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# JOHN TAYLOR AND THE ORIGINS OF AMERICAN FEDERALISM

Andrew C. Lenner

In the spring of 1820, John Taylor of Caroline responded forcefully to what he regarded as John Marshall's audacious attempt in *McCulloch v. Maryland* to consolidate the separate state governments under one central power. In *Constitutions Construed and Constitutions Vindicated*, Taylor outlined his own interpretation of the Constitution and sought to demonstrate that Marshall's doctrine of implied powers would annihilate the foundations on which the American union was based. The federal government, he declared, "is not a national government; it is a league between nations. By this league, a limited power only over persons and property was given to representatives of united nations." In Taylor's mind, the United States was not one sovereign nation but a confederation, or an alliance of independent states. And according to all established authorities on the law of nations, the states, as "perfect individual nations," upon forming a confederation retained those rights not expressly delegated. Contrary to the Chief Justice, Taylor asserted, the right of concurrent taxation, not being prohibited, remained with the states.<sup>1</sup>

As the debate over *McCulloch* reveals, Taylor's definition of the "United States" differed radically from Marshall's. "It was never imagined," he declared, "that the individuals inhabiting the states had constituted themselves into one people." Not a single one of the "United States" would have ever "consented to have dissolved its people," thereby uniting them "into one great people." To do so would have been to surrender the natural right of self-government. No central government,

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<sup>1</sup> John Taylor, *Construction Construed, and Constitutions Vindicated* (Richmond, 1820), 234.

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Taylor claimed, could ever govern a group of nations as diverse as the “United States.” Each region, and even each state, had common traditions, interests, and aspirations different from the others. Local habits and circumstances made the unification of the thirteen states impractical as well as undesirable. Those who framed and ratified the Constitution, Taylor believed, understood this fact. The federal government “was therefore adopted to provide for the interests of the states *as separate nations*.”<sup>2</sup>

Just as striking was Taylor’s belief that the Constitution simply strengthened the Articles of Confederation and that the law of nations continued to govern relations among the states within the federal Union. For when Taylor spoke of a “confederacy” or “a league between nations,” he assumed his audience would recognize that he was referring to the law of nations, or the law of nature applied to political states. Unlike many of his Republican allies in the 1790s, Taylor believed that the ratification of the Constitution actually changed relations between the states very little. The American states, while still provinces of Britain, had been imperfect nations, but under their colonial charters they obtained and exercised a “separate and distinct national character in relation to internal affairs.”

After the Revolution, each state became a perfect individual nation and acquired all the natural rights of nations. Taylor argued that as independent nations they joined two confederations, both of which were “influenced by the principles to which as colonies they were willing to have conformed in a union with Britain.” As members of these confederations, they relinquished several national rights, and retained all not relinquished. The difference between the Articles of Confederation and the Constitution was one of means, not ends. Under the latter, the organs of the central government were strengthened so as to empower it with the authority to further the objectives belonging to the former. Whatever natural rights the states did not delegate away, according to the authorities on law of nations, they retained in their original character. The most important of these rights—the right of self-defense—was implicitly incorporated into the federal Constitution.<sup>3</sup>

On the few occasions when Taylor’s constitutional thought has been examined by historians, it has been misrepresented and overly simplified. Taylor traditionally has been characterized as a “strict-constructionist” and a positivist, adhering to the narrow letter of the written text. He has

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<sup>2</sup> *Ibid.* 47, 235 (emphasis added).

<sup>3</sup> *Ibid.*, 172.

been portrayed as dogmatic and inflexible because of his reliance on the explicit positive grants of power in the Constitution. In broader treatments of politics in the early national period, the doctrines of “Old Republicans” like Taylor have often been depicted as lofty intellectual justifications for the South’s “peculiar institution.” The main thrust of Taylor’s thought is thus presented negatively as the doctrine of agrarian-minded oppositionists who sought only to deny power to the federal government. This view ignores the fact that Taylor’s positions remained constant over time and were solidly grounded in history and tradition—namely in the law of nature and of nations. Indeed, Taylor responded not to the politics of the moment, but reasoned from a theory of the union that deviated very little over thirty-five years.<sup>4</sup>

By focusing on a few episodes in John Taylor’s long career, like the great clash of 1798, one can easily lose track of Taylor’s broader conception of the Union and the larger principles on which he based his interpretations. It is easy to forget how Taylor’s definition of the “United States” and his ideas about state sovereignty shaped his thinking about federal-state relations and the powers of the national government. It is also easy to forget that Taylor participated in a dialogue—a dialogue with

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<sup>4</sup> Alfred H. Kelly, Winfred A. Harbison and Herman Belz, *The American Constitution Its Origins and Development* (1948; 7th ed., 2 vols., New York, 1991), I; Jesse Carpenter, *The South as a Conscious Minority, 1789-1861: A Study in Political Thought* (New York, 1930); James Roger Sharpe, *American Politics in the Early Republic: The New Nation in Crisis* (New Haven, 1993), 187-207; Eugene Tenbroeck Mudge, *The Social Philosophy of John Taylor: A Study in Jeffersonian Democracy* (New York, 1939); Henry Simms, *The Life of John Taylor, the Story of a Brilliant Leader in the Early Virginia State Rights School* (Richmond, 1932); Norman K. Risjord, *The Old Republicans: Southern Conservatism in the Age of Jefferson*, (New York, 1965), 25-26. Risjord characterizes Taylor as a conservative Liberal obsessed with preserving a predominantly agricultural society. See also William Freehling, *Prelude to Civil War: The Nullification Movement in South Carolina, 1816-1836* (New York, 1966); Michael F. Holt, *Political Parties and American Political Development from the Age of Jackson to the Age of Lincoln* (Baton Rouge, 1992), 37; Harry Watson, *Liberty and Power: The Politics of Jacksonian America* (New York, 1990), 61-62; Stanley Elkins and Eric McKittrick, *The Age of Federalism* (New York, 1993), 243; Robert Shalhope, *John Taylor of Caroline: Pastoral Republican* (Columbia, SC, 1980); and Kent Newmyer, “John Marshall and the Southern Constitutional Tradition,” in Kermit Hall and James W. Ely, eds., *An Uncertain Tradition: Constitutionalism and the History of the South* (Athens, GA, 1989), 105-24. Newmyer’s essay is an important exception in this body of literature. He looks at the constitutional thought of Old Republicans with a fine eye, although it is doubtful that their views towards the central government would have been substantially different if *McCulloch* had been decided differently, as he argues. Newmyer is correct, though, in suggesting *McCulloch* hardened the positions of many states’ rights southerners, especially in regards to the federal judiciary.

a common set of terms and definitions—with Federalists as well as other Republicans over the nature of the American Union. Although he did not by any means win this debate, Taylor quite effectively molded the raw materials the founders provided into a clear and cohesive theory of the Constitution.

