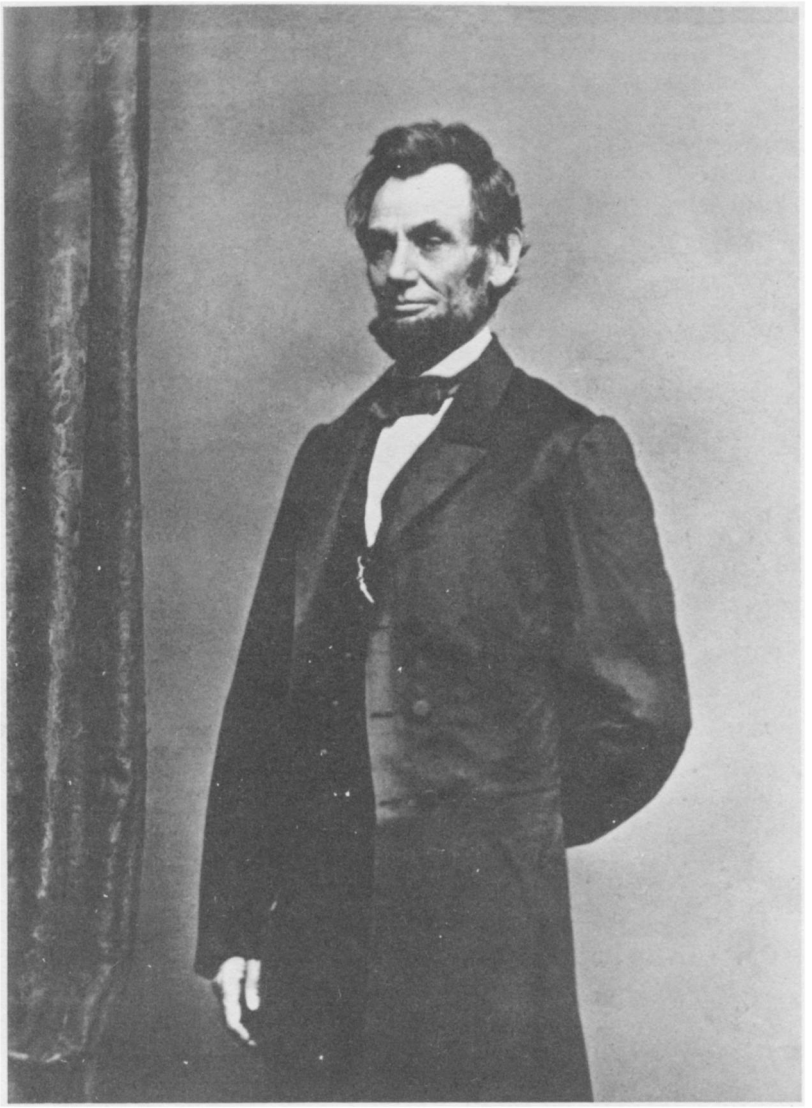

Mathew Brady print of Lincoln, January 8, 1864, Washington, D.C.

Abraham Lincoln and Federalism

MICHAEL LES BENEDICT

The Civil War often is seen as a turning point in the history of American federalism. In one sense the truth of this perception is beyond dispute. Had the South secured secession by force of arms, the Union would have been broken, the federal system disrupted. There is no telling what the consequences for attitudes toward federalism the world over would have been or what sort of federal system would have survived, North or South.

But scholars—especially constitutional scholars—see the Civil War as a turning point in a narrower doctrinal sense. They perceive the doctrine of state sovereignty, by which southerners justified secession, to have embodied a profound challenge to the federal system created by the Founders. Yet constitutional historians have not attended very well to antebellum theories of federalism. There has been a tendency to overidentify with antebellum constitutional nationalism as the "correct" understanding of federalism endorsed by the Supreme Court and to view state sovereignty as a kind of heresy.[1] Analysts also assume that modern-day constitutional nationalism corresponds to Marshallian nationalism and that acknowledgments

1. For traditional constitutional histories that explicitly or implicitly indicate that constitutional nationalism has been the "correct" doctrine of American federalism, see Hermann von Holst, *The Constitutional and Political History of the United States*, 8 vols. (Chicago: Callaghan, 1877–92); James Ford Rhodes, *History of the United States from the Compromise of 1850 to the Final Restoration of Home Rule at the South*, 7 vols. (New York: Harper & Bros., 1893–1906); Francis Newton Thorpe, *The Constitutional History of the United States, 1765–1895*, 3 vols. (Chicago: Callaghan, 1901); Charles Warren, *The Supreme Court in American History*, 3 vols. (Boston: Little, Brown, 1922); Andrew C. McLaughlin, *A Constitutional History of the United States* (New York: D. Appleton-Century, 1935); Benjamin F. Wright, *The Growth of American Constitutional Law* (New York: Houghton Mifflin, 1942); Carl Brent Swisher, *American Constitutional Development* (Boston: Houghton Mifflin, 1943); Carl Brent Swisher, *The Growth of Federal Power in American History* (Chicago: University of Chicago Press, 1946); Robert G. McCloskey, *The American Supreme Court* (Chicago: University of

The author wishes to acknowledge the support of the American Council of Learned Societies, the Ford Foundation, and the National Endowment for the Humanities. This paper was one of several delivered at the annual Abraham Lincoln Symposium in Springfield, Illinois, on February 12, 1987. The symposium was made possible by a generous grant from the Horace W. Goldsmith Foundation.

Journal of the Abraham Lincoln Association Vol. 10, 1988

Robert Marshall Root print of the Lincoln-Douglas debate at Charleston.

of what scholars call "dual federalism" are deviations from a long-standing nationalist understanding of the federal system.[2] At the same time there has been a tendency to confuse the doctrine of "state sovereignty" with that of "state rights," a confusion reflected in the recently published *Encyclopedia of the American Constitution,* which has no entry for "state sovereignty" and identifies "state rights" not as a doctrine of federalism but as a mere slogan used for tactical reasons in political controversies.[3]

Abraham Lincoln is central to understanding the history of federalism. Lincoln transcends even Alexander Hamilton, John Marshall, and Daniel Webster as an icon of constitutional nationalism—

Chicago Press, 1960); Bernard Schwartz, *The Reins of Power: A Constitutional History of the United States* (New York: Hill & Wang, 1963); Samuel J. Konefsky, *John Marshall and Alexander Hamilton: Architects of the American Constitution* (New York: Macmillan, 1964); Morton Grodzins, *The American System: A New View of Government in the United States* (Chicago: Rand McNally, 1966), 17–57; Charles Herman Pritchett, *The American Constitution,* 2nd ed. (New York: McGraw-Hill, 1968); Alfred H. Kelly and Winfred A. Harbison, *The American Constitution: A History,* 5th ed. (New York: Norton, 1976).

