

## FOUR VIEWS OF THE NATURE OF THE UNION

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*This Essay summarizes four Founding-Era views about the nature of the Union and the key interpretive implications that followed from those views. In doing so, it emphasizes the importance of social-contract theory and engages a recent scholarly debate over the influence of the law of nations on Founding-Era constitutional interpretation. Without taking a position about which view of the Union was correct, the Essay aims to illuminate the range of interpretive possibilities, including ones informed more by social-contractarian premises than by the law of nations.*

One of the most enjoyable yet challenging aspects of studying American constitutional history is that the earlier generations often did not share our vision of constitutional law. For us, the written Constitution grounds constitutional argument. We treat the text as the source of our fundamental law,<sup>1</sup> and then as Justice Scalia would say, the rest is “a matter of interpretation.”<sup>2</sup>

In taking this approach, we have mostly rejected other ways of grounding constitutional law—including through invocations of social-contract theory, natural rights, and natural law. These are things that might come up in a philosophy class, but they have little

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1. Even “substantive due process” rights—frequently described as “unenumerated” rights—are grounded in the Due Process Clauses. *See, e.g.,* *Lawrence v. Texas*, 539 U.S. 558, 564–65 (2003).

2. ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997).

relevance to legal doctrine. Not coincidentally, we also have mostly moved beyond the fights over sovereignty and the “nature of the Union” that dominated the first century of American constitutional debate.<sup>3</sup>

But Americans from the Founding through Reconstruction did not share this perspective. For them, the text mattered a great deal. But there were deeper foundations—and more fundamental sources of authority—than the written document. Americans thus often debated how the text of the Constitution fit within a broader matrix of fundamental law. This was especially true of federalism disputes, which frequently turned on social-contractarian assumptions about the locus of sovereignty within the federal system. So in order to think historically, we need to imagine the nature of constitutional law—and the grounding of constitutional law—in these older ways.

This Essay describes four Founding-Era views about the nature of the Union—views exemplified by the writings of Thomas Jefferson, James Madison, John Marshall, and James Wilson—and it explores how these theoretical disagreements about the grounding of federal authority impacted constitutional debates. Rather than saying which view was correct, my hope is to help clarify the terrain of historical argument. In doing so, this Essay also intervenes in an ongoing scholarly debate over the relevance of the law of nations to constitutional interpretation at the Founding,<sup>4</sup> illustrating how assumptions about the nature of the Union remain salient today—

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3. See ELIZABETH KELLEY BAUER, COMMENTARIES ON THE CONSTITUTION, 1790–1860 (1952) (documenting the importance of sovereignty and the nature of the Union in early treatises).

4. Particularly, this Essay emphasizes how social-contract theory provided a competing paradigm for evaluating transfers of sovereign authority. For the most part, however, social-contract theory is missing from the literature addressing the influence of the law of nations on federalism debates. See, e.g., Martin S. Flaherty, *Peerless History, Meaningless Origins*, 1 J. AM. CONST. HIST. 670 (2023); David S. Schwartz, *The International Law Origins of Compact Theory: A Critique of Bellia & Clark on Federalism*, 1 J. AM. CONST. HIST. 629 (2023); Ryan C. Williams, *Federalism, The Law of Nations, and the Excluded Middle*, 1 J. AM. CONST. HIST. 721 (2023). But see Jonathan Gienapp, *In Search of Nationhood at the Founding*, 89 FORDHAM L. REV. 1783 (2021) (drawing heavily on social-contract theory to illuminate federalism debates).

even if mostly below the surface of our constitutional consciousness.<sup>5</sup>

## I. SOCIAL-CONTRACT THEORY

The starting point of Founding-Era constitutionalism was social-contract theory, which framed how the Founders thought about the purposes and limits of governmental authority.<sup>6</sup> The gist of social-contract theory was that God created humans as political equals and endowed them with natural rights—capacities that they would enjoy in a hypothesized state of nature, subject to the dictates of natural law.<sup>7</sup> Principally, this meant that political authority had to be rooted in consent, and particularly in an imagined social contract (or “social compact”<sup>8</sup>) through which individuals unanimously agreed to create a self-governing polity.<sup>9</sup> This way of thinking undergirded the principle of “popular sovereignty,” which posited that ultimate political authority resided in a sovereign body politic composed of all citizens.<sup>10</sup>

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5. Although mostly concealed, contests over the nature of the Union occasionally surface. *See, e.g.*, *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 846 (1995) (Thomas, J., dissenting); Bradford R. Clark, *The Eleventh Amendment and the Nature of the Union*, 123 HARV. L. REV. 1817, 1819–21 (2010).

6. *See* Jud Campbell, *Republicanism and Natural Rights at the Founding*, 32 CONST. COMMENT. 85, 87–90 (2017); Gienapp, *supra* note 4, at 1788–92.

7. *See* Campbell, *supra* note 6, at 87–88.

8. *See* Jud Campbell, *Compelled Subsidies and Original Meaning*, 17 FIRST AMEND. L. REV. 249, 263 n.68 (2018) (“The term ‘social compact’ is more historical, but it is avoided in this Essay to prevent confusion with the separate notion of ‘compact’ frequently invoked in historical debates over the nature of the federal union.”).

9. *See* Campbell, *supra* note 6, at 87–88; *see, e.g.*, 1 EMER DE Vattel, *THE LAW OF NATIONS; OR PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS* 12 (J. Newbery et al. eds., 1760) (arguing that political obligation “is not derived to nations immediately from Nature, but from the agreement by which civil society is formed: it is therefore not absolute, but conditional, that is, it supposes an human act, a pa[c]t or agreement of society”).

10. *See* Campbell, *supra* note 6, at 89–90; *see, e.g.*, *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 454–58 (1793) (discussing different conceptions of sovereignty and defending the sovereignty of the people).

After sovereignty was vested in a polity, the people would then, through majority consent, create a system of government in a “constitution.”<sup>11</sup> Thus, a constitution was a secondary agreement, or collection of agreements, predicated on an even more fundamental political compact—the social contract.<sup>12</sup>

Although social-contract theory was widely accepted at the Founding, it was uncertain how these ideas would operate in a federal system.<sup>13</sup> Thus, while “it was clear that *the people* wielded sovereign authority,” Jonathan Gienapp observes, “it was much less clear *which* people delegated the relevant authority: the people of the United States or the people of the separate states.”<sup>14</sup> This dispute over “the nature of the Union” was foundational.

## II. FOUNDING-ERA VIEWS OF THE NATURE OF THE UNION

Very little sophistication was needed to theorize about the nature of the Union or to appreciate its importance. For anyone with a basic understanding of social-contract theory, three possibilities

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11. See Campbell, *supra* note 6, at 89.