Without a clear notion of John Taylor's constitutional thought, the partisan struggles of the 1790s, the meaning of the "Revolution of 1800," and the nature of the "Tertium Quid" movement remain ambiguous. One of the most remarkable aspects of the founding era and the 1790s was the fact that debates centering on "basic, constitutive issues of power and government structure" were, as Jefferson Powell has remarked, carried on with a "remarkably high degree of sophistication."<sup>5</sup> Disagreements during this decade (as well as much of the nineteenth century) were connected to conflicting interpretations of the Constitution and represented nothing less than a struggle to define the terms and meaning of American nationhood. And finally, given Taylor's prominence and stature among Old Republicans and their admirers, it is clear that without a thorough grasp of his thought, an understanding of individual statesman from John C. Calhoun to Abel Upshur as well as debates ranging from the nullification crisis to the secession movement will remain elusive.

While it is known that Taylor opposed the ratification of the Constitution, very little is known about the nature of his opposition in 1787 and 1788. One might conjecture, though, that he opposed adoption for many of the same reasons other moderate anti-federalists in his home state of Virginia opposed it.<sup>6</sup> Without express limitations on federal authority, it was argued, the Constitution was likely to be misinterpreted and misrepresented, *against the will of those who ratified it*, until expanded beyond recognition. Although its elasticity was by no means the only objection raised by opponents of the Constitution, it was clearly one of their primary concerns. What was there to stop a committed party of aristocrats or sectionalists, acting through fraud and deceit, from trampling the barriers, both implicit and explicit, between the states and federal government?

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<sup>5</sup> H. Jefferson Powell, "How Does the Constitution Structure Government?" in Burke Marshall, ed., *A Workable Government? The Constitution After 200 Years* (New York, 1987), 13-48; Donald Lutz, *The Origins of American Constitutionalism* (Baton Rouge, 1988), 1-12.

<sup>6</sup> For an excellent study of moderate antifederalism in Virginia, see Karl Wilson, *Lee, Monroe, and Moderate Anti-Federalism* (M.A. Thesis, University of Virginia, 1993). For a description of Taylor's antifederalism, see Shalhope, *John Taylor of Caroline*, 33.

Years later in 1823, in *New Views of the Constitution*, Taylor did provide a thorough exposition of the supreme law of the land. One of Taylor's more novel contentions in *New Views* was the idea that a national, consolidated government was decisively defeated at the Philadelphia convention yet resurrected only a short time later in the *Federalist* series by Alexander Hamilton and James Madison. Relying on the notes of Judge Yates and the newly published convention record, Taylor sought to reconstruct the debates that took place in 1787 in Independence Hall. According to this interpretation, a sizable party of monarchists and consolidators went into Philadelphia with the hope of establishing a government which embraced all general or national objects. As evidence of these ambitions, Taylor pointed to Madison's proposed congressional veto over state laws as well as Hamilton's motion that a "supreme legislature should have the power to *pass all laws whatsoever*." Taylor also emphasized the attempt to extend the jurisdiction of the judiciary "to questions which involve the *national peace and harmony*" and the proposal to give Congress the authority to promote agriculture, commerce, and manufactures. Finally, he maintained that intentional use of the word "national," as opposed to "federal," throughout these early debates symbolized the contempt participants felt for the governments of the states.<sup>7</sup>

A majority of the delegates, however, Taylor found remaining faithful to instructions by "recommending a convention for the *sole purpose* of revising the articles of confederation, to render the *federal constitution* adequate to the preservation of the union." Proposals giving Congress the power to promote manufactures, erect internal improvements, and incorporate a bank were all voted down. The language giving the judiciary jurisdiction over "questions which involve the *national peace and harmony*" was rejected. Most importantly, the congressional veto over state laws was discarded while the term "federal" began to appear frequently in the conventional journal. With the realization that the country would never accept a consolidated government, the tide turned in favor of "federal republicans" who desired to preserve the authority of the states.<sup>8</sup>

In the final composition of the text lay the ultimate proof that the consolidator's vision had been rejected decisively. Membership in the

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<sup>7</sup> John Taylor, *New Views of the Constitution of the United States* (Washington, DC, 1823). 107, 26, 268.

<sup>8</sup> *Ibid.*, 14, 30. Massachusetts's instructions were almost identical to those of other states.

Senate was based on the principle of state equality. The Electoral College guaranteed that *state* delegations selected the president. The amendment process ensured that the states would have to approve any enlargement of federal powers. And the process of ratification by state conventions reflected a respect and deference for state sovereignty. These features, Taylor argued, logically flowed from the rejection of a national government. They were the culmination of *federal* republican principles.

Taylor admitted that the series of *Federalist* papers published over the signature of *Publius*, acknowledged the original sovereignty of the states as well as certain pre-existing rights that remained undisturbed by the Constitution's ratification. Writing as *Publius*, Hamilton and Madison, also acknowledged the unconstitutionality of an attempt by the federal government to usurp or abridge a state's rights. Neither author could deny any of these characteristics, Taylor maintained, because to do so would have sparked public outcry.<sup>9</sup>

What disturbed Taylor was the effort by the authors of the *Federalist* to introduce national features into the Constitution where he thought none existed. Madison and Hamilton "were ingenious in procuring the ratification of the constitution," Taylor conceded, but "their ingenuity consisted in copious solicitations of public opinion by the federal doctrines, mixed with tints transfused from the conclave, too faint to alarm the federal part, and yet sufficiently perceivable to obtain the concurrence of the consolidating and monarchical parties." Specifically, Taylor denounced Madison for the suggestion that the House of Representatives represented the people as a whole. But there was nothing national about the House of Representatives: it was part of a compromise between large and small states. The needs of the "nation-states" clearly were taken into account when membership in the lower house was determined, and every state had a right to at least one representative. By making the people parties to the federal compact, Madison as *Publius* thus laid the groundwork for further infringements on the rights of the real parties to the federal compact. Finally, the only individuals who participated in the ratification process, Taylor argued, were those acting *through* the states.<sup>10</sup>

Taylor also heavily criticized Madison's claim that the federal judiciary was the ultimate judge of the boundaries between the state and federal governments. Such a claim, he argued, was contrary to the spirit of a federal system in which equal partners joined together for certain

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<sup>9</sup> *Ibid.*, 75.