2. The orthodox view reflects the approval of nationalist constitutional interpretation that developed powerfully during the Depression and the simultaneous attack upon state-rights constitutionalism. See especially Edward S. Corwin, "Dual Federalism Versus Nationalism and the Industrial Process," in Corwin, *The Twilight of the Supreme Court* (New Haven: Yale University Press, 1934), 1–51, and Corwin, *The Commerce Power Versus State Rights* (Princeton: Princeton University Press, 1936), which was revealingly subtitled *Back to the Constitution.* The orthodox view is also reflected in the casebooks used in constitutional law courses: Paul G. Kauper and Francis X. Beytaugh, *Constitutional Law,* 5th ed. (Boston: Little, Brown, 1980), 217; John E. Novak, Ronald D. Rotunda, J. Nelson Young, *Constitutional Law,* 2d ed. (St. Paul, Minn.: West Publishing Co., 1983), 128–29; Norman Redlich and Bernard Schwartz, *Constitutional Law,* 2 vols. (New York: Matthew Bender, 1983), 3–51. The dominant view is that of Robert L. Stern, who took part on the government side in New Deal cases: The perception underlying modern constitutional nationalism "is hardly a novel or radical concept. It underlay the assignment of powers to the federal government at the Constitutional Convention of 1787. . . . [T]he same standard is accepted and applied 186 years later." Stern, "The Commerce Clause Revisited—The Federalization of Interstate Crime," *Arizona Law Review,* 15 (No. 2, 1973), 271–85 at 284.

3. Leonard Levy et al., eds., *Encyclopedia of the American Constitution,* 4 vols. (New York: Macmillan, 1986), 4:1755–57. Elizabeth Kelley Bauer, in her standard study *Commentaries on the Constitution, 1790–1860* (New York: Columbia University Press, 1952) refers to the commentaries of St. George Tucker, John Taylor, and Henry St. George Tucker as "The State Rights School of the South," without referring to any other variants. The eminent constitutional scholar Bernard Schwartz fails to differentiate between state rights and state sovereignty in *From Confederation to Nation: The American Constitution, 1835–1877* (Baltimore: Johns Hopkins University Press, 1973).

"the supreme nationalist in this history of the United States," in the words of one historian; a man whose "great unwritten contribution" to the fundamental law of the United States was "a sort of quasi-amendment that definitely settled for all time the constitutional status of the Union,"[4] in the words of another. But on closer examination, the eminent constitutional scholar Gerald Gunther was surprised to find Marshall's nationalism less expansive than historians had described it.[5] Likewise, a closer look at Lincoln indicates both how his nationalism contrasted with other conceptions of the federal system and its limitations. As we conclude the bicentennial year of the framing of the American Constitution, it seems particularly appropriate to clarify the antebellum theories of federalism, to discuss the degree to which constitutional nationalism was triumphant in the Civil War, and to describe how Lincoln personified it.

ANTEBELLUM DOCTRINES OF FEDERALISM

Before the Civil War, the resolution of a variety of controversies over government policy turned on where they would be decided, the state or national forums. Would there be a legal environment in the United States conducive to modern economic institutions, especially banks and business corporations? How fixed, stable, and reliable would contracts be? Would the power of government be harnessed to promote economic development through subsidies, tariff protection, and the establishment of government banks? Would Indian tribes retain control of lands desired by white Americans for commercial development? Should government take steps to discourage the continued existence of slavery? The resolution of all these controversies would be different if people agreed that the Constitution required them to be decided in the state rather than the national arena.

In the course of these antebellum controversies over government policy, Americans developed three different understandings of federalism, articulated in court opinions, legal arguments, legislative debates and resolutions, in party platforms, public addresses, newspaper editorials, journal articles, and all the other media through which public opinion was formed. Two understandings stressed the

4. James A. Rawley, "The Nationalism of Abraham Lincoln," *Civil War History* 9 (Sept., 1963), 283–98, quoted at 283; Albert A. Woldman, *Lawyer Lincoln* (Boston: Houghton Mifflin, 1936), 313–29, quoted at 327.

5. Gerald Gunther, ed., *John Marshall's Defense of McCulloch v. Maryland* (Stanford: Stanford University Press, 1969), 19–21.

autonomy of state decision making and too often are not distinguished properly by scholars, just as they were often conflated by contemporaries. The doctrine of state sovereignty was developed over time by such lawyers, politicians, and political philosophers as Virginia Congressman John Randolph, jurisprudents St. George Tucker and Spencer Roane, John Taylor of Caroline, and John C. Calhoun, elaborating upon principles originally articulated by Jefferson and Madison in the Kentucky and Virginia Resolutions. The other doctrine, "state rights," was articulated especially by James Madison in the 1830s and associated with President Andrew Jackson, Chief Justice Roger Taney, Illinois Senator Stephen A. Douglas, and the Jacksonian Democratic party (especially its northern wing, although many southerners adhered to it too).[6]

Central to the doctrine of state sovereignty was the conviction that the several states became independent, sovereign polities upon throwing off their allegiance to Great Britain. As independent sovereignties they agreed first to the Articles of Confederation and then to the Constitution, which was thus a compact that created a confederacy, not a nation. When the preamble to the Constitution said "We the People of the United States . . . do ordain and establish this Constitution for the United States of America," it referred to the separate peoples of the individual states, "to thirteen distinct communities and not to one," who in their separate sovereign capacities had ratified it.[7] Sovereignty remained in the states; the federal government was merely their agent—"the representative and organ of the States," as Calhoun put it[8]—bound to act on behalf of all of them equally when exercising its delegated powers. There could be no conflict over jurisdiction between the central government and an individual state government. Any conflict was really between the

6. Before the war, Americans tended to refer to both state sovereignty and dual federalism as "state rights." Edward S. Corwin first identified the nonstate-sovereignty version of state rights as "dual federalism." See Corwin's *The Commerce Power Versus State Rights* and also "The Passing of Dual Federalism," *Virginia Law Review* 36 (Feb. 1950), 1–24.