12. See, e.g., 2 THOMAS RUTHERFORTH, *INSTITUTES OF NATURAL LAW* 159 (J. Bentham ed., 1756) (“The right . . . which this second compact [*i.e.*, the constitution] conveys to the magistrate, though it may be less, cannot possibly be greater, than what the first compact [*i.e.*, the social contract] had given to the collective body of the society: so that unless we can shew, that the first compact gives the collective body such a right or such a power . . . the second compact can convey no such right or power to the civil magistrate.”). Moreover, eliminating a constitution did not dissolve the social contract. See JAMES MADISON, *Comments on Petitions of Kentuckians* (1782), in 5 *THE PAPERS OF JAMES MADISON: CONGRESSIONAL SERIES* 82, 83 (William T. Hutchinson & William M. E. Rachal eds., 1967) (“The dissolution of the Charter did not break the social Compact among the people.”).

13. Debates about the status of Great Britain in relation to England, Wales, and Scotland presaged some of the American debates. See ALISON LACROIX, *THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM* 11–29 (2010). But the existence of a unitary British Parliament and King—without separate Parliaments or heads of state in England, Wales, and Scotland—made the American situation unique.

14. Gienapp, *supra* note 4, at 1793; see CHRISTIAN G. FRITZ, *AMERICAN SOVEREIGNS: THE PEOPLE AND AMERICA’S CONSTITUTIONAL TRADITION BEFORE THE CIVIL WAR* 194 (2008) (making the same point); ST. GEORGE TUCKER, *View of the Constitution of the United States* (1803), in *VIEW OF THE CONSTITUTION OF THE UNITED STATES: WITH SELECTED WRITINGS* 91, 101 (Liberty Fund ed., 1999) (1803) (inquiring “[w]hether this original compact be considered as merely federal, or social, and national”).

were readily apparent: the Constitution was (1) essentially a treaty among sovereign states, (2) a true “constitution” grounded in a sovereign national polity, or (3) something in between.<sup>15</sup> And the nationalist position had two variants: one that traced nationhood to constitutional ratification and the other that traced it to American Independence.

Four approaches to the nature of the Union thus emerged: first, compact theory; second, quasi-nationalism; third, 1787 nationalism; and fourth, 1776 nationalism. This Essay illuminates these four perspectives by focusing on the writings of four leading Founders: Thomas Jefferson, James Madison, John Marshall, and James Wilson.<sup>16</sup> For expository reasons, it makes sense to proceed from the least nationalistic to the most nationalistic.

#### A. *Jefferson’s Compact Theory*

Jefferson denied national sovereignty. In his eyes, no national body politic existed, and the peoples of the several states remained

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15. Because the historical debate was framed in these terms, analogies to *other* types of instruments are, in my view, generally unhelpful. Cf. John Mikhail, *Is the Constitution a Power of Attorney or a Corporate Charter?*, 17 GEO. J.L. & PUB. POL’Y 407 (2019) (analogizing to corporate charters); Farah Peterson, *Expounding the Constitution*, 130 YALE L.J. 2 (2020) (analogizing to public and private legislative acts). By and large, the Founders had no need to reason by analogy to other types of legal instruments. Rather, social-contract theory and the law of nations already supplied the relevant intellectual frameworks for debating the nature of the Union and its implications. See, e.g., 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 314–15 (Max Farrand ed., 1911) (remarks of James Madison) (commenting on the importance of determining whether the Articles of Confederation were “analagous [sic] to the fundamental compact by which individuals compose one Society” or “to the conventions among individual States”).

16. In my view, each of these writers was mostly consistent in his statements about the nature of the Union, but this Essay does not aim to prove that point. Rather, in order to sharpen our understanding of the range of views held at the Founding, it generally assumes the consistency of each writer across time. Cf. J.G.A. Pocock, *Introduction: The State of the Art*, in VIRTUE, COMMERCE, AND HISTORY: ESSAYS ON POLITICAL THOUGHT AND HISTORY, CHIEFLY IN THE EIGHTEENTH CENTURY 1, 11 (1985) (“It does not make the historian an idealist to say that he regularly, though not invariably, presents the language in the form of an ideal type: a model by means of which he carries on explorations and experiments.”).

the only true sovereigns.<sup>17</sup> To be sure, the federal government held several “sovereign” powers—political authority that the sovereign states had authorized through their ratification of the Constitution of 1787.<sup>18</sup> But the idea of delegating *powers* without transferring *sovereignty* was commonplace in eighteenth-century legal thought, both in domestic and international contexts.

Domestically, this perspective underpinned the logic of limited monarchy. The British King, for example, held a variety of sovereign “prerogatives” and therefore was often called “the sovereign.”<sup>19</sup> But British and American writers universally agreed that the people were sovereign and that the King possessed only delegated powers.<sup>20</sup> Because they ultimately remained sovereign, the people could reallocate or repossess their power, at least in certain situations.<sup>21</sup>

International delegations of sovereign power were also common. Treatise writers on the “law of nations” had long recognized that sovereign nations could delegate authority to a foreign government

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17. See H. Jefferson Powell, *The Principles of '98: An Essay in Historical Retrieval*, 80 VA. L. REV. 689, 717–18 (1994).

18. See Thomas Jefferson, *Draft of the Kentucky Resolutions of 1798*, in 30 THE PAPERS OF THOMAS JEFFERSON 536, 536 (Barbara B. Oberg ed., 2003) [hereinafter *Kentucky Resolutions*] (explaining that “the several states . . . constituted a general government for special purposes [and] delegated to that government certain definite powers”).

19. See, e.g., 1 WILLIAM BLACKSTONE, COMMENTARIES \*216 (referring to “our present gracious sovereign, king George the third”).

20. See, e.g., ALEXANDER HAMILTON, *The Farmer Refuted* (1775), in THE PAPERS OF ALEXANDER HAMILTON 81, 90 (Harold C. Syrett ed., 1961) (arguing that George III was “King of America, by virtue of a compact between us and the Kings of Great-Britain); JOHN ADAMS, *Novanglus* No. VII (1775), in THE POLITICAL WRITINGS OF JOHN ADAMS 58, 74 (George W. Carey ed., 2000) (“[W]e, as well as the people of England, made an original, express contract with King William.”); see also MICHAEL W. MCCONNELL, THE PRESIDENT WHO WOULD NOT BE KING: EXECUTIVE POWER UNDER THE CONSTITUTION 28 (2020) (describing the British view of royal prerogative governed by law).