<sup>10</sup> *Ibid.*, 51, 90-92.

limited purposes. Madison's construction would set the federal government above the states and permit the courts to collude with the Congress in order to expand the powers of both branches. Madison acknowledged that the states were sovereign, but he then destroyed the co-ordinate and co-equal relations among them. How could the people preserve a union of states if that preservation depended on a federal court, and not the states themselves! Taylor viciously denounced Madison's "partly federal, partly national" republic as a wolf in sheep's clothing. A government "partly federal, partly national," he maintained, was a contradiction in terms, obviously manufactured to allay the fears of one class and promote the interests of another.<sup>11</sup>

Hamilton's assertions were no less outrageous. As the leader of what Taylor styled the monarchist faction at the convention, Hamilton supposedly hoped to replicate as far as possible the British model in the United States. By claiming that Congress was the judge of its own powers, checked only by periodic elections, he barely managed to conceal his contempt for legitimately constituted authorities. If it were admitted that the states are equal partners in the union, Taylor countered, why should the Congress be the only arbiters of what is and what is not constitutional? Under Hamilton's system, a highly organized cabal of monarchists or any gust of popular passion could tear down those barriers erected to protect Americans' liberties.<sup>12</sup>

Federal supremacy, concluded Taylor, which had been rejected by the convention, was thus re-instituted by Hamilton and Madison under more insidious guises. The consolidating school "contends that we have co-ordinate sovereignties," but that "one is sovereign over the other." Had the authors of the *Federalist* been faithful to the intentions of the framers of the Constitution, they would have acknowledged that the "supremacy of the constitution is an admonition to all departments, both state and federal, that they were bound to obey the restrictions it imposes." A complete and perfect national government had been defeated and "*confederation of popular republics*" established, therefore, it followed that one branch of government could never have supremacy over the thirteen individual "state nations." Unlike the states, a "confederation of United States" enjoyed no innate sovereignty, while the states themselves, possessing the natural "right of self preservation," may "repeat the proof

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<sup>11</sup> *Ibid.*, 119, 147, 116, 71. Taylor declared that "whenever the federal court shall determine that its jurisdiction extends to the regulation of state powers, federal legislation must extend as far" (147).

<sup>12</sup> *Ibid.*, 105-06.

of their sovereignty, by [the federal government's] annihilation." Consistent with reason and the general law of nations, Taylor concluded, the original parties to the federal alliance might resist, by whatever means necessary, unwarranted encroachment on their powers.<sup>13</sup>

Implicit in Taylor's arguments were several commonly neglected assumptions about the nature and scope of federal authority. When Taylor spoke of a "confederation of popular republics" or "a league between nations," he assumed his audience would link these terms with the rules that governed relations between nations, or the law of nations. Taylor assumed, in other words, that his audience would recognize the fundamental laws that the United States government, as a "confederation of popular republics," was obligated to observe and the legitimate rights of nation-states within the American union. Taylor also assumed, as will be shown, that these nation-states possessed certain inherent rights of self-preservation which permitted them to nullify federal laws and, ultimately, dissolve the federal compact. Since the law of nations defined many of the terms Taylor employed and provided the intellectual basis of many of the ideas he articulated, it is necessary to explore what the law of nations meant to eighteenth-century Americans and how it was relevant to constitutional debates in the early republic.

Looking back over centuries of sweeping legal change, James Kent in 1826 described the law of nations as a "system of rules which reason, morality, and custom had established among the civilized nations of Europe, as their public law." This system had evolved and developed over the ages while profiting from the experience of men and nations. As the ancients possessed an imperfect understanding of the proper relationships between sovereigns, it was not until the late eighteenth century, when legal theorists such as J. J. Burlamaqui, Samuel Pufendorf, Hugo Grotius, and Emmerich de Vattel refined and perfected the law of nations, that one could say that it was truly an expression of natural principles of justice. The men coming of age during the American Revolution considered the law of nations an exact science, consisting of the just and rational application of the laws of nature to the conduct of nations. Nations were "absolutely bound to observe it," Vattel wrote, because it contained "those precepts which the natural law dictates to States." Echoing these sentiments, James Wilson provided perhaps one of the clearest definitions:

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<sup>13</sup> *Ibid.*, 66, 22, 102 (emphasis added), 194, 197, 205, 37.

the law of nations, properly so called, is the law of nature applied to states and sovereigns. The law of nations, properly so called, is the law of states and sovereigns, obligatory upon them in the same manner, and for the same reasons, as the law of nature is obligatory upon individuals. Universal, indispensable, and unchangeable is the obligation of both.<sup>14</sup>

For those not familiar with the legal tracts and pamphlets written during the founding era and early national period, the overwhelming

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<sup>14</sup> James Kent, *Commentaries on American Law*, ed. George F. Comstock (1826; 11th ed., 4 vols., Boston, 1868), I, 1-19; Emmerich de Vattel, *The Law of Nations; or, Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns*, trans. Charles G. Fenwick (1758; rep., Washington, 1916), 4; James Wilson, *The Works of James Wilson*, ed. Robert Green McClosky (1804; rep., 2 vols., Cambridge, MA, 1967), I, 151. Kent's work was originally published in 1826. Also see James Kent, *Dissertations; being the Preliminary Part to a Course of Law Lectures* (1795; rep., Littleton, 1991). See also J.J. Burlamqui, *The Principles of Natural and Politic Law* (1763; 7th ed., 2 vols., Philadelphia, 1830); Hugo Grotius, *The Rights of War and Peace, Including the Law of Nature and of Nations*, trans. A.C. Campbell (1625; rep., Washington, 1901); Samuel Pufendorf, *De Jure Naturae Et Gentium Libri Octo*, trans. C.H. and W.A. Oldfather (1672; rep., London, 1934); and Thomas Rutherforth, *Institutes of Natural Law* (1754; rep., Baltimore, 1832); Vattel was regarded as the most authoritative of the four authors. See Daniel George Lang, *Foreign Policy in the Early Republic: The Law of Nations and the Balance of Power* (Baton Rouge, 1985), 15-16. For a discussion of the influence of writers like Coke, Pufendorf, Burlamqui, Vattel, and Rutherforth on eighteenth-century legal and constitutional thought, see Thomas Grey, "Origins of the Unwritten Constitution: Fundamental Law In American Revolutionary Thought," *Stanford Law Review*, 30 (1978), 843; Lang, *Foreign Policy in the Early Republic*; Andrew C. Lenner, "A Tale of Two Constitutions," *American Journal of Legal History*, (Jan. 1996), 76-80; Stephen Presser, *The Original Misunderstanding: The English, the Americans, and the Dialectic of Federalist Jurisprudence* (Durham, NC, 1993); Suzanna Sherry, "The Founders' Unwritten Constitution," *University of Chicago Law Review*, 54 (1987), 1127; and "Opinion on the Treaties with France," in Thomas Jefferson, *The Papers of Thomas Jefferson*, ed. Julian P. Boyd et al. (25 vols, Princeton, 1950-96), XXV, 609. For Jefferson's general view of the law of nations see Charles A. Miller, *Jefferson and Nature: An Interpretation* (Baltimore, 1988), 192-99. Blackstone wrote: "A third kind of law to regulate mutual intercourse, called 'the law of nations;' which . . . depends entirely upon the rules of natural law, or upon mutual compacts, treaties, leagues, and agreements." See William Blackstone, *Commentaries on the Laws of England* (4 vols., London, 1765), I, 43. Blackstone's impact on Americans has been profound. In general, see Daniel Boorstin, *The Mysterious Science of the Law: An Essay on Blackstone's Commentaries, Showing How Blackstone, Employing Eighteenth-century Ideas of Science, Religion, History, Aesthetics, and Philosophy, Made the Law at once a Conservative and Mysterious Science* (Boston, 1941); and Dennis Nolan, "Sir William Blackstone and the New American Republic: A Study of Intellectual Impact," *New York University Law Review*, 51 (Nov. 1978), 731-68.