7. James Monroe, "Views of the President of the United States on the Subject of Internal Improvements," in James D. Richardson, comp., *A Compilation of the Messages and Papers of the Presidents of the United States, 1789–1897*, 10 vols. (Washington, D.C.: Government Printing Office, 1896–1899), 2:149. See also James Madison's explication in the Virginia general assembly's "Report on the Resolutions," in Madison, *The Writings of James Madison*, ed. Gaillard Hunt, 9 vols. (New York: Putnam, 1900–1910), 6:346 (hereafter cited as Madison, *Writings*).

8. John C. Calhoun, *A Discourse on the Constitution and Government of the United States*, in *The Works of John C. Calhoun*, ed. Richard K. Cralle, 6 vols. (Charleston: Walker & Jones, 1851–1855), 1:187 (hereafter cited as Calhoun, *Works*).

individual state and its sister states. The compact provided no forum to adjudicate such conflicts, since the Supreme Court, as part of the subordinate government, could not bind the sovereign states. State courts could ignore federal court decisions that transcended the jurisdiction of the federal government. By 1830, adherents of state sovereignty insisted that each state retained final authority to decide such conflicts by nullifying the operation of federal laws within its own boundaries. Finally, if the other parties to the compact sought to enforce a federal law or court decision over the opposition of the state, the compact would be broken and the state could exercise its sovereign authority to withdraw from the confederacy. States could exercise the same right if the central government failed to fulfill its obligation to promote the interests of all states equally.

Since the states retained final sovereignty, the only cement that bound them together was the mutual regard, respect, and affection of their peoples. This imposed a special obligation on the people of each state to regard the feelings and property rights of the people of sister states with solicitude. If they failed, this too might be justification for withdrawing from the Union.[9]

State-sovereignty theory was anomalous with regard to the scope of federal power. In general, state-sovereignty theorists stressed the limitations on federal power. Like adherents of state rights, they argued that there was a line separating the jurisdiction of the state governments and the central government. The people of the states

9. The great statements of the state sovereignty theory as it developed between 1798 and 1861 were the Kentucky Resolutions, in Thomas Jefferson, *The Writings of Thomas Jefferson*, ed. Albert Ellery Bergh, 20 vols. (Washington, D.C.: Thomas Jefferson Memorial Association, 1903), 17:379–91 (hereafter cited as Jefferson, *Writings*); the Kentucky Resolutions, in James Madison, *Writings*, 6:332–40; St. George Tucker, "Of the Constitution of the United States," Appendix Note D in Tucker, ed., *Blackstone's Commentaries: With Notes of Reference, to the Constitution and Laws of the Federal Government of the United States; and the Commonwealth of Virginia*, 5 vols. (Philadelphia: Birch and Small, 1803), 1:140–377; Spencer Roane in Hunter v. Martin, published in the Richmond *Enquirer*, January 27, 1816; Judge William Brockenbrough's "Amphyction" essays and Roane's "Hampden" essays, in Gunther, *Marshall's Defense*, 52–77, 106–54; John Taylor, *Construction Construed and Constitutions Vindicated* (Richmond, VA: Shepherd & Pollard, 1820); Taylor, *New Views of the Constitution of the United States* (Washington, D.C.: Way & Gideon, 1823); Robert Y. Hayne in the famous Hayne-Webster debate, *Register of Debates in Congress*, 21 Congress, 1 Session, 31–35, 43–58, 82–92 (January 19, 24–25, 27, 1830); Calhoun, "Fort Hill Address," in John L. Archer, *Life of John C. Calhoun . . . from 1811 to 1843 . . .*, (New York: Harper, 1843), Part 2:27–43; Calhoun, *A Discourse on the Constitution*, 1:109–406; Calhoun, "Resolutions in Respect to the Rights of the States," in Calhoun, *Works*, 3:140–41. See also Elizabeth Bauer, *Commentaries on the Constitution, 1790–1860*

had delegated to the United States government power to deal with the external affairs of the states and to regulate relations among them. Final authority over internal matters remained with the states. This boundary between state and national authority inhered in the fact that the central government's powers were delegated, with undelegated powers retained by the states or the people of the states, an understanding formalized by the Tenth Amendment. Therefore, it was essential that the delegation be strictly construed. The delegation of all powers "necessary and proper" to carry out the powers granted to Congress in Article I, section 8 of the Constitution posed a particular danger to state authority. As Jefferson had warned, if the words received a latitudinarian construction, they "would swallow up all the delegated powers. . . . [T]here is not one [power] which ingenuity may not torture into a convenience in some instance or other" to carry out the enumerated powers.[10] If this were done, nothing would be left of the powers reserved to the states. Under the latitudinarian reading of the "necessary and proper" clause, "the powers of the federal government would be enlarged so much . . . as to sweep off every vestige of power from the state governments," warned another Virginia constitutional controversialist.[11]

Stressing the separate sovereignty of each state and denying that the United States was a single nation, it was natural that state-sovereignty theorists perceived as illicit those federal policies that seemed to benefit some states more than others. Webster made the point best in his famous reply to South Carolina Senator Robert Y. Hayne, who defended nullification. "What interest has South Carolina in a canal in Ohio?" Hayne had asked. Webster answered, "On [Hayne's] system, it is true, she has no interest. On that system, Ohio and Carolina are different governments and different countries; connected . . . by some slight and ill-defined bond of union, but in all main respects separate and diverse. On that system, Carolina has no more interest in a canal in Ohio than in Mexico.[12]

(New York: Columbia University Press, 1952), 231–52, 260–75, 287–94; Walter Hartwell Bennett, *American Theories on Federalism*, (University: University of Alabama, 1964), 108–59; Jesse Thomas Carpenter, *The South and a Conscious Minority, 1789–1861: A Study in Political Thought* (New York: New York University Press, 1930); August O. Spain, *The Political Theory of John C. Calhoun* (New York: Bookman Associates, 1968); Note, "Judge Spencer Roane of Virginia: Champion of States' Rights—Foe of John Marshall," *Harvard Law Review* 66 (May 1953), 1242–59.

10. Jefferson, "Opinion Against the Constitutionality of a National Bank," in Jefferson, *Writings*, 3:149.

11. "Amphyction" [William Brockenbrough], Letter to the Editor of the Richmond *Enquirer*, April 2, 1819, in Gunther, ed., *Marshall's Defense of McCulloch v. Maryland*, 64.