21. See, e.g., JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 149, in LOCKE, TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 166 (Ian Shapiro ed., 2003) (1689); FRITZ, *supra* note 14, at 101.

or to a confederated league, even while remaining sovereign.<sup>22</sup> And Americans were especially familiar with this paradigm, since it captured how they thought about the British Empire on the eve of the Revolution. On this view, the American colonies were distinct polities, independent of Parliamentary authority, even while enjoying the protection of the Crown.<sup>23</sup> As Alexander Hamilton explained, the colonies were “individual societies, or bodies politic, united under one common head.”<sup>24</sup> The King thus possessed certain delegated sovereign powers but not sovereignty itself. And many Americans viewed federal authority under the Articles of Confederation in the same way.<sup>25</sup>

Jefferson took these lessons to heart. In the Kentucky Resolutions of 1798, he stated that the federal Constitution was merely a “compact under the style & title of a Constitution.”<sup>26</sup> In other words, although the Constitution might *claim* to be a “constitution”—that is, an act of a sovereign body politic—Jefferson thought that the document was mislabeled. At core, the Constitution was a pact among

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22. See, e.g., VATTEL, *supra* note 9, at 11 (“Several foreign and independent states may unite themselves together by a perpetual confederation without each in particular ceasing to be a perfect state.”); see also Anthony J. Bellia Jr. & Bradford R. Clark, *The International Law Origins of American Federalism*, 120 COLUM. L. REV. 835, 852–53 (2020).

23. See JAMES H. KETTNER, *THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608–1870*, at 131–209 (1978); see also Jud Campbell, *General Citizenship Rights*, 132 YALE L.J. 611, 629–31 (2023) (summarizing this view and collecting sources).

24. HAMILTON, *supra* note 20, at 98.

25. See, e.g., JAMES MADISON, *Vices of the Political System of the United States* (1787), in 9 THE PAPERS OF JAMES MADISON 345, 352 (Robert A. Rutland et al. eds., 1975) (“As far as the Union of the States is to be regarded as a league of sovereign powers, and not as a political Constitution by virtue of which they are become one sovereign power . . .”); see also JERRILYN GREENE MARSTON, *KING AND CONGRESS: THE TRANSFER OF POLITICAL LEGITIMACY, 1774–1776* 9 (1987) (observing that the Articles of Confederation assigned to the Continental Congress many displaced royal powers).

26. *Kentucky Resolutions*, *supra* note 18, at 536; see also JOHN C. CALHOUN, *A DISQUISITION ON GOVERNMENT AND A DISCOURSE ON THE CONSTITUTION AND GOVERNMENT OF THE UNITED STATES* 276 (Richard K. Cralle ed., 1853) (“It is but a *compact* and not a *constitution*.”).

states.<sup>27</sup> As fellow Virginian Spencer Roane stated, “The act of union thus entered into” was really “to all intents and purposes a *treaty* between sovereign states.”<sup>28</sup>

To be sure, the Constitution was not an ordinary treaty. After all, it was approved by the sovereign peoples of the several states—not by the state governments. It therefore trumped state law.<sup>29</sup> But the core point remains: To Jefferson’s mind, states had delegated sovereign *power* to a federal government without transferring *sovereignty* itself. At core, then, the United States remained a league of states, bound together by an interstate compact misleadingly called a “constitution.”

And this was far from a trivial fight over semantics. If the Constitution was not a constitution in the technical sense, but merely a compact among states, then it naturally made sense to interpret it as an agreement among sovereigns under the law of nations.<sup>30</sup> Above all else, those rules favored a narrower, “strict construction” of federal powers.<sup>31</sup> As William Branch Giles commented during the 1791 debates over the Bank of the United States, broad incidental powers “seem to me to apply to a government growing out of a state of society [*i.e.*, those premised on an underlying social contract], and not to a government composed of chartered rights from previously existing governments, or the people of those governments.”<sup>32</sup> It also meant that federal institutions lacked final interpretive authority regarding constitutional questions and probably also that states could secede, at least in certain situations, as the

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27. See JOHN TAYLOR, CONSTRUCTION CONSTRUED, AND CONSTITUTIONS VINDICATED 39–50 (1820).

28. Spencer Roane, *Hampden No. IV* (1819), in JOHN MARSHALL’S DEFENSE OF *McCULLOCH V. MARYLAND* 138, 150 (Gerald Gunther ed., 1969).

29. See TAYLOR, *supra* note 27, at 43.

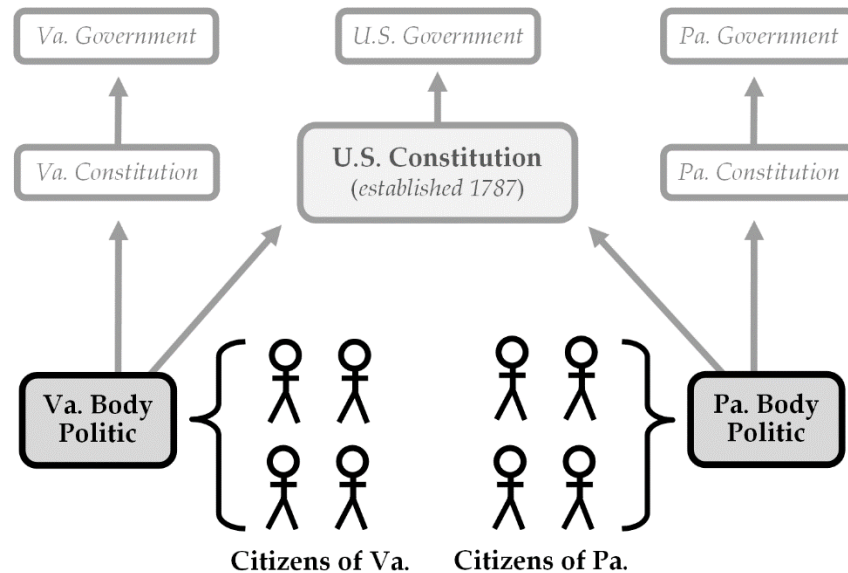
30. Accord Schwartz, *supra* note 4, at 631–32.

31. See, *e.g.*, TUCKER, *supra* note 14, at 101–02; see also Anthony J. Bellia Jr. & Bradford R. Clark, *The Constitutional Law of Interpretation*, 98 NOTRE DAME L. REV. 519, 569 (2022) (“Under the rules recognized by the law of nations, a legal instrument could be read to alienate sovereign rights only if it did so in clear and express terms.”).

32. *Gazette of the United States* (Apr. 6, 1791), in 14 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA 466, 467 (William Charles DiGiacomantonio et al. eds., 1995).

American Revolutionaries had done.<sup>33</sup> This was, of course, a logic that eventually came to fruition in what Southerners would insist was a “War Between the States.”<sup>34</sup>

**FIGURE 1: JEFFERSON’S COMPACT THEORY**



Explanation: This figure depicts Jefferson’s theory of federal authority, under which the peoples of the several states formed an interstate compact by adopting the federal Constitution. On this view, the Constitution was more enduring than the earlier Articles of Confederation, which was a treaty made by state governments, not by the people themselves. But the Constitution did not transfer or diminish state sovereignty. It merely delegated certain powers to the federal government. (Note: Black depicts the locus of sovereignty.)