presence of a number of eminent authorities on the law of nations might come as a surprise. It has often been remarked that Blackstone's *Commentaries* was the Bible of American lawyers. While this certainly was true, American leaders were no less familiar with Pufendorf, Grotius, and especially Vattel. For eighteenth-century Americans, these writers articulated and clarified the laws which defined the rights and responsibilities of nations, promoted international harmony and stability, and provided foreign policy guidelines during war and peace. Although the origins of the law of nations emanated from the customs and traditions of particular countries as well as from the accumulated experience of the nations of the world, it was treasured for much more. The law of nations was prized because, like the common law, it seemed so reasonable. And while some of its doctrines remained contested, its central tenets were regarded by many Americans as manifestations of higher law.<sup>15</sup>

Recent scholars have argued that the law of nations was very much on the minds of Americans during the drafting of the Constitution and the ensuing ratification battles. As the great constitutional battles of the 1790s took shape, the law of nations continued to inform the debates. Federalists believed that the central government had a duty to shape economic growth, align the country with the world's civilized nations, and prevent the breakdown of law and order associated with popular governments. Republicans opposed executive and legislative consolidation, high taxes, patronage, financial schemes, and corrupt foreign alliances. Moderate and conservative Federalists alike claimed that the Constitution of the United States was intended to remedy the defects of the Articles of Confederation by instituting a sovereign government—"supreme, irresistible, absolute" with respect to national concerns. Although Republicans agreed that the United States was sovereign in relation to national affairs—in its war and treaty-making capacity—and that certain principles were binding upon nations regardless of their written constitutions, they did not agree that the 1787 Constitution had created a complete and sovereign government. Republicans did not doubt that government had the right to punish sedition, expel aliens, and establish corporations: the law of nations upheld each of these sovereign rights. They simply believed such powers were reserved to the states.<sup>16</sup>

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<sup>15</sup> Grey, "Origins of the Unwritten Constitution"; Lang, *Foreign Policy in the Early Republic*, 15-16; Lenner, "A Tale of Two Constitutions"; Presser, *The Original Misunderstanding*, 66-99; Sherry, "The Founders' Unwritten Constitution."

<sup>16</sup> Peter S. Onuf and Nicholas G. Onuf, *Federal Union, Modern World; The Law of Nations in an Age Revolution, 1776-1814* (Madison, 1993), esp. 123-44. One of the

For John Taylor, the law of nations provided explicit guidance for American jurists and political leaders who sought to interpret the Constitution. As a well-defined system of law based on the customs and traditions of the nations of the world, the law of nations provided the kind of wisdom only experience could impart. Specifically, it helped define the relationship between the states and federal government as well as between the states themselves. Far better than the propaganda found in the *Federalist*, the law of nations clarified the powers of the central government of a confederacy, and provided guidance to sovereign states whose national rights were threatened by that government. Especially in the face of what he saw as a dangerous consolidationist movement underway by the 1820s, Taylor labored to refocus Americans' attention on the law of nations as a guide to the original intentions of the founding generation.

According to law of nations theorists, while the state of nature might not have been, as Hobbes had portrayed it, "solitary, poor, nasty, short & brutish," mankind nonetheless was bequeathed a wretched environment in which to live. Men were left to their own devices for securing their property and defending their lives. Every individual had a right, by the law of nature, to preserve himself, promote his own welfare, and punish those who violated the laws of nature. When men united in civil society, however, government was entrusted with the power of providing for their safety. "The principal end of civil government and society," wrote Burlamaqui, "is to secure mankind all their natural advantages, and especially their lives." Nations in their corporate capacity possessed the same rights as men in the state of nature. The first law of nature, the right of self-protection, was thus transformed from an individual right to

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Onuf's major contributions to the historiography of the 1780s and 1790s has been to show just how important participation in a progressive, commercially oriented European state system—a state system bound by the law of nations—was to Federalists during the ratification debates. They believed that America could simply not compete, or survive, on the world stage unless it was united under a strong and stable national government. Edwin Dickinson also argued that the authors of the Constitution intended to incorporate the law of nations into the text—that they regarded them as binding upon the nation. See Edwin D. Dickinson, "The Law of Nations As Part of the National Law of the United States," *University of Pennsylvania Law Review*, 101 (1952), 26-56, 792-833. Dickinson did not analyze the controversies of the 1790s, nor did he draw distinctions between how Federalists and Republicans applied the law of nations within the federal union. See also, William Blackstone, *Commentaries on the Laws of England* (Chicago, 1971), 49; Presser, *The Original Misunderstanding*, 66-99; and Andrew Lenner, "Separate Spheres: Republican Constitutionalism in the Federalist Era," *American Journal of Legal History* (forthcoming).

a national one. "Civil society is obliged," wrote Thomas Rutherford, "by its social compact, to guard the rights of its several members" by all necessary means. The right of "self-preservation," declared Vattel, "carries with it the right to do whatever is necessary for that purpose, for the natural law gives us the right to all those things without which we cannot satisfy our obligations."<sup>17</sup>

One customary way for free and independent nations to promote their interests and defend their citizens, all writers on the law of nations acknowledged, was to form alliances with other nations. But while two or more nations may unite to form a perpetual confederation, they did not cease "to be perfect States." Their joint resolutions, wrote Vattel, did not "impair the sovereignty of individual members, although its exercise may be restrained by reason of voluntary agreements. Systems of states may be held together so that they appear to form one body, but each member, according to Pufendorf, retained "supreme sovereignty over its own affairs."<sup>18</sup>

As a general principle, alliances among nations, particularly those established with a view toward promoting commerce and providing for the common defense of the various parties, must not create undue burdens on any of the allies. Vattel voiced the belief of many international law theorists when he claimed that because nations are no less bound than individuals to respect justice: "they should make their treaties equal, as far as that is possible. When, therefore, the parties are in a position to grant each other the same mutual advantages, the natural law requires that the treaty between them be equal." Confederations established on an equal basis were seen as excellent vehicles for preserving the rights of nations and, hence, the liberties of the people.<sup>19</sup>

In a properly governed league, the authority of commissioners (by analogy, congressmen) flowed from the confederated states to their "deputies" who "are no more than ministers of the allies." Naturally, minorities within the confederation were bound to obey the majority in

<sup>17</sup> Burlamqui, *The Principles of Natural and Politic Law*, II, 130; Rutherford, *Institutes of Natural Law*, 508; Vattel, *The Law of Nations*, 130, 14.

<sup>18</sup> Vattel, *The Law of Nations*, 12; Pufendorf, *De Jure Naturae Et Gentium Libri Octo*, 1043. Pufendorf declared that "it is convenient that the individual states reserve themselves liberty in the exercise of those parts of supreme sovereignty, the manner of conducting which is of little or no interest . . . to the rest." Pufendorf, *De Jure Naturae Et Gentium Libri Octo*, 1047.