12. Webster, Second Speech on Foot's Resolution, in *The Writings and Speeches of*

Since the central government was merely an agent for the states, its powers were really duties to the states. The duties were the measure of its powers, and if it exerted a power for a purpose other than to serve the states, it transgressed its limits.[13] But, as Arthur Bestor pointed out in his article on state sovereignty, when slaveholders turned to state-sovereignty doctrines to protect their interests, they discovered broad powers in the general government to promote and protect slavery. The obligation of the general government, as agent of the states, to promote state interests equally meant that where federal power existed, it must be exercised vigorously to enforce the property rights of slaveholders.[14]

The second theory of federalism, state rights, was similar enough to state sovereignty to allow adherents of both to cooperate in the antebellum Democratic party. But the differences were great enough to split the party during the Nullification Crisis of 1832 and to precipitate the party disruption that led to Lincoln's victory in 1860. Like proponents of state sovereignty, state-rights theorists traced the foundations of their argument to the Kentucky and Virginia Resolutions. They, too, were hostile to broad construction of the "necessary and proper" clause and denounced the notion that the Constitution delegated to the national government a wide range of "implied powers." But they recoiled from the idea that the states should have the final say about the constitutionality of federal and state laws, whether by leaving final determination with the state courts or through nullification. As Jefferson in his retirement swung firmly toward the state-sovereignty doctrines of Roane and Taylor, Madison warned him, "a paramount . . . Authority [to interpret the Constitution] in the States, would soon make the Constitution & laws different in different States, and thus destroy that equality & uniformity of rights & duties which forms the essence of the Compact."[15] Madison, Jackson, Taney, and others who shared both a commitment to state rights and a powerful national patriotism developed a concept of federalism that recognized the national character of the United States government but treated the national and the state governments as equally sovereign.

Daniel Webster, 18 vols. (Boston: Little, Brown, 1903) 6:22–23 (hereafter cited as Webster, *Writings*).

13. See especially Tucker, 170.

14. Arthur Bestor, "State Sovereignty and Slavery: A Reinterpretation of Proslavery Constitutional Doctrine, 1846–1861," *Journal of the Illinois Historical Society* 54 (Summer 1961), 162–67.

15. Madison to Jefferson, June 27, 1823, in Madison, *Writings,* 9:137–44 at 141.

Proponents of state rights continued to cite the Tenth Amendment to defend the general principle that the national government possessed only specified delegated powers, reiterating the arguments of the Kentucky and Virginia Resolutions. They aimed at limiting the definition of such words as "commerce" and "necessary and proper." They continued to maintain that the "general welfare" clause did not delegate to Congress a general power to promote the public good. In doing so, they articulated the concept denominated "dual federalism" by the great constitutional historian Edward S. Corwin.[16] The key to this understanding was the conviction, adopted from Roane and Taylor, that the constitution delegated distinct jurisdictions to the states and to the nation. Whether the people or the states were parties to the Constitution was immaterial, although most adherents of state rights opted for the states. Whoever fashioned the Constitution, they delegated a portion of their sovereign power to the national government and left another portion with the states. Thus, the Constitution did create a truly national government, and at the same time the states retained a wide range of sovereign power. The national government was not merely the agent of the states, and the exercise of its powers was not limited to protecting state interests. The federal system was one that posited "dual sovereignty." But the ends toward which each government could exercise its powers were different. Dual federalism led theorists to try to establish a clear demarcation between state and national power. Its proponents worked to define the boundary precisely. By definition, a road or canal that began and ended within one state had to be within the boundary of state authority and thus could not receive a direct federal subsidy.[17] An immigration restriction or quarantine must be either a regulation of foreign or interstate commerce, and thus within federal jurisdiction, or a public health law, and thus within the jurisdiction of the states.[18]

Modern analysts of antebellum dual federalism sometimes analogize its conception of the Union to a layer cake, with a distinct horizontal separation between the national and state layers.[19] But

16. Corwin, "Passing of Dual Federalism."

17. Jackson, Maysville Road Bill Veto, in Richardson, *Messages and Papers of the Presidents*, 2:483–93, esp. 487–88.

18. New York v. Miln, 11 Pet. 102 (1837); *The Passenger Cases*, 7 How. 283 (1845); *The License Cases*, 5 How. 504 (1847). This kind of line drawing also underlies the logic of the "original package rule" articulated in Brown v. Maryland, 12 Wheat. 419 (1827).

19. Morton Grodzins, "Centralization and Decentralization in the American Federal System," in Robert A. Goldwin, ed., *A Nation of States: Essays on the American Federal System* (Chicago: Rand McNally, 1963), 3–4.

the line was vertical. The national and state governments were equally sovereign, each supreme within its own sphere, and the line between them was determined by fixing upon those subjects that must remain within state jurisdiction. Therefore, as Monroe put it, "The National Government begins where the State governments terminate."[20] A national law, even one exercising a plainly delegated power, such as a tax law or a regulation of interstate or foreign commerce, was unconstitutional if it invaded the reserved jurisdiction of the states. "The very existence of these local sovereignties is a controul on the pleas for a constructive amplification of the powers of the General Govt," Madison observed.[21] That expressed the essence of dual federalist doctrine as defined by Corwin—that "the coexistence of the states and their power is of itself a limitation upon the national power."[22]

The paradigmatic example was the protective tariff. The Constitution delegated to Congress the power to levy taxes for the general welfare and to regulate foreign commerce. Superficially the tariff was an exercise of those powers. But, in fact, the protective tariff was designed to promote economic development, especially of nascent American industry. The Constitution nowhere delegated that power to the national government, dual federalists (and state-sovereignty advocates) insisted. The protective tariff was the use of a delegated power for an unconstitutional purpose.

For the majority of dual federalists, who accepted Tucker, Roane, and Taylor's argument that the Constitution was a compact among the states, this equal sovereignty was the logical consequence of the process by which the Union was established: The states retained the sovereign power they had not delegated. But even Americans who believed that the people as a whole established the Union could agree that the Tenth Amendment, which reserved to the states or the people all powers not delegated to the United States, provided a constitutional sanction for this arrangement. That amendment was "the foundation of the Constitution," Jefferson wrote. "To take even a single step beyond the boundaries thus specially drawn around the powers of Congress is to take possession of a boundless field, no longer susceptible of any definition."[23]

20. Monroe, "Views of the President . . . on Internal Improvements," in Richardson, 2:148.

21. Madison to Spencer Roane, September 2, 1819, in Madison, *Writings*, 8:447–53 at 452.

22. Corwin, "The Power of Congress to Prohibit Commerce: A Crucial Constitutional Issue," *Cornell Law Quarterly* 18 (June 1933), 477–506 at 482.