33. See Kentucky Resolutions, *supra* note 18, at 536 (stating that “the government created by this compact was not made the exclusive or final judge of the extent of the powers delegated to itself” and that “each party has an equal right to judge for itself, as well of infractions, as of the mode & measure of redress”). Scholars have long disputed Jefferson’s exact views about the scope of unilateral state remedies. See Powell, *supra* note 17, at 720.

34. See 2 ALEXANDER H. STEPHENS, A CONSTITUTIONAL VIEW OF THE LATE WAR BETWEEN THE STATES 425–26 (1870) (noting how the terminology—“Civil War” or “war between the States”—reflected the fight over the nature of the Union); DAVID ARMITAGE, CIVIL WARS: A HISTORY IN IDEAS 178–95 (2017) (same).

### B. Madison's Quasi-Nationalism

James Madison took a more nationalistic approach than Jefferson, but he still recognized confederal aspects of the federal system. In *Federalist No. 39*, he probed at length whether the Framers had “preserved the *federal* form” by recognizing “a *confederacy* of sovereign states” or, instead, had “framed a *national* government, which regards the union as a *consolidation* of the States.”<sup>35</sup> He concluded that the Framers had blended confederal and national features through what we might call a *quasi-nationalist* approach.

Genealogically, Madison accepted that the Constitution was authorized by the peoples of the several states, acting as “independent States, not as forming one aggregate nation.”<sup>36</sup> He bolstered this conclusion by invoking the social-contractarian precept that constitutions needed only the approval of a simple majority: “Were the people regarded in this transaction as forming one nation,” Madison explained, “the will of the majority of the whole people of the United States, would bind the minority; in the same manner as the majority in each State must bind the minority.”<sup>37</sup> State-by-state ratification made the Constitution in *some* sense an interstate compact. The bodies politic of the several states were thus, as Madison later explained in 1800, “parties to the compact from which the powers of the federal government result.”<sup>38</sup>

Departing from Jefferson, however, Madison also viewed the federal Union as having national characteristics.<sup>39</sup> The Constitution formed “an intimate and constitutional union,” Madison wrote, unlike “the case of ordinary conventions between different nations.”<sup>40</sup>

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35. THE FEDERALIST NO. 39, at 253 (James Madison) (Jacob E. Cooke ed., 1961).

36. *Id.* at 254; see also, e.g., Letter from James Madison to Daniel Webster (March 15, 1833), in 9 THE WRITINGS OF JAMES MADISON 604 n.1 (Gaillard Hunt ed., 1910) (“[T]he undisputed fact is, that the Constitution was made by the people, but as embodied into the several States[.]”).

37. THE FEDERALIST NO. 39, *supra* note 35, at 254.

38. *The Report of 1800*, in 17 THE PAPERS OF JAMES MADISON 303, 309 (David B. Mattern et al. eds., 1991) (“The Constitution of the United States was formed by the sanction of the states, given by each in its sovereign capacity.”).

39. *Accord* Powell, *supra* note 17, at 717.

40. *Report of 1800*, *supra* note 38, at 310.

For example, although the Senate would represent states, the House of Representatives was to represent “the people of America.”<sup>41</sup> And federal legislation would directly bind “the individual citizens, composing the nation, in their individual capacities,” rather than having to rely on states as intermediating institutions, as occurred under the Articles of Confederation.<sup>42</sup> Moreover, the process of amending the Constitution revealed its quasi-national character. “Were it wholly national,” Madison stated, “the supreme and ultimate authority would reside in the *majority* of the people of the Union.”<sup>43</sup> But “[w]ere it wholly federal on the other hand, the concurrence of each State in the Union would be essential to every alteration that would be binding on all.”<sup>44</sup> In sum, the Constitution was “neither a national nor a federal constitution; but a composition of both.”<sup>45</sup>

Madison came back to this theme decades later, spurred by the Nullification Crisis in South Carolina. Against John C. Calhoun’s assertion of state sovereignty and Daniel Webster’s embrace of American nationalism,<sup>46</sup> Madison rejected their binary framing. “[T]he true character of the Constitution,” he wrote to Edward Everett, was neither “a consolidated Government” nor “a Confederated Gov[ernment]” but instead “a mixture of both.”<sup>47</sup> To be sure, the Constitution was initially “formed by the States—that is by the people in each of the States, acting in their highest sovereign capacity.”<sup>48</sup> In that sense, it was an interstate compact authorized by

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41. THE FEDERALIST NO. 39, *supra* note 35, at 255.

42. *Id.*

43. *Id.* at 257.

44. *Id.*

45. *Id.*

46. See John C. Calhoun, *South Carolina Exposition* (Dec. 1828), in 1 THE RECONSTRUCTION AMENDMENTS: THE ESSENTIAL DOCUMENTS 97 (Kurt T. Lash ed., 2021); Daniel Webster, *The Constitution Is Not a Compact* (Feb. 16, 1833), in THE RECONSTRUCTION AMENDMENTS: THE ESSENTIAL DOCUMENTS, *supra*, at 106.

47. Letter from James Madison to Edward Everett (Aug. 28, 1830), in 9 WRITINGS OF JAMES MADISON, *supra* note 36, at 383–84.

48. *Id.* at 386.

states “in their individual capacities.”<sup>49</sup> But once ratified, the Constitution had “constitut[ed] the people thereof one people for certain purposes.”<sup>50</sup>

In viewing things this way, Madison drew on social-contractarian logic. The social contract was an agreement among individuals in a state of nature, much like the Constitution was an agreement among states. Yet upon forming the social contract, individuals had unified themselves into a single polity composed of all citizens, much like the Constitution had done among the peoples of each state. In other words, although sovereignty resided in the people themselves—a citizenry composed of constituent members—the social contract also transformed the people into “one moral whole,” with ultimate power exercised through majority will.<sup>51</sup> Madison essentially took the same view of the federal system.<sup>52</sup>

Nonetheless, the unique character of the polity and its formation justified, in Madison’s eyes, a more historically based approach to constitutional interpretation, focusing on how the Constitution was understood at the moment of its adoption.<sup>53</sup> It was a mistake, he thought, to construe the federal Constitution in light of the usual

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49. *Id.* at 385.

50. *Id.* at 386

51. THEOPHILUS PARSONS, *Essex Result* (1778), in MEMOIR OF THEOPHILUS PARSONS 359, 366 (1861) (“When men form themselves into society, and erect a body politic or State, they are to be considered as one moral whole, which is in possession of the supreme power of the State. This supreme power is composed of the powers of each individual collected together, and voluntarily parted with by him.”); see also LOCKE, *supra* note 21, at bk. 2, chap. 8, § 96 (“For when any number of Men have, by the consent of every individual, made a *Community*, they have thereby made that *Community* one Body, with a Power to act as one Body, which is only by the Will and Determination of the *Majority*.”).

52. Notably, the Framers’ letter announcing the Constitution employed this analogy. See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 666–67 (Max Farrand ed., 1911).

