y. TIMES, Dec. 8, 2003, at A3 (discussing rifts within NATO and between United States and Europe).

²³⁵ See, e.g., BERNIS, *supra* note 24, at 60 ("Rather than being attached to his country, the capitalist is said to be at home in the market, and the market, as we have ever greater reason to know, has no national boundaries."). *But cf.* HUNTINGTON, *supra* note 26, at 13 (arguing that "the emergence of a global economy, tremendous improvements in communications and transportation, rising levels of migration" and other forces are leading many people to redefine themselves "in narrower, more intimate communal terms," with "[s]ubnational cultural and regional identities . . . taking precedence over broader national identities").

²³⁶ Held, *supra* note 199, at 407, 409.

²³⁷ See discussion *supra* note 52 (noting this development).

Eric Hobsbawm argues, for example, that national boundaries are becoming continually less relevant, due to “major transformations in the international division of labour whose basic units are transnational or multinational enterprises of all sizes.”²³⁸ Even the United States, Hobsbawm writes, which only recently “seemed sufficiently vast and dominant to deal with its economic problems without taking any notice of anyone else,” recognizes today that it has “ceded considerable control over its economy to foreign investors who now hold the power to help keep the [American] economy growing, or to help plunge it into recession.”²³⁹ As a result of these and related developments, Hobsbawm predicts that we will see a marked decline in the significance of the nation-state and a corresponding rise in international governmental structures. When future generations write the history of the twenty-first century, Hobsbawm argues,

it will inevitably have to be written as the history of a world which can no longer be contained within the limits of “nations” and “nation-states” as these used to be defined, either politically, or economically, or culturally, or even linguistically. It will be largely supranational and infranational, but even infranationality . . . will reflect the decline of the old nation-state as an operational entity. It will see “nation-states” and “nations” . . . primarily as retreating before, resisting, adapting to, being absorbed or dislocated by the new supranational restructuring of the globe. Nations and nationalism will be present in this history, but in subordinate, and often rather minor roles.²⁴⁰

Needless to say, such a significant movement from national to international governance would not come easily. As Thorstein Veblen pointed out many years ago, powerful appeals to an us-versus-them patriotism frequently are made by those who stand to gain from “such restraint of international trade as would not be tolerated within the national domain.”²⁴¹ We saw this during the 2004 presidential campaign, for example, when Senator Kerry criticized “Benedict Arnold corporations” that shipped jobs overseas.²⁴² We also continue to see such

²³⁸ HOBBSAWM, *supra* note 26, at 174.

²³⁹ *Id.* at 175 (internal quotation and alterations omitted).

²⁴⁰ *Id.* at 183.

²⁴¹ THORSTEIN VEBLÉN, AN INQUIRY INTO THE NATURE OF PEACE AND THE TERMS OF ITS PERPETUATION 76 (1917).

²⁴² See Julie Hirschfeld Davis, *Kerry Offers Plan Designed to Curb Outsourced Jobs; Economists Mixed on Candidate's Proposal to Shift Corporate Taxes*, BALT. SUN, Mar. 27, 2004, at A3 (reporting Senator Kerry's pledge “to scrub the tax code of benefits for ‘Benedict

attitudes manifested at the state level each time a state's protectionist legislation prompts the courts to invoke the antiprotectionist principles of the Dormant Commerce Clause.²⁴³ Nevertheless, just as the economic fortunes of the fifty American states tend to rise and fall together, leading Americans to believe that their interests are generally best served by modes of regulation that pay little heed to state boundaries, so too may Americans increasingly come to feel that their fates are joined with those of people around the world. As that occurs, many Americans may find themselves feeling increasingly drawn to international governmental mechanisms.

CONCLUSION

One wonders how the Federalists who fiercely advocated ratification of the Constitution would react to the strength of our nation-focused patriotism today. The Federalists feared the divisive effects of strong state and local attachments, they predicted that the American people would one day join together as a nation, and they believed that Americans might eventually entrust a greater share of their regulatory affairs to the federal government. In each of these respects, they surely would be pleased to see that their foresight had proven to be more impressive than that of their Antifederalist opponents. It has been a very long time indeed since the country's leaders bemoaned the strength of state and local attachments and worried about Americans' devotion to their nation and their federal government.²⁴⁴

But might the Federalists also worry that their efforts to build national loyalties had culminated in a little *too much* success? The Framers believed that the states and the federal government would compete with one another for the people's devotion and for the regulatory power which that devotion often yields. Through that competition, the Framers contended, the country's two principal sovereigns would hold one another in check with each preventing the other from acquiring monopolistic control of the people's governmental business. The nation today possesses an overwhelmingly powerful claim to Americans' patriotism, however, and vast swaths of power have accordingly been conferred upon the federal government. Indeed, it appears highly unlikely that the states will ever again command the patriotic devotion

Arnold' corporations that send jobs to lower-wage countries").

²⁴³ See discussion *supra* note 52 (discussing Dormant Commerce Clause).

²⁴⁴ Cf. *supra* notes 31-40 and accompanying text (recounting concerns of this type expressed during country's early years).

necessary to win back a significant share of the regulatory power they have lost. America today is a robust nation-state, and it is principally through the federal government's law-making mechanisms that the national community continually refines the values on which it is built.

Despite its many virtues, therefore, American patriotism has become troublingly anticompetitive. Because of the extent to which our nation-focused patriotism has pushed the states to the wayside, the federal government today need not worry much about the competitive forces that the Framers believed would force it to remain responsive to the needs and desires of the American people. As a result, if we share the Framers' profound concerns about the consequences of giving one of the country's sovereigns sweeping control of the people's regulatory affairs, we face a serious problem.

I have argued that one means of reinvigorating governmental competition in the United States involves giving increased consideration to internationally negotiated regulatory arrangements. Especially given the breadth of the treaty power, there are innumerable areas of domestic and international concern in which Americans have a choice: they can permit their national leaders to exercise virtually unilateral regulatory control or they can demand that their national leaders enter into negotiations with their counterparts in countries for which the American people feel an affinity. I have argued that, far from being irreconcilable with a devout sense of patriotism, governmental arrangements that are international in scope may become increasingly attractive to many Americans in the years ahead. Some of the same forces that historically gave rise to our nation-focused patriotism may now push Americans toward developing stronger political attachments with like-minded people in other parts of the world. If that does indeed occur, the federal government undoubtedly will continue to wield vast power, but its ability to abuse that power will be curbed by the very kinds of competitive forces that this country's founders envisioned more than two centuries ago.