23. Jefferson, "Opinion on the Constitutionality of a National Bank," in Jefferson, *Writings*, 3:146.

This concept of national-state equality had several consequences for the scope of national power. The "necessary and proper" clause must be strictly construed so as to keep the national government within the bounds of the jurisdiction defined by the enumerated powers. Congress and the states should avoid passing laws that might impinge on the jurisdiction of the other. As much as possible, national and state laws should be interpreted to avoid overlap and conflict.

Where there was a conflict, however, it was the Supreme Court, not the states, that had the final power to determine the result. It was here that state-rights theory differed most radically from state-sovereignty theory. Madison conceded to his friend Jefferson that Marshall's Supreme Court had grievously abused its power by expanding national authority and restricting that of the states. But, he insisted, "the abuse of a trust does not disprove its existence." Likewise, in *Ableman v. Booth,* Taney delivered an endorsement of judicial supremacy even more ringing than Marshall's.[24] Thus, between the power of the federal judiciary to protect state rights and the power of the people to substitute new leaders for those who had violated a constitutional trust, there was no jurisdiction for nullification or secession. Such doctrines were, Jackson declared, "*incompatible with the existence of the Union, contradicted expressly by the letter of the Constitution, unauthorized by its spirit, inconsistent with every principle on which it was founded, and destructive of the great object for which it was formed.*"[25]

In umpiring the federal system, dual federalists insisted, the justices must sustain state laws passed in pursuance to the legitimate ends of state government unless they were in plain contravention of national laws passed pursuant to national ends. Moreover, state laws passed pursuant to the state police power might outweigh national laws only tenuously connected to national functions. Thus, the Supreme Court had a difficult time wrestling with the federalism issues presented when states tried to use their police powers to prevent the free entry of unwanted immigrants. On the one hand, this seemed to be a regulation of commerce, a power delegated to Congress. On the other, it was a police regulation designed to pro-

24. Madison to Jefferson, June 27, 1823, in Madison, *Writings,* 9:137–44 at 143; Ableman v. Booth, 21 How. 506 (1859).

25. Andrew Jackson, Proclamation, December 10, 1832, in Richardson, 2:640–56 at 643; Richard P. Longaker, "Andrew Jackson and the Judiciary," *Political Science Quarterly* 71 (Sept. 1956), 359–63. See also Madison to Edward Everett, August 28, 1830, in Madison, *Writings,* 9:383–403.

mote the public welfare, similar to state laws barring the entry of free blacks. If the Court held that Congress's power over commerce superseded such police regulations, it would be conceding the ability of Congress to overturn state police regulations wherever it could exercise its commerce power. Advocates of state rights resisted any such concession. "We must . . . ascertain what is commerce and what is police," wrote state-rights Supreme Court Justice Henry Baldwin, "so that when there arises a collision between an act of Congress regulating commerce . . . and a state law . . . , we may know which shall give way to the other; which is supreme and which is subordinate, the law of the Union or the law of the State.[26] Charles B. Goodrich expressed the dual federalism position succinctly in his *Science of Government,* published in 1853: "Our system of government is composed of two distinct, sovereign jurisdictions, each limited by a certain and prescribed boundary, beyond which it cannot pass."[27]

The third basic doctrine of federalism was constitutional nationalism. Hamilton, Marshall, Supreme Court Justice Joseph Story, Webster, and others held that it was the people of the United States as a whole, not the people of the individual states, who had established the Constitution. "It is, Sir, the people's Constitution, the

26. Henry Baldwin, *General View of the Origin and Nature of the Constitution and Government of the United States* . . . . (Philadelphia: J. C. Clark, 1837), 187. Likewise, Sabbatarians could argue that state Sunday blue laws took precedence over federal provisions for Sunday mail delivery, which plainly was an exercise of the enumerated power to provide postal service. "Can Congress, by one or two sentences in regulating her Post Office Department, virtually repeal and annul all these state laws?" they asked. "If they come into collision, which is to yield?" U.S. Congress, *American State Papers: Documents, Legislative and Executive of the Congress of the United States,* 38 vols. (Washington, D.C.: Gales & Seaton, 1832–1861), Class VII:Post Office Department, 235.

27. Charles B. Goodrich, *The Science of Government as Exhibited in the Institutions of the United States of America* (Boston: Little, Brown, 1853), 4. For classic statements of dual federalism, see Madison's published letter to Edward Everett, in Madison, *Writings,* 9:383–403; Baldwin, *General View of the Origin and Nature of the Constitution;* Andrew Jackson, Maysville Road Veto, in Richardson, 3:483–93; Jackson, Second Annual Message, ibid., 500–529; Jackson, Message on Intercourse with the Indians, ibid., 536–41; Jackson, Veto of the Bill to Re-Charter the National Bank, ibid., 576–91. The classic scholarly description is in Edward S. Corwin, *Commerce Power versus State Rights.* See also Corwin, "The Passing of Dual Federalism"; Corwin, *National Supremacy: The Treaty Power v. State Power;* John Andrew Schroth, "Dual Federalism in Constitutional Law" (unpublished Ph.D. dissertation, Princeton University, 1941); Alpheus T. Mason, William M. Beaney, and Donald Greer Stephenson, *American Constitutional Law: Introductory Essays and Selected Cases* (Englewood, N.J.: Prentice-Hall, 1983), 145–46.

people's government, made for the people, made by the people, and answerable to the people," Webster replied to Hayne's articulation of state sovereignty. "So far as the people have given power to the general government, . . . the government holds of the people, and not of the State governments. We are all agents of the same supreme power, the people. The general government and State governments derive their authority from the same source."[28] Deriving its power from a constitution framed by the people, just as the states did, the United States was not a league or a confederacy. For the purposes enumerated in the Constitution, the American people made up a nation. "In war we are one people," Marshall wrote, "In making peace we are one people. In all commercial regulations we are one and the same people. In many other respects the American people are one, and the government which is alone capable of controlling and managing their interests in all these respects, is the government of the Union. It is their government, and in that character they have no other."[29]