53. See Letter from James Madison to Henry Lee (June 25, 1824), in 9 WRITINGS OF JAMES MADISON, *supra* note 36, at 190–91 (“I entirely concur in the propriety of resorting to the sense in which the Constitution was accepted and ratified by the nation.”). For discussion, see Christopher L. Eisgruber, *Marbury, Marshall and the Politics of Constitutional Judgment*, 89 VA. L. REV. 1203, 1221 (2003); JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 339–65 (1996).

authority of polities to promote the public good.<sup>54</sup> That was typically the correct approach.<sup>55</sup> But “the case is obviously different,” Madison insisted, with respect to the *federal* Constitution, since states had retained much of their sovereignty.<sup>56</sup> “There is certainly a reasonable medium between expounding the Constitution with the strictness of a penal law, or other ordinary statute,” he wrote, “and expounding it with a laxity which may vary its essential character, and encroach on the local sovereignties with w[hich] it was meant to be reconcilable.”<sup>57</sup> In short, the Constitution ought to be interpreted in light of the unique, hybrid nature of the polity it created.

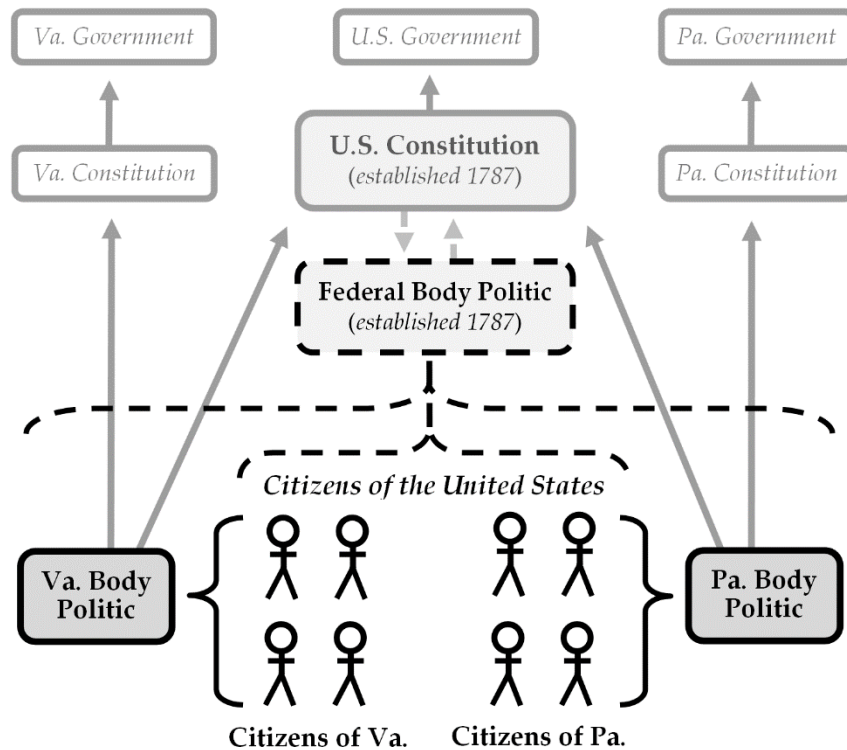
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54. Letter from James Madison to Spencer Roane (Sep. 2, 1819), in 8 THE WRITINGS OF JAMES MADISON 447, 451 (Gaillard Hunt ed., 1908) (“Much of the error in expounding the Constitution has its origin in the use made of the species of sovereignty implied in the nature of Gov[ernment].”).

55. *Id.* at 452 (stating that powers were usually “understood to extend to all the Acts whether as means or ends required for the welfare of the Community, and falling within the range of just Government.”).

56. *Id.*

57. *Id.* at 451–52.

**FIGURE 2: MADISON'S QUASI-NATIONALISM**

Explanation: This figure depicts Madison's theory of quasi-nationalism, under which the peoples of the several states, upon adopting the Constitution, transferred part of their sovereignty to a federal body politic. But on Madison's view, the Constitution blended confederal and national features, and it therefore created a distinctive polity—one that remained somewhat tethered to state polities. The methods and processes for construing the Constitution should thus reflect its idiosyncratic origins and character. (Note: Black depicts the locus of sovereignty; the dashed lines and braces reflect the idiosyncratic origins and hybrid character of the federal polity.)

### C. Marshall's 1787 Nationalism

In some ways, John Marshall's theory of the Union was similar to Madison's. From a genealogical standpoint, Marshall thought that a federal polity was created through the Constitution's ratification, whereby individual sovereign states had transferred portions of

their sovereignty to a federal polity.<sup>58</sup> In response to Spencer Roane's attacks on *McCulloch v. Maryland*,<sup>59</sup> for instance, Marshall agreed that "[t]he Constitution of the United States was not adopted by the people of the United States as one people, it was adopted by the several states."<sup>60</sup> In this way, the formation of the national body politic departed from the imagined social-contractarian origins of other polities.

Yet Marshall also insisted that the United States was a sovereign nation, undergirded by a unitary, national body politic. "[T]he constitution of the United States is not an alliance, or a league, between independent sovereigns; nor a compact between the government of the union, and those of the states," he wrote, "but is itself a government, created for the nation by the whole American people."<sup>61</sup> It should thus be construed as "the act of a single party"—namely, "the people of the United States, assembling in their respective states."<sup>62</sup> Or, as he declared in *Cohens v. Virginia*,<sup>63</sup> "the United States form, for many, and for most important purposes, a single nation . . . [with] one people."<sup>64</sup>

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58. See, e.g., *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 187 (1824) (the Constitution was "the instrument by which that change [in the nature of the Union] was effected").

59. 17 U.S. (4 Wheat.) 316 (1819).

60. John Marshall, *A Friend of the Constitution* No. 3 (July 2, 1819), in JOHN MARSHALL'S DEFENSE OF *MCCULLOCH V. MARYLAND* 167, 167 (Gerald Gunther ed., 1969); John Marshall, *A Friend of the Constitution* No. 7 (July 9, 1819), in JOHN MARSHALL'S DEFENSE, *supra*, at 196, 197; see also John Marshall, *A Friend of the Constitution* No. 6 (July 6, 1819), in JOHN MARSHALL'S DEFENSE, *supra*, at 191, 194; John Marshall, *A Friend of the Union* No. 1 (Apr. 24, 1819), in JOHN MARSHALL'S DEFENSE, *supra*, at 78, 88–90.

61. John Marshall, *A Friend of the Constitution* No. 8, in JOHN MARSHALL'S DEFENSE, *supra* note 60, at 202.

62. *Id.* at 203; see also *Gibbons*, 22 U.S. (9 Wheat.) at 187 ("[W]hen these allied sovereigns converted their league into a government . . . the whole character in which the States appear, underwent a change . . .").