<sup>19</sup> Vattel, *The Law of Nations*, 165; Pufendorf, *De Jure Naturae Et Gentium Libri Octo*, 1331-33; Rutherford, *Institutes of Natural Law*, 55-64; Grotius, *The Rights of War and Peace*, 169-70.

those instances where sovereignty clearly had been delegated. But when commissioners exceeded the limits of their authority or when members of an alliance violated the terms of the league which linked them together, the state placed at a disadvantage was justified in moving to defend itself. Such was the nature of all compacts, concluded Burlamaqui. The “mutual obligation which lies between united kingdoms,” wrote Pufendorf, “can be broken off on the side of one which has been injured by a violation of the laws of that union, even though the hurt may be of little consequence.” And Vattel declared that “no nation may ruin itself” by entering “into agreements opposed to its indispensable obligations.” When-ever an alliance was perverted for the benefit of one or more member states, the right of self-preservation, so vital in the state of nature, became the primary source of authority for the constituent nation under siege.<sup>20</sup>

The law of nations, as articulated by Vattel and others, was well known and esteemed by American leaders, but there was considerable confusion about its applications to the Constitution in particular. The men who controlled the government of the United States during the first twelve years of its existence believed that the very act of establishing a national government empowered them to legislate on every subject contained in the law of nations, except where expressly prohibited. Federalists like James Wilson and John Jay reasoned that in 1787 a government, sovereign with respect to national affairs, replaced the loose confederation of states that had preceded it, rendering commentaries on confederacies by Vattel and others irrelevant to American affairs. The American government, like all independent nations, had a right (and a duty) to uphold the law of nations through all known and usual means. Thus, during the 1790s Federalists invoked the law of nations to support the enactment of a national sedition law as well as the arrest (and expulsion) of suspicious aliens during peacetime.<sup>21</sup> Taylor on the other hand, saw these Federalist claims as proof of an intent to establish a monarchy on the ruins of the Constitution. The Federalists were wrong in their original premises. The federal

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<sup>20</sup> Pufendorf, *De Jure Naturae Et Gentium Libri Octo*, 1049-51, Burlamaqui, *The Principles of Natural and Politic Law*, II, 222; Pufendorf, *De Jure Naturae Et Gentium Libri Octo*, 1046; Vattel, *The Law of Nations*, 161. Grotius declared: “If one of the parties violates a treaty, such a violation releases the other from its engagements. For every clause has the binding force of a condition. And as an example of this, a passage from Thucydides may be quoted, where that historian says that ‘for one power to accede to a new confederacy, and to desert an ally who has neglected to fulfill his engagements, is no breach of treaty.’” Grotius, *The Rights of War and Peace*, 174.

<sup>21</sup> Lerner, “A Tale of Two Constitutions,” 93-105.

government was not a consolidated government, and there was no single American “people.” Rather, the “United States” was a confederacy made up of thirteen distinct nations. The law of nations applied therefore, not as a prop for the federal government but as an impediment to its actions.

The conflict between Federalists and their Republican opponents reached a crisis in 1798. By June the United States was teetering on the brink of war with France, and political passions were as high as they had ever been in American history. In this atmosphere, the Alien Act was passed (by a strictly partisan vote) empowering the president to deport any persons he had “reasonable grounds to suspect are concerned in any treasonable or secret machinations” against the United States government. A companion Sedition Act was intended to intimidate citizens as well, promising imprisonment for any person who should “write, print, utter or publish . . . any false, scandalous, or malicious writing” against the president or members of Congress.<sup>22</sup>

In the face of this partisan gauntlet, opposition voices, including John Taylor’s, raised a chorus of bitter objections. Taylor’s reaction to the Alien and Sedition Acts has been explained as a function of his devotion to English “country” thinkers—men like James Burgh and Viscount Bolingbroke. According to these critics, power and liberty—the “court” and the “country”—stood in perpetual opposition. Constitutional regimes, unless guarded by a vigilant citizenry, were prone to inevitable degeneration. Executive influence, through taxes, patronage, and various financial schemes, corrupted the body politic and robbed men of their independence. Expressing many of the same fears as the opponents of Walpole’s ministry, Taylor in the early 1790s had lashed out at the entire Hamiltonian financial program, especially the bank and the funding system. The Alien and Sedition Acts as well as the enlargement of the federal army seemed to be a culmination of an effort to replicate England’s degenerate social order in America by wedding the United States to English capital and encouraging dependency among poor and rich alike. But Taylor’s opposition to Federalist policies reflected more than the influence of English “country” ideology. According to Taylor, liberty required a particular structure of limited government. Disrespect for the limited jurisdiction of the federal government therefore threatened

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<sup>22</sup> John Howe, “Republican Thought and the Political Violence of the 1790s,” *American Quarterly*, 19 (Summer 1967), 147; Marshall Smelser, “The Federalist Period as an Age of Passion,” *ibid.*, 10 (Winter 1958), 392-412; James Morton Smith, *Freedom’s Fetters: The Alien and Sedition Laws and American Civil Liberties* (Ithaca, 1956), 435-42. See also Presser, *The Original Misunderstanding*, 119.

liberty and the principles of republican government. For Taylor, the Alien and Sedition Acts were prime examples of such disrespect.<sup>23</sup>

In the Virginia House, Taylor denounced the Alien Act for violating the Fourth, Fifth, and Sixth Amendments by denying aliens jury trials, protection against unreasonable searches and seizures, and practically every procedural safeguard known in the English-speaking world. He also denounced it for arming a judge appointed at the president's discretion with legislative and executive powers. Worst of all, it encroached on the authority of state governments. "It was impossible that the states conventions which assented to the Constitution," Taylor wrote, "could have ever supposed they were establishing a government which could dip with pleasure into the inexhaustible treasures of the common law and law of nations, and thence extract as much power as they pleased." Virginia, he was sure, had specifically reserved these rights at the time of ratification.<sup>24</sup>

Republicans like Taylor did not deny there were powers every nation had a right to exercise—for example, over alien enemies. Indeed, Taylor supported legislation, grounded on the law of nations, that gave the federal government the right to expel aliens during wartime. Republicans like Taylor simply denied that the United States was a complete and sovereign nation in regards to alien friends. Alien friends, Taylor declared, "were entitled and subject to the sanctions of municipal law," and while he did not deny that government possessed a power over strangers, the Constitution gave no such authority to Congress. Taylor opposed the Alien Friends Act for the same reason he opposed the Sedition Act. The power "to regulate public opinion" remained with the parties to the federal compact. Indeed, "If Congress should undertake to regulate public opinion, they would be sure to regulate it so as to detach the people from the state governments" and pervert the meaning of an alliance formed in accordance with the principle of equality.<sup>25</sup>

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<sup>23</sup> Shalhope, *John Taylor of Caroline*; Banning, *The Jeffersonian Persuasion*, 192-201, 226-29, 282-83.