Generally, nationalists conceived of the United States as having been created by the Constitution—that is, by compact among the people. "America has chosen to be, in many respects, and to many purposes, a nation," Marshall wrote.[30] But some argued that the colonial experience and especially the resistance to Britain had welded the people of the thirteen colonies into one nation even before they formalized its government through a written document. Such notions strengthened the argument that the people of the United States as a whole, not the people of the individual states, had established the Constitution.[31]

This understanding of the origins of the Union cut the ground out from under state-sovereignty arguments for secession, nullification, and the idea that the national government was merely the agent of the states.[32] It was equally corrosive of the tenets of dual federalism. Nationality implied that the general government possessed broad, sovereign power, nationalists argued. That was con-

28. Webster, Second Speech on Foot's Resolution, in Webster, *Writings*, 6:54–55.

29. Cohens v. Virginia, 6 Wheat. 264 at 413–14 (1821).

30. Ibid., 413.

31. Webster, "First Settlement of New England," in Webster, *Writings*, 1:177–230.

32. Kenneth Stampp has pointed out that the argument that the Union was by nature perpetual was not widely articulated until the Nullification controversy from 1830 to 1833. But it was implicit in the argument that the United States was a nation, rather than a Confederacy, and proceeded on that basis. Stampp, "The Concept of a Perpetual Union," *Journal of American History* 65 (June 1978), 5–33.

firmed by the explicit delegation of authority "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States" in Article I, section 8. The authorization of all laws "necessary and proper" to the execution of national powers meant those laws appropriate for fulfilling its obligations. Thus, the powers of the federal government were to be construed broadly. As John Marshall put it in the most famous judicial articulation of nationalist constitutional theory, "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end . . . are constitutional."[33]

National legislation acted upon the people of the United States as a whole; therefore, where the national government had constitutional authority to act, state boundaries were irrelevant. If a law secured a national benefit, the fact that it was to be executed within a particular state made no difference. Webster explained why nationalists believed South Carolinians ought to support the building of that Ohio canal: "We look upon the States, not as separated, but as united. . . . In our contemplation, Carolina and Ohio are parts of the same country; States, united under the same general government, having interests, common, associated, intermingled. In whatever is within the proper sphere of the constitutional power of this government, we look upon the States as one."[34]

Just as state boundaries could not limit national authority, neither could the fact that states retained sovereign jurisdiction over subjects the Constitution had not placed within national jurisdiction. The question was whether or not the Constitution had delegated power over certain subjects to the government of the United States. The Tenth Amendment, which merely reserved to states those powers not delegated, could not affect that question. As Story insisted, "The attempts . . . to force upon this language an abridging or restricting influence are utterly unfounded."[35] The fact that a subject was within state jurisdiction did not bar Congress from affecting it by legislation within its delegated powers. In case of conflict, the states must give

33. McCulloch v. Maryland, 4 Wheat. 316 at 421 (1819).

34. Webster, Second Speech on Foot's Resolution, in Webster, *Writings*, 6:23. See also Clay's speech on the veto of the Maysville Road bill.

35. Joseph Story, *Commentaries on the Constitution of the United States: With a Preliminary Review of the History of the Colonies and States, Before the Adoption of the Constitution*, 3 vols. (Boston: Hilliard, Gray, 1833), 3:752–54 (sections 1900–1901).

way. Consequently, nationalists supported the broad use of federal power to promote public welfare, despite the fact they might affect subjects over which the states had authority. Nationalist arguments supported aid to education, the establishment of a national bank, protective tariffs, and an active program of "internal improvements" designed especially to develop the American transportation system.[36]

Given these understandings, the potential for radical expansion of national jurisdiction is clear. Taken to its logical conclusion, nationalism can threaten the very existence of the states. For example, which constitutional limitation would prevent Congress from levying destructive taxes on state salaries, securities, or institutions? Or, as state rights–oriented justices of the Supreme Court have recently wondered, what would prevent Congress from ordering the relocation of a state capital in order to promote interstate commerce?[37] Yet, constitutional nationalism was on the defensive after the 1820s, and its advocates were more worried about defending the principle of broad construction and the Supreme Court's power to adjudicate conflicts between state and national law than they were about the potential of their own theories. Therefore, they generally ignored the challenge they might pose to the whole federal system.

Twentieth-century nationalism and state rights differ primarily over the dual federalist notion that the Tenth Amendment reserves to the states an area of sovereign jurisdiction, even against powers delegated to national government. To state-righters, the Tenth Amendment operates just as the prior nine amendments, all of which are restraints upon delegated powers. Just as the national government cannot regulate the postal service in a way that violates the First

36. Among the classic statements of nationalist constitutionalism are Alexander Hamilton's Opinion as to the Constitutionality of the Bank of the United States, in Harold C. Syrett et al., eds., *The Papers of Alexander Hamilton,* 27 vols. (New York: Columbia University Press, 1961–1981), 8:99–134 (hereafter cited as Hamilton, *Papers*); John Marshall's opinions in McCulloch v. Maryland, 4 Wheat. 316 (1819) and Cohens v. Virginia, 6 Wheat. 264 (1821); the responses of the states to the resolutions of South Carolina in the Nullification Crisis, published in *State Papers on Nullification* . . . (Boston: Dutton & Wentworth, 1834); James Kent, *Commentaries on American Law,* 4 vols. (New York: O. Halstead, 1826–1830); Joseph Story, *Commentaries on the Constitution of the United States;* Henry Clay, "Speech on Internal Improvement," March 13, 1818, in *The Life, Correspondence, and Speeches of Henry Clay,* ed. Calvin Colton, 6 vols. (New York: A. S. Barnes, 1857), 5:115–35; Webster, Second Speech on Foot's Resolution, in Webster, *Writings,* 6:23–75; William Alexander Duer, *A Course of Lectures on the Constitutional Jurisprudence of the United States,* 2nd ed. (Boston: Little Brown, 1856). See also Bennett, 164–69; Bauer, 213–31, 254–60, 276–87, 309–31.

37. Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 at 586 (1985) (O'Connor dissenting).