63. 19 U.S. (6 Wheat.) 264 (1821).

64. *Id.* at 413. Importantly, Marshall used the plural verb not because "the United States" referred merely to a collection of states, cf. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 846 n.1 (1995) (Thomas, J., dissenting), but instead because collective nouns often took plural verbs. See Ronald R. Butters, *Grammatical Structure*, in 6 THE CAMBRIDGE HISTORY OF THE ENGLISH LANGUAGE 325, 335–36 (John Algeo ed., 2001) (noting the shift in American grammar).

At first glance, it is perplexing that Marshall articulated a unitary, nationalistic account of the Union alongside a state-based description of its genesis.<sup>65</sup> But once again, basic precepts of social-contract theory bolstered this position.<sup>66</sup> Although the parties to a social contract began as individuals, they forged themselves together into a unitary whole—a body politic. From this perspective, a state-based account of the Union’s formation did not undermine the unitary character of the national polity.<sup>67</sup>

Given his nationalistic view of the Union, it is no surprise that Marshall’s reading of the Constitution was more nationalistic than Jefferson’s and Madison’s. Although Marshall acknowledged that federal powers were limited, he insisted that the grounding of federal authority (in a national body politic) paralleled the grounding of state authority (in state bodies politic). And for that reason, the federal Constitution should be interpreted using essentially the same methods as were used to construe state constitutions. As Marshall explained in *McCulloch v. Maryland*, the “nature” of a constitution “requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves . . . . [W]e must never forget that it is a constitution we are expounding.”<sup>68</sup>

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65. See, e.g., TAYLOR, *supra* note 27, at 143 (“No derived power can be greater than the primitive power. No state, nor a majority of states, had any species of primitive sovereignty or supremacy over other states.”).

66. See *supra* notes 51–52 and accompanying text.

67. Marshall, *A Friend of the Constitution* No. 7, *supra* note 60, at 197 (“The character of a government depends on its constitution, not on its being adopted by the people acting in a single body, or in single bodies.”); see Martin S. Flaherty, *John Marshall, McCulloch v. Maryland, and We the People: Revisions in Need of Revising*, 43 WM. & MARY L. REV. 1339, 1373 (2002) (describing Marshall’s view).

68. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819); see also Powell, *supra* note 17, at 728 (“Nationalists of the 1790s often displayed something close to impatience with the Republicans’ legalistic mode of constitutional argument.”).

Marshall's overriding approach to constitutional interpretation thus differed from Madison's.<sup>69</sup> Both men, of course, invoked standard interpretive devices—text, history, pragmatic reasoning, and so on. But for Marshall, interpreters should consider the Constitution's author as the people of the nation. Even his invocations of original public meaning are revealing in this respect—quietly assuming a unitary (and thus national) American public.<sup>70</sup> Relatedly, and in contrast to Madison,<sup>71</sup> Marshall was mostly interested in the Constitution's deeper principles, not in the specific intentions of its drafters or ratifiers.<sup>72</sup> “It is impossible to construe such an instrument rightly,” he stated, “without advert[ing] to its nature, and marking the points of difference which distinguish it from ordinary contracts.”<sup>73</sup> Although the Constitution was ratified at a particular moment, it was authored by an enduring polity, and the broad language of the Preamble was among its most important interpretive guides.<sup>74</sup>

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69. To be sure, Marshall favorably cited *Federalist* No. 39, but he did so only in reference to the idea that sovereignty was divided within the United States. See Marshall, *A Friend of the Constitution* No. 6, *supra* note 60, at 194.

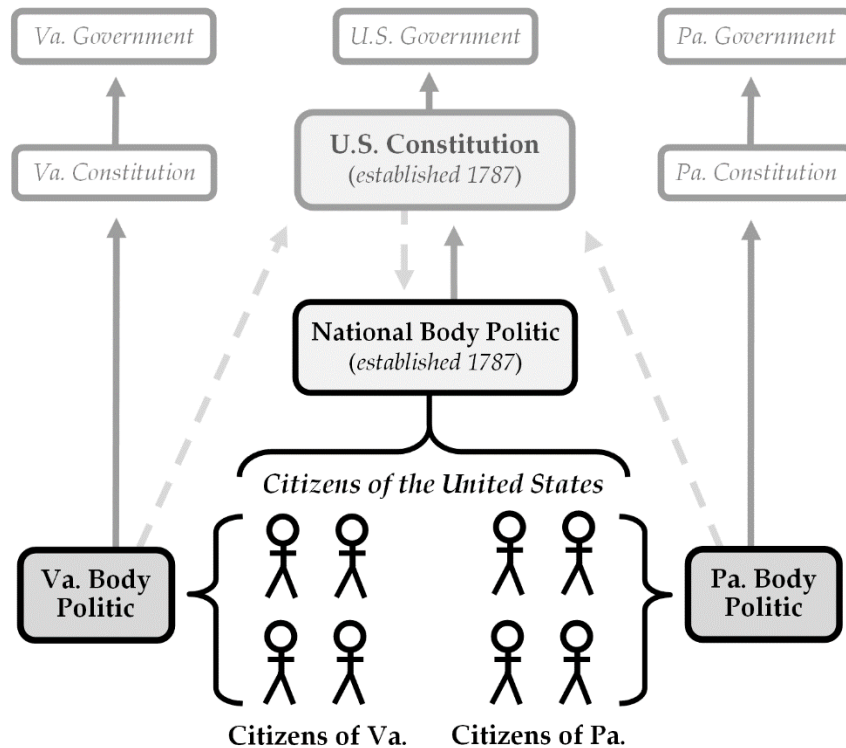
70. See Lawrence B. Solum, *The Public Meaning Thesis: An Originalist Theory of Constitutional Meaning*, 101 B.U. L. REV. 1953, 1979 (2021) (collecting citations).

71. See sources cited *supra* notes 53–70; *infra* notes 72–73.

72. See, e.g., John Marshall, *A Friend of the Constitution* No. 2, in JOHN MARSHALL'S DEFENSE, *supra* note 60, at 161, 163 (invoking principles applicable to sovereigns under the law of nations); Marshall, *A Friend of the Constitution* No. 3, *supra* note 60, at 167 (“I admit it to be a principle of common law, ‘that when a man grants any thing, he grants also that without which the grant cannot have its effect.’”); see also Eisgruber, *supra* note 53, at 1221 (“Marshall did refer to ‘intent’—but he almost always did so in a highly abstract way, referring not to any specific judgments made by actual Framers but rather to aspirations that the American people must have had when they adopted the Constitution, given the general nature of the constitutional project.”); Jeremy Telman, *John Marshall's Constitution: Methodological Pluralism and Second-Order Ipse Dixit in Constitutional Adjudication*, 24 LEWIS & CLARK L. REV. 1151, 1187 (2020) (“Gestures towards the Framers’ intentions become the sleight of hand through which the Justices obscure other interpretive modalities, such as appeals to natural law or pragmatic considerations.”).