<sup>24</sup> "Speech of John Taylor," in *The Virginia Report of 1799-1800: touching the Alien and Sedition laws; together with the Virginia Resolutions of December 21, 1798, the debates and proceedings thereon in the House of Delegates of Virginia, and several other documents illustrative of the report and resolutions* (New York, 1970), 25, 115-16. This is a reprint of the 1850 reprint of the debates in the House of Delegates.

<sup>25</sup> "Speech of John Taylor," 24, 26 (first quotation), 116-18 (second quotation); "Speech of Rep. Daniel," *ibid.*, 85; Lenner, "Separate Spheres; Republican Constitutionalism in the Federalist Era."

Taylor simply refused to believe that the federal government could legislate on every subject contained in the full body of the law of nations. He also explicitly defended the rights of states to expound the Constitution and impede the operation of the federal government by declaring its laws null and void. He suggested that both departments (i.e. the state and federal governments) were given the right to check and balance each other. In a letter to Thomas Jefferson, Taylor even went so far as to contemplate calling state conventions to dissolve the union. While he may have privately thought about taking action to counter federal tyranny, in public Taylor dedicated himself to turning public opinion to the Republicans' favor. He shared Jefferson's opinion that the mass of Americans were republicans at heart and eventually would turn the Federalists out of office. Taylor was proven partially correct. The "Revolution of 1800" swept the Federalists, their ideas about government, and their expansive, higher law theories of the constitution from office. Public opinion seems to have determined that the government of the United States was to be a limited one, consisting of clearly defined and enumerated powers. A number of Republicans remarked years later that the election of Thomas Jefferson had "exploded" Federalists' theories on the Constitution. Taylor's later career as a Republican polemicist, however, showed how thoroughly contested the Constitution was and would remain.<sup>26</sup>

Three years into the presidential administration of Thomas Jefferson, Taylor could not help but be pleased with the state of the nation. Much had been accomplished in a short time: internal taxes had been slashed, the national debt had been cut substantially, the armed forces had been reduced, and the federal judiciary, briefly expanded under the Judiciary Act of 1801, had been restored to its original state. The Twelfth Amendment had been ratified, sparing the country a repeat of the confusion that threatened the Electoral College in 1800. Above all, peace was at hand and the nation was on the verge of acquiring the Louisiana Territory.

The ratification of the Louisiana Treaty was by no means a foregone conclusion. Federalists in Congress, fearful of possibly a half-dozen new

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<sup>26</sup> Speech of John Taylor, *The Virginia Report*, 112, 121; Taylor to Thomas Jefferson, June 25, 1798, in William Dodd, ed., "Letters of John Taylor," *John P. Branch Historical Papers of Randolph Macon College*, IV (1904), 271-77; Sharpe, *American Politics in the Early Republic*, 187-207. Book One of Vattel's *Law of Nations* is devoted not to international or foreign policy matters, but to the obligations every political state has to itself, including the obligation to preserve itself by any means not contravening the law of nature.

states falling into Republican hands, actively opposed it. More important, many Republicans, including President Jefferson, worried that Congress lacked the authority under the Constitution to incorporate Louisiana into the Union. Here again, Republicans turned to the law of nations for a justification of this new exercise of federal power. The “American people, in forming their Constitution,” argued James Elliot in the House of Representatives, “had an eye to that law of nations, which is deducible by natural reason and established by common consent, to regulate the intercourse and concerns of nations.” Elliot went on to suggest that with a view to that law, federal treaty-making power was constituted. And by virtue of this power, the government of the United States, “in common with all other nations, possess the power and right of making acquisitions of territory, by conquest, cession, or purchase.” Liberally citing Vattel, Grotius, and Pufendorf, Elliot pointed out that all established authorities on the law of nations agreed that the acquisition of territory was an inherent power of every nation. “Can it be doubted,” added Rep. Joseph Nicholson, “that when a state is attacked, it has a right to assail its enemy in turn, and weaken its aggressor by dispossessing him part of his territory?” Such a right, he continued, was “essential to independent sovereignty.”<sup>27</sup>

Whenever they spoke about the sources of federal authority, in regards to power to acquire territory, Republicans referred to the law of nations. It was agreed that according to this extra-constitutional body of law, certain powers were attached to every country’s treaty-making authority, including confederacies. Taylor was no exception to Republican unanimity on this matter. Before ratifying the Articles of Confederation each state, he asserted, “possessed a right, as attached to sovereignty, of acquiring territory.” With the adoption of the Constitution, this power was implicitly recognized. For evidence one need look no further than the clause granting the federal government the right to “dispose of and regulate the territory belonging to the United States.” Taylor went on to argue that this right was “*indispensably annexed* to the treaty making power.” As with the Alien Enemies Act, Republicans like Taylor supported assertion of federal power under limited and carefully defined circumstances.<sup>28</sup>

Despite Jefferson’s many victories in the battle to restore the federal government to its original principles, deep conflicts continued to disturb the Republican party. The most radical Republicans in and out of

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<sup>27</sup> *Annals of Congress*, 8th Cong., 1st sess., 44-47, 53-58, 448-49, 467-68.

<sup>28</sup> *Ibid.*, 50.

Congress favored constitutional amendments limiting the tenure of the presidents and senators, tightening the language in Article I which justified liberal constructions, and purging the judiciary of Federalist influence. Within a few years of his support of the Louisiana Treaty, Taylor broke with the Jefferson Administration over the Yazoo Compromise—an agreement with corrupt land speculators that Taylor and others said violated natural principles of justice as well as republican principles of government. Taylor also differed with Jefferson over foreign policy toward England. At the end of Jefferson's tenure, Taylor found himself among the minority of Republicans who favored James Monroe over James Madison for president. Increasingly bothered by Jefferson's drift back toward what looked like Federalist views, Taylor did not trust Madison—original author of the hated *Federalist* propaganda—to steer a true republican course.<sup>29</sup>

By the War of 1812 a new generation of so-called “war hawks” came to dominate the Republican party in Congress, and by the end of that war, Republicans like Taylor believed the party of Jefferson had acquiesced in many programs Republicans thought were Federalist to the core: large-scale manufacturing, a protective tariff, and a second national bank. Although Jefferson himself, now out of office, seemed once again to embrace conservative views, his party responded more to the likes of Henry Clay, architect of the nationalistic “American System.” “Old Republicans” like Taylor had always feared wars because they fostered standing armies, public debts, the domination of the few over the many, the expansion of executive power, and an exacerbation of social inequality. Now their worst fears appeared to be coming true. Thanks in part to the War of 1812, Federalism seemed to be alive and resurgent.<sup>30</sup>

Taylor spent the last few years of his life confronting the return of Federalist consolidation in all its diverse forms. His greatest concerns—and the focus of two of his last works—were the Marshall court

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<sup>29</sup> For a description of these divisions, consult Richard E. Ellis, *The Jeffersonian Crisis: Courts and Politics in the Young Republic* (New York, 1971), 19-107. Taylor strongly urged the repeal of the Judiciary Act of 1801. Many historians have seen this incident as the first split in the Jeffersonian ranks after 1800. See Harry Ammon, “The Republican Party in Virginia, 1789-1824,” (Ph.D. diss., University of Virginia, 1948); Risjord, *The Old Republicans*; and John Taylor, *A pamphlet, containing a series of letters, written by Colonel John Taylor, of Caroline, to Thomas Ritchie, in Consequence of an Unwarrantable Attack Made by that Editor upon Colonel Taylor* (Richmond, 1809), 24.