Amendment's guarantee of free speech, it also cannot use its delegated powers in ways that invade the rights of the states reserved by the Tenth Amendment.[38] Twentieth-century nationalists, on the other hand, deny that the Tenth Amendment can restrain federal use of delegated powers. Powers delegated to the national government, expressly or by implication, are "plenary" and "absolute," they insist. In the classic nationalist formulation of *U.S. v. Darby,* the Tenth Amendment "states but a truism that all is retained which has not been surrendered."[39] So to modern nationalists, there is no fixed line separating national from state jurisdiction, no need to avoid overlap. State sovereignty begins only where national sovereignty ends. National power defines the limits of state sovereignty.[40]

Most modern commentators assume that the nationalism of Hamilton, Marshall, and Lincoln corresponds to the modern version.[41] In fact, constitutional nationalism before the Civil War differed from state rights primarily by insisting that such words as "commerce" and "necessary and proper" be broadly defined and by insisting that the Constitution delegated implied powers to the national government. The very power of the state-rights response that such broad construction threatened to undermine the federal system led nationalists to suggest that there were limits to national power. Antebellum nationalists stressed that although the national government needed ample power, it needed that power only to accomplish *the ends for which it was instituted.*

Although Marshall condoned legislation that promoted more general goals while carrying out mandated objectives, he made it clear that the constitutionality of such legislation depended "on their being the natural, direct, and appropriate means, or the known and usual means, for the execution of the given power."[42] Marshall regularly

38. For classic twentieth-century judicial articulations of this doctrine, see Hammer v. Dagenhart, 247 U.S. 251 (1918); Bailey v. Drexel Furniture Co., 259 U.S. 20 (1922); U.S. v. Butler, 297 U.S. 1 (1936); National League of Cities v. Usery, 426 U.S. 833 (1976). See also Corwin, *Commerce Power versus State Rights* and "The Passing of Dual Federalism."

39. U.S. v. Darby, 312 U.S. 100 at 124 (1941).

40. For classic twentieth-century judicial expressions of modern nationalism: Champion v. Ames, 188 U.S. 321 (1903); McCray v. U.S., 195 U.S. 27 (1904); Hoke v. U.S., 227 U.S. 308 (1913); Stewart Machine Co. v. Davis, 301 U.S. 548 (1937); U.S. v. Darby, 312 U.S. 100 (1941).

41. There are exceptions. Among them are Bennett, 168–69, and the author of the law review note "Section 1983 and Federalism," *Harvard Law Review* 90 (April 1977), 1133–1361 at 1138–41.

42. Marshall, writing as "A Friend of the Constitution," in Gunther, 186.

defined the powers of the national government in terms of their purpose, deducing their constitutionality from the postulate that "in America, the powers of sovereignty are divided between the government of the Union, and those of the states. They are each sovereign with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other." That language is from *McCulloch v. Maryland* and was followed by Marshall's blunt confirmation that "[s]hould Congress under the pretext of executing its powers, pass laws for the accomplishment of objects, not entrusted to the government, it would become the painful duty of this tribunal . . . to say that such an act was not the law of the land."[43] In *Gibbons v. Ogden* he made clear at least one limitation on a power delegated to the national government. "Congress is not empowered to tax for those purposes which are in the exclusive province of the states," he averred.[44] Even though he would not concede that the Tenth Amendment imposed a limit to the powers delegated to the national government, Marshall vaguely suggested that the Constitution's apportionment of powers did, after all, create some area where the states had sole and, therefore, sovereign jurisdiction.

Marshall enunciated his view of federalism most powerfully in *McCulloch v. Maryland,* the most celebrated pronouncement of nationalist constitutional theory. He wrote, "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end . . . are constitutional." This is quite different from the modern nationalist argument that delegated powers may be used to achieve any end, a view which has permitted the creation of a national police power. Modern constitutional nationalism has converted Marshall's rule to read more like, "Let the means be legitimate, let them be within the scope of the Constitution, and all ends that are achieved by those means are constitutional."

Despite the dual federalist tinge to Marshall's nationalism, much of the legislation sustained by nationalist arguments did have the air of achieving undelegated ends through delegated means. Hamilton frankly admitted that the first benefit secured by establishing a national bank was "[t]he augmentation of the active or productive capital of a country," hardly an enumerated end of national power.[45]

43. McCulloch v. Maryland, 4 Wheat. 316, at 410, 423 (1819).

44. Gibbons v. Ogden, 9 Wheat. 1 at 199 (1824). Compare this dictum to the holding of the dual federalist decision U.S. v. Butler, 297 U.S. 1 (1936).

45. Hamilton, "National Bank," in Hamilton, *Papers* 8:218.

President John Quincy Adams avowed his desire that the national government accomplish indirectly what could not be done directly.[46] Clay professed himself unable to comprehend the difference between ends and means.[47] And Story's dismissal of the Tenth Amendment, as noted above, was as forceful as the language the Supreme Court used in *U.S. v. Darby.*

But despite such expansive rhetoric, nationalists often lapsed into dual federalist language, assuming some fixed line beyond which the national government could not exercise authority, "a wise and happy partition of powers between the national and state governments, in virtue of which the national government is relieved from all odium of administration."[48] Webster admitted the necessity for keeping "the general government and the State government each in its proper sphere."[49] Clay, too, seemed to recognize some limit to

46. "The Constitution . . . is a charter of limited powers. . . . But if . . . powers . . . enumerated in the Constitution may be effectually brought into action by laws promoting the improvement of agriculture, commerce, and manufactures, the cultivation and encouragement of the mechanic and of the elegant arts, the advancement of literature, and the progress of the sciences, . . . to refrain from exercising them for the benefit of the people . . . would be treachery to our most sacred trusts." John Quincy Adams, First Inaugural Address, in Richardson, 2:315–16.

47. See, for example, Clay, "Speech on Internal Improvement," in Colton, 5:126, where Clay responded to opponents of his American system who were complaining that by building "post roads" and "military" highways and canals, the national government was using means derived by implication to achieve "substantive" ends outside the scope of the enumerated powers. Clay dismissed the objection. "What is their definition of a substantive power?" he asked. "Will they favor us with the principle of discrimination between powers which, being substantive, are not grantable but by express grant, and those which, not being substantive, may be conveyed by implication?"

48. Edward Everett quoted in Phillip S. Paludan, *A Covenant with Death: The Constitution, Law, and Equality in the Civil War Era* (Urbana: University of Illinois Press, 1975), 14–15.