73. See Marshall, *A Friend of the Constitution* No. 3, *supra* note 60, at 171.

74. See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 188–89 (1824) (“[I]t is a well settled rule, that the objects for which it was given, especially when those objects are expressed in the instrument itself, should have great influence in the construction.”).

**FIGURE 3: MARSHALL'S 1787 NATIONALISM**

Explanation: This figure depicts Marshall's theory of nationalism, under which the peoples of the several states, upon adopting the Constitution, transferred part of their sovereignty to a national body politic. The national polity thus had idiosyncratic origins, having been created through a written agreement among states rather than through an imagined social contract among individuals. But after ratification, the federal polity became fully autonomous and sovereign within the scope of its authority. Consequently, the Constitution paralleled state constitutions and should be interpreted using standard methods of constitutional interpretation. (Note: Black depicts the locus of sovereignty; the dashed lines, showing the idiosyncratic origins of the federal polity, are faded to reflect their insignificance to constitutional interpretation after ratification.)

#### *D. Wilson's 1776 Nationalism*

While Jefferson, Madison, and Marshall agreed that states were fully sovereign prior to ratification of the Constitution, James Wil-

son took a different view. He thought that national sovereignty inhered in a national social contract created in 1776. As he saw it, the act of declaring independence vested the people of the United States with certain national rights and national powers.<sup>75</sup>

Wilson began articulating this view from the outset. Less than a month after the Declaration of Independence, Wilson opined on the nature of the Union: “[I]t has been said that Congress is a representation of states; not of individuals.” But “as to those matters which are referred to Congress,” he retorted, “we are not so many states; we are one large state.”<sup>76</sup> He reiterated this position a decade later, writing:

The United States have *general* rights, *general* powers, and *general* obligations, not derived from *any* particular States, nor from *all* the particular States, taken *separately*; but *resulting from the union of the whole*. . . . To many purposes, the United States are to be considered as one *undivided, independent* nation; and as possessed of *all the rights, and powers, and properties*, by the law of nations *incident* to such.<sup>77</sup>

Wilson based this nationalist view in part on a genealogical account of the nation’s origins. “The act of independence was made before the articles of confederation,” he argued, and it was done in the name of “‘*these UNITED Colonies*,’ (not enumerating them separately).”<sup>78</sup> The nation thus became a freestanding political entity in 1776—not one created by the several states in 1787.<sup>79</sup>

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75. See Jonathan Gienapp, *The Myth of the Constitutional Given: Enumeration and National Power at the Founding*, 69 AM. U. L. REV. F. 183, 198–204 (2020); Gienapp, *supra* note 4, at 1795–97; John Mikhail, *The Necessary and Proper Clauses*, 102 GEO. L.J. 1045, 1074–78 (2014).

76. Thomas Jefferson, *Notes of Proceedings in the Continental Congress* (July 30–Aug. 1, 1776), in 1 THE PAPERS OF THOMAS JEFFERSON 309, 327 (Julian P. Boyd ed., 1950) (remarks of Rep. Wilson).

77. JAMES WILSON, CONSIDERATIONS ON THE BANK OF NORTH-AMERICA 10 (Philadelphia, Hall & Sellers 1785).

78. *Id.*

79. For a scholarly evaluation of this genealogical claim, see Craig Green, *United/States: A Revolutionary History of American Statehood*, 119 MICH. L. REV. 1 (2020). On Wilson’s view, the Articles of Confederation did not form the nation nor recognize

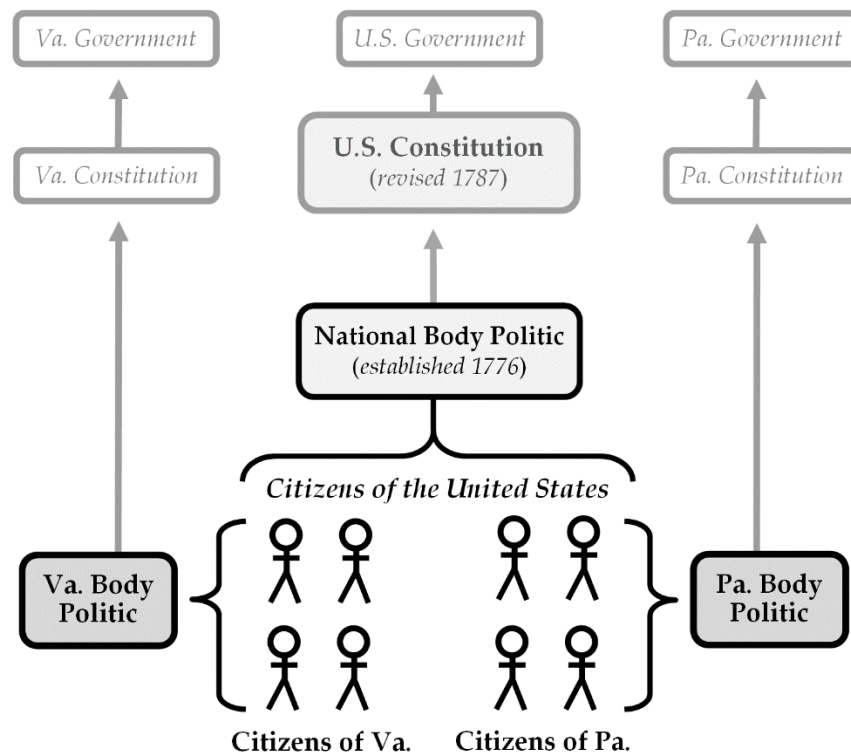
Viewing the nature of the Union in this way profoundly affected constitutional interpretation. Because Congress represented a national body politic, Wilson argued, it had inherent powers that exceeded those mentioned in Article I of the Constitution. For instance, the federal government had authority over those matters where “no particular state is competent.”<sup>80</sup> It also meant that final interpretive authority rested in national institutions, not in individual states.<sup>81</sup>

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the full swath of its powers. “The confederation,” he wrote, “was not intended to weaken or abridge the *powers and rights*, to which the United State were *previously* entitled.” WILSON, *supra* note 77, at 10.

80. WILSON, *supra* note 77, at 66; *see also* Mikhail, *supra* note 75, at 1074–78.

81. *See, e.g.,* Martin v. Hunter’s Lessee, 14 U.S. (1 Wheat.) 304 (1816); 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION §§ 163–77 (1833).

**FIGURE 4: WILSON'S 1776 NATIONALISM**

Explanation: This figure depicts Wilson's theory of nationalism, under which the people of the United States—acting in a national capacity, and not through the states—formed a national body politic upon declaring independence in 1776. On this view, the Constitution formed a new system of government but did not create the nation. (Note: Black depicts the locus of sovereignty.)