<sup>30</sup> Drew R. McCoy, *The Elusive Republic: Political Economy in Jeffersonian America* (Chapel Hill, 1980); Robert J. Morgan, *James Madison on the Constitution and the Bill of Rights* (New York, 1988).

and the protective tariff.<sup>31</sup> The Marshall court's collective decisions, Taylor as well as a great many Southerners believed, laid the groundwork for an enormous expansion of legislative power: the doctrine of implied powers justified just about any policy the government determined expedient. Indeed, the protective tariff was the fruit of such thinking. It permitted a minority in one section of the country to enrich itself at the expense of the mass of Americans, particularly Southerners. By the end of his life, Taylor was prepared to carry the ideas about the Constitution that he had advocated all his life to their ultimate and fateful conclusion.

Yet Taylor did more than wage a hopeless battle against the forces of nationalism and consolidation. Along with jurists like Spencer Roane, Taylor laid the theoretical groundwork for assaults on the federal judiciary, particularly Section 25 of the Judiciary Act, as well as South Carolina's nullification movement and her opposition to Andrew Jackson's tariff policy.<sup>32</sup> Indeed, while John Calhoun and other future Southern firebrands were voting for the Bonus Bill, the Bank Bill, and legislation raising tariffs, Taylor and other Old Republicans were articulating a theory of the Constitution from ashes of the Republican "Revolution of 1800" that would later be used to challenge the Democratic-Republican establishment.

In *Construction Construed and Constitutions Vindicated* (1820), Taylor repeated a few familiar themes about the purposes of government. The aim of all governments, Taylor wrote, is to promote civil liberty by securing man's natural rights. The most valuable of these rights is the right to pursue the religion of one's choice and the right to own and acquire property. For a government to abridge these rights would be to violate the social compact. When a government established a bank or granted bounties or monopolies, it abridged one of these rights by establishing artificial privileges and transferring property from one person to another. In Taylor's mind, creating a corporation was no different

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<sup>31</sup> Newmyer, "John Marshall and the Southern Constitutional Tradition," 108-15. Newmyer argues that the *McCulloch* decision was the point of no return for southerners like Taylor. They believed that the Court had virtually written the implied powers doctrine into law; the federal judiciary therefore had to be decapitated.

<sup>32</sup> For a history of assaults on the judiciary, see Charles Warren, "Legislative and Judicial Attacks on the Supreme Court of the United States—A History of the Twenty-fifth Section of the Judiciary Act," *American Law Review*, 47 (Jan./Feb., 1913); Charles Warren, *The Supreme Court in the United States History* (2 vols., Boston 1922); and Boyd Clifton Rist, "The Jeffersonian Crisis Revisited," (Ph.D. diss., University of Virginia, 1985). See also Ellis, *The Jeffersonian Crisis*; and Richard E. Ellis, *The Union At Risk: Jacksonian Democracy, States' Rights, and the Nullification Crisis* (New York, 1987).

from establishing a religion: in both cases, a special privilege was given to one group so that it could exploit another. With protective tariffs and the national bank affirmed by supposedly Republican leaders, Taylor thought he saw Walpolean corruption returning. The primary consequence of enacting Henry Clay's American System, he thought, would be to replicate England's degenerate political and social class system in the United States.<sup>33</sup>

In Taylor's mind, republicanism and constitutionalism were inextricably intertwined, and like many Americans of this period he looked at unconstitutional laws as evidence of a conspiracy against republicanism. He equated the rejection the Constitution's careful delegations of power with a repudiation of republican principles; by the same token, adherence to its strict limits was evidence of a natural abhorrence of aristocracy, monarchy, and all forms of exclusive privilege. Further for Taylor, the rights of each one of the United States could not be injured by a *legitimate* federal government. Just as the authorities on the law of nations believed that equality among nations was a precondition for a stable international order, Taylor believed that state equality was a precondition for preserving liberty within the American constitutional order. Unequal relations among the states—the domination of one state by another—impaired the natural right of self-government and, hence, threatened to undermine the republican regimes established in each of those states.

Nothing more clearly threatened the equal rights of the states, Taylor reasoned, than the consolidationist pretensions of the Marshall court during the Monroe administration. Taylor argued that the Marshall 1819 ruling in *McCulloch v. Maryland* was based on the mistaken premise that the formation of the union dramatically changed the relationship between the states and central government. The Constitution, he countered, was not created "with an intention of excluding from the new union the idea of a compact among states, but of placing that compact upon better ground, than that which it previously rested." Furthermore, Marshall's claim that the federal government was sovereign within its own sphere was simply a way of avoiding the Constitution's explicit limits on federal power. According to American principles of government, only the people, not political spheres, are truly sovereign. Equally misleading was Marshall's use of the supremacy clause. Taylor claimed that he used the clause as a pretext for allowing the federal courts to void state laws and consolidate national power. To elevate the federal courts over the states

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<sup>33</sup> Taylor, *Construction Construed*, 203-58.

and declare them the final and supreme arbiters of state-federal relations, as Marshall did in *McCulloch* (and Madison had done long ago in the *Federalist*) was to annihilate the foundations on which the union was based. According to Taylor, the federal courts had no authority to declare state laws unconstitutional. After all, federal officials swore to uphold the federal Constitution but not those of the states.<sup>34</sup>

To counter Marshall's arguments, Taylor once again turned to the "general law of nations" to convince his readers of the veracity of his observations. No reasonable man, he began, could deny that "by the revolution, each state became a perfect individual nation, possessed of all the natural rights of nations." As perfect nations, the states joined two confederations, and their "natural and national rights," being antecedent to both compacts, "and also never delegated, but reserved," therefore remained intact as "perfect national rights." The states thus were armed with their original national rights, while Congress possessed only conventional rights. According to the authorities on the law of nations, a central council or legislature could exercise only those rights and powers delegated to it by the various confederated states. Among the conventional rights delegated to Congress, and prohibited to the states, was the right to tax imports and exports, but the right of Congress to tax other objects (banknotes, for example) was limited both by constitutional specifications and the concurrent right of states to tax the same. Therefore, the states, Taylor concluded, could tax a federal bank just as the federal government could tax state banks. For Taylor, the concurrent right of both the state of Maryland and of the federal government to tax the bank was deduced from the letter of the Constitution as well as all known and usual modes of interpreting treaties, alliances, or compacts. As Vattel, Pufendorf, and other writers on the law of nations agreed, only specific and exclusive delegations of power prohibited a member of a confederacy from exercising one of its national rights. The union itself was founded on the principle of state equality.<sup>35</sup>

Taylor employed the same mode of reasoning to discredit tariffs and internal improvements. Congress may tax, under the Constitution, for defense and the welfare of the country. An imposition of taxes for the purpose of enriching one state, one interest, and one individual, at the expense of another state, interest, or individual was patently unconstitutional. Because tariffs and internal improvements necessarily bestowed immediate favor on particular regions or groups, they clearly

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<sup>34</sup> *Ibid.*, 98-188, esp, 43, 147, 134.

<sup>35</sup> *Ibid.*, 154, 171.

violated a compact based on the principle of strict equality. Plainly, Congress was given no power to transfer property from consumers to manufacturers, from southern farmers to northern capitalists, or from the very poor to the very rich. He believed that partial legislation, by its very nature, was unconstitutional.<sup>36</sup>

It was the debate over slavery in Missouri that forced Taylor finally to contemplate forceful actions against the pattern he perceived of abuse of power in the federal government. Taylor assumed that a northern majority in Congress had no more right to compel states to abolish slavery in the South than a southern majority to impose it on the North. According to both the law of nations and the Constitution, states entering the union cannot form agreements with other states without the permission of all those states. The agitation on the Missouri question resulted, Taylor argued, from an unconstitutional alliance of northern states, the purpose of which was to use the slavery issue to rally the North against the South, raise protective tariffs, and pass other discriminatory, unconstitutional legislation.<sup>37</sup>

Fearing the worst, Taylor turned to the question of remedies. There remained a right, Taylor wrote, "anterior to every political power whatsoever, and alone sufficient, to put the subject of slavery at rest; the natural right of self-defense." Derived from the first law of nature and the law of nations, the right of self-defense justified the nullification of federal laws and even the dissolution of the Union. In the past, Taylor had concentrated on trying to correct misinterpretations of the Constitution; only occasionally did he discuss remedies for states victimized by unconstitutional laws. But by the time he wrote *Tyranny Unmasked* (1822), any remaining hope he had for sectional reconciliation gave way to despair for the Union's future.<sup>38</sup>

The first two-thirds of *Tyranny Unmasked* showed how protective tariffs taxed (southern) farmers and consumers to subsidize (northern) manufactures and bankers. Although they might initially result in an

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<sup>36</sup> *Ibid.*, 214, 235.

<sup>37</sup> *Ibid.*, 304, 300. Harry Watson argues in *Liberty and Power* that the fear of slavery was at the heart of the Old Republicans' concern (62). Richard Ellis, in *The Union at Risk*, takes a more nuanced approach. He suggests that historians must consider other factors, such as the Panic of 1819 and the decisions of the Marshall court, in shaping the fears of Old Republicans. He writes, "Old Republicans never made the defense of slavery a central political concern the way Calhoun and his followers began to do after 1833." Arguments concerning slavery "tended to take the form of *ad hoc* defensive responses to appeals for increasing the power of the federal government" (193).

<sup>38</sup> Taylor, *Construction Construed*, 314, 127.

increased demand for domestically produced food, Taylor predicted that in the long term agriculture would decline as a result. The last third of *Tyranny Unmasked* addressed the related constitutional issues. Unlike his other works, the bulk of his constitutional analysis was devoted to elaborating and justifying a theory for nullifying unconstitutional laws. For Taylor, the Union was centered on the states, not the national government; therefore the states possessed the same rights that Federalists had claimed for the United States, including “a moral right of self-defense against every species of aggression.” Accordingly, state courts and legislatures were authorized to interpose themselves between the people and an abusive federal government. As trustees of original state sovereignty, they were authorized to nullify unconstitutional federal laws and take whatever action was required to prevent the operation of measures repugnant to fundamental law.<sup>39</sup>

Of course there was a price to pay for entrusting the states with such a veto over federal laws. Collisions of power were inevitable, but in *Tyranny Unmasked* and other subsequent works, Taylor argued that the end result was well worth the cost. All good governments, he wrote, contained “collateral, balancing, and controlling departments. The constitution, by dividing powers, and declaring itself to be supreme, prohibits either the federal or state governments from usurping that character.” Taylor asked his readers to choose which is the best principle for the preservation of the rights of the people: the concentration of power in the federal department, or its division between the federal and state departments? Clashes between them were the (for him acceptable) cost of preventing the total consolidation of federal power.<sup>40</sup>

Taylor’s use of the law of nations and natural law in interpreting the Constitution contradicts the notion that states’ rights Republicans were positivists and strict constructionists. Although Taylor did expect America’s leaders to consider the intentions of the parties to the federal compact when fashioning public policy, it was primarily for evidence of a particular relationship among the states as defined by the law of nations. Taylor’s constitutional thought was founded on the natural rights of nations within a confederacy. The American Union as he saw it was a compact whose interpretation could not be divorced from the laws that governed all sovereign and independent nations. Because Taylor clung to this model of the Union as a confederation of states, he felt that American statesmen were obligated to follow the precepts of the law of

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<sup>39</sup> John Taylor, *Tyranny Unmasked* (Washington, 1822), 201.

<sup>40</sup> Taylor, *New Views*, 218-19.

nations. As should also be clear, due respect for the law of nations, especially as it pertained to confederations, implied the recognition of equality among states. The recognition of equality among states, in turn, became the test of legitimacy for all government in the Union. In other words, due respect for state equality was the necessary condition for drawing Americans together in a way that would preserve and strengthen republican liberty. Only equal and independent states, secure in their sovereign rights, were capable of uniting to pursue their collective interests.

Taylor's constitutional views also gave evidence to a profound division within the Republican party—a division that became apparent only after the "Revolution of 1800." It has been argued that this split resulted from the conflict between the forces of capitalism within the party and southern proponents of radical agrarianism. It has also been argued that the extreme localism of "Old Republicans" like Taylor resulted from Virginia's decline on the national stage as well as the need to protect slavery from growing northern assaults.<sup>41</sup> All of this may have contributed to Taylor's reaction to the events of the nineteenth century, but these explanations alone do not account for his break with the Republican party. It was Taylor's conception of the Union that provided the greatest stumbling block to support for nationalistic programs of banks, tariffs, and internal improvements. More than anything else, it was Taylor's definition of the "United States" that separated him from Federalists and National Republicans alike.

Taylor's discourses on American constitutional law failed to define the nature of the American Union or settle long standing controversies over federal power. Taylor's legacy is not to be found in the accomplishments of a practical statesman, but in his contribution to American political thought as a member of the "Old Republican" school and as a forerunner to prominent southern confederates. By 1833, there were three basic interpretations of America's fundamental charter and three basic approaches to federalism questions. Nationalists from Hamilton to Webster maintained the Americans were one people who had acted jointly to form a national government. Moderates from Madison to Andrew Jackson and Roger Brooke Taney contended that the United States was a "partly federal, partly national" republic in which the federal courts were ultimate arbiters of federal powers. And then there were men like John

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<sup>41</sup> Charles Sellers, *The Market Revolution: Jacksonian America, 1815-1846* (New York, 1991).

Taylor. This gaunt, often sickly figure gave life and vigor to ideas that would send Jackson, and later the Union itself, into convulsions.