### III. RECONSIDERING THE LAW OF NATIONS

In recent articles, Professors Anthony J. Bellia Jr. and Bradford Clark have argued that because federal constitutional authority came from sovereign states, the law of nations supplied rules for constitutional interpretation.<sup>82</sup> Most notably, these rules demanded

82. See Bellia & Clark, *supra* note 22; Bellia & Clark, *supra* note 31.

clarity before recognizing the derogation of a sovereign right.<sup>83</sup> Thus, for instance, the Constitution preserved state sovereign immunity and withheld federal power to commandeer states.<sup>84</sup>

If Jefferson was right about the nature of the Union, then Bellia and Clark have a convincing argument. *If* the Constitution was a compact among sovereign states and merely assigned certain powers to a federal government, then using interpretive principles from the law of nations made sense.<sup>85</sup>

But as we have seen, the law of nations was not the only interpretive framework for evaluating consolidations of political authority. Social-contract theory offered an alternative.<sup>86</sup> In its traditional form, social-contract theory stipulated that sovereign individuals had transferred sovereignty to a new corporate entity—the body politic—in which they became constituent members.<sup>87</sup> In a sense, their rights were thus preserved, since sovereignty remained in themselves. But after forming a social contract, sovereignty belonged to the people collectively, not individually.<sup>88</sup> A social-

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83. Professors Bellia and Clark try to cast their argument in narrower terms—admitting room for “ordinary” interpretation rather than only “strict” interpretation, *see, e.g.*, Bellia and Clark, *supra* note 31, at 563–66, and focusing on the nonderogation of “residual sovereign rights of the States through doctrines such as sovereign immunity, the anticommandeering doctrine, and the equal sovereignty doctrine,” rather than on the general scope of federal power, *id.* at 523. But these distinctions do not seem to have been grounded in eighteenth-century understandings of the law of nations. It is highly doubtful, for instance, that principles of “strict construction” differed from a requirement that delegations of sovereign powers had to be enumerated in “clear and express terms.” *Cf. id.* at 552. And as Professors Bellia and Clark acknowledge, “One of the most significant rights possessed by all sovereign states was the exclusive right to govern persons and property within their own territory.” *Id.* at 546.

84. Bellia and Clark, *supra* note 31, at 523. Of course, one might defend state sovereign immunity and anticommandeering doctrine under other views of the nature of the Union.

85. *See* Schwartz, *supra* note 4, at 631–32.

86. *See supra* notes 51–52, 65–67 and accompanying text.

87. *See* *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 456, 458 (1793) (opinion of Wilson, J.) (“The *sovereign*, when traced to his source, must be found in the *man*.”); *see also* Campbell, *supra* note 6, at 90 (discussing Wilson’s argument).

88. *See, e.g.*, NATHANIEL CHIPMAN, *SKETCHES OF THE PRINCIPLES OF GOVERNMENT* 208 (J. Lyon ed., 1793) (discussing “the people, thus associated, not individually, but collectively”).

contractarian account of political authority, rather than one framed by the law of nations, thus made sense when previously independent entities agreed to consolidate their sovereignty, retaining it among themselves but now exercising it collectively through a new polity. Unlike the law of nations, which addressed transfers of sovereign *power*, social-contract theory supplied a framework for considering the consolidation of *sovereignty* itself.

Marshall embraced this reasoning with gusto, defending the existence of a fully sovereign national body politic—albeit one formed in an unusual way and vested with sovereignty in only certain respects.<sup>89</sup> Madison, by contrast, viewed the polity as having a hybrid form.<sup>90</sup> Both men, however, rejected the Jeffersonian premise that the Constitution had merely transferred certain powers to a confederal government. “All arguments founded on leagues and compacts,” Marshall stated, “must be fallacious when applied to a government like this.”<sup>91</sup>

#### CONCLUSION

Fights over the nature of the Union were not simply philosophical debates. Although Americans disagreed sharply, they recognized that the nature of the Union profoundly impacted how to read the Constitution. This is why virtually all early treatises on constitutional law started with a discussion of sovereignty. As John Pomeroy observed in his treatise, “all the relations of the United States and the several commonwealths to each other, and of all the functions of the general and local governments, must depend” on “the essential character of this organic law, and of the body-politic

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89. See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 197 (1824) (observing that federal power is “limited to specified objects”).

90. See *supra* Part II.B.

91. See Marshall, *A Friend of the Constitution* No. 8, *supra* note 61, at 203; see also Marshall, *A Friend of the Constitution* No. 3, *supra* note 60, at 169 (“The difference between the instruments in the examples taken from Vattel, or from the books of the common law; and the constitution of a nation, is, I think, too apparent to escape the observation of any reflecting man.”).

which lies behind it.”<sup>92</sup> Everybody took the text seriously. But as Pomeroy recognized, contrasting views of the nature of the Union enabled people to see that text in very different ways.

For Jefferson, the text was a treaty-like compact among sovereign states, and therefore it had to be interpreted using principles of “strict construction.” Nontextual federal powers or nontextual limits on state power thus made no sense. This way of thinking also led Jefferson to view states as the ultimate expositors of constitutional meaning.

For Madison, the Constitution was a textual marker of an agreement created by the peoples of the several states at a particular historical moment. It therefore should be interpreted based on the intentions of those who ratified it. This helps explain why Madison cared so much about ratifiers’ intent. Perhaps these intentions could include implied powers or dormant limits, but only if history said so. This approach also led Madison to think that the most authoritative way of interpreting the Constitution was for state legislatures to collectively announce their views.

For Marshall and Wilson, the foundation of federal authority was a national body politic that paralleled state bodies politic. The federal Constitution should thus be interpreted in essentially the same way as state constitutions. This meant, for instance, that ambiguities could be settled by looking to the Preamble. And by accepting the notion that states had transferred some of their sovereignty in 1787, as Marshall believed, or had begun with limited sovereignty in 1776, as Wilson thought, the nationalist perspective also made space for arguments about inherent powers as well as “dormant” or “negative” inferences from express powers. It also meant that *national* institutions were the final expositors of federal constitutional law.<sup>93</sup>

Crucially, this dispute was not merely over constitutional *interpretation*. It went to the deeper, more fundamental question of the

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92. JOHN N. POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES: ESPECIALLY DESIGNED FOR STUDENTS, GENERAL AND PROFESSIONAL 20 (3d ed. 1888).

93. *See, e.g.,* *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304 (1816).

nature of the Union. Or, to put the point more bluntly, one could not know how to approach constitutional law without first knowing the locus of sovereignty in the federal system. Understanding the nature of the Union was a predicate of—not a product of—constitutional interpretation.<sup>94</sup>

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94. In their original oral form, these remarks responded to a prompt about whether constitutional federalism promotes unity or disunity, and my overriding point was to challenge the directional assumption of the question—that is, that we can properly understand the Constitution without *first* considering whether Americans are united or disunited.