49. Edwin P. Whipple, *The Great Speeches and Orations of Daniel Webster* (Boston: Little, Brown, 1889), 272. This consideration led him to urge adherence to a strict conceptual differentiation between national regulations of interstate commerce and state police powers affecting commerce, such as inspection and quarantine laws, toll-road, ferry, and bridge regulations, and restrictions on black immigration. "If all these be regulations of commerce," he warned, "does it not admit the power of Congress . . . upon all these minor objects of legislation, . . . acknowledg[ing] the right of Congress over a vast scope of internal legislation, which no one has heretofore supposed to be within its powers" and subjecting "all State legislation over such subjects . . . to the superior power of Congress, a consequence which no one would admit for a moment." Webster, Argument in Gibbons v. Ogden, in Webster, *Writings*, 11:13–15 at 14.

delegated powers.[50] Even Story occasionally sounded like a dual federalist. Although he generally argued that Congress could use its powers any way it saw fit, he still conceded inconsistently in his *Commentaries* "that powers given for one purpose may not be perverted to purposes wholly opposite, or beside its legitimate scope."[51] Like Webster, he drew a clear line between state police powers and powers delegated to the national government. And in one of the rare instances where the court discussed whether the national government could use a delegated power in such a way as to directly affect the integrity of the states themselves by requiring state officers to enforce federal laws or constitutional provisions, Story expressed doubts as to whether the imposition of the duty would be constitutional.[52]

While commitment to dual federalism was a hallmark of state-rights doctrine, nationalists were ambivalent about it. They could not accept a formulation that precluded a protective tariff or promotion of internal improvements; they were unable to free themselves from the notion that the Constitution must impose some limit to the use of delegated power; they could not devise a coherent doctrine that accommodated both. Instead, they simply insisted that exercises of implied powers to establish a national bank or to make internal improvements were directly related to enumerated powers, to ends on the national side of the line separating national from state authority.[53] Before the Civil War, most Americans did not perceive that a reserved area of state jurisdiction was inherently incompatible with nationalist constitutionalism, and they certainly had not confronted the potential of constitutional nationalism to radically alter the federal system. Prewar nationalism corresponded to what we would consider a nationalistic form of state rights, perhaps similar to the philosophy of federalism implicit in recent opinions of Chief Justice Rehnquist and his allies on the Supreme Court.[54]

50. Clay could not conceive of national legislation aimed at eliminating state-chartered banks, for example. "The great mass of legislative authority abides with the States. Their banks exist without us, independent of us, and in spite of us. We have no constitutional power or right to put them down." Colton, 6:74.

51. Story, 2:524 (sect. 1077).

52. Prigg v. Pennsylvania, 16 Pet. 539, at 625, 615, 622 (1842).

53. For example, see Story, 2:519–38 (sects. 1073–89); Clay's speech on internal improvements in Colton, 5:115–35. See also Webster on the national bank and the national government's responsibility for regulating the currency, in Webster, *Writings*, 6:127–30, 134–35, 8:62–94. After affirming the primary utility of a national bank in concentrating capital for investment, which was not a delegated power of the national government, Hamilton listed benefits directly connected to the administration of national finances. "National Bank," in Hamilton, *Papers*, 8:218–20.

54. National League of Cities v. Usery, 426 U.S. 833 (1976); FERC v. Mississippi, 456 U.S. 742, at 775–97 (1982); EEOC v. Wyoming, 460 U.S. 226, at 251–65 (1983).

FEDERALISM AND THE CONFLICT OVER SLAVERY

The various understandings of federalism were intimately connected to the conflict over slavery. Calhoun and other aggressive defenders of slavery had fashioned much of it. As the agent of the states, the general government was bound to protect the property of all citizens wherever it had the authority to do so. That was particularly true of slave property, they insisted, because if that had not been understood when the Constitution had been proposed, the southern states would never have ratified it. Therefore, the central government was bound to protect slaveholders' property rights where it had jurisdiction by passing a national slave code applying to the territories and the District of Columbia. Congress was required to provide for the recovery of runaway slaves, even though the language of the Constitution seemed to impose that responsibility upon the individual states rather than on the federal government. Congress's power to regulate interstate and foreign commerce and to deliver the mail could be used only to promote and never to diminish the interests of the people of slaveholding states. Slavery was one of the interests to be protected by American foreign policy.[55]

The special obligation incumbent on all Americans to maintain the bonds of affection and respect that were the only true cement of a union among sovereign peoples meant that northerners were morally bound to suppress those who threatened to alienate that necessary affection by attacking slavery. The provisions to the Constitution requiring states to return fugitives from justice and runaway slaves ("Persons held to Service or Labour," as the framers delicately put it) also had to be read in light of this special obligation, and therefore had to be enforced with vigor. Failure to do so, as by refusing to extradite people charged in the South for violating slave codes on the grounds that these were not recognized as offenses in northern states, threatened the Union. So did judicial decisions limiting the ability of southerners to take slaves on visits to the North and state laws requiring trials to determine the truth of allegations that one was a runaway slave. In effect, state-sovereignty concepts of the Union enabled southerners to demand that northerners enforce within their own boundaries elements of southern law supporting slavery.[56]

55. Bestor, "State Sovereignty and Slavery," 117–80; Carpenter, 148–55; Robert R. Russel, "Constitutional Doctrines with Regard to Slavery in the Territories," *Journal of Southern History* 32 (Nov. 1966), 470–71.

56. Resolutions of South Carolina, December 16, 1835, in *State Documents on Federal Relations: The States and the United States*, ed. Herman V. Ames (New York: DaCapo Press, 1970), 24–27; Resolutions of Virginia, 1835, quoted in Dwight Lowell Dumond, *Antislavery: The Crusade for Freedom in America* (Ann Arbor: University of Michigan Press, 1961), 206–208.

Nationalism, on the other hand, suggested a range of actions the national government might take against slavery. Since the national government was sovereign wherever the Constitution had delegated power, with no obligation to legislate only to promote the interests of the states, Congress could make any rule relative to slavery in the territories or Washington, D.C. Antislavery forces urged Congress to abolish slavery in both Washington and the territories, and by the late 1840s the latter proposal had won wide support throughout the North. Ultimately, the Republican party swept the North largely on the promise to stop the expansion of slavery into the territories, but all knew that pressure would come from antislavery constituents to extend the ban to Washington and to take further action as well. Certainly, nationalist interpretations of federal power would have sustained steps to protect the circulation of antislavery materials in the southern mails. Ever since the Missouri Crisis, antislavery people had argued that Congress's power to admit new states to the union implied a power to require abolition as a condition for entrance. They argued that Congress's interstate commerce power would justify a ban on the interstate slave trade, although legal opinion generally held that the power to regulate commerce did not include power to ban it. The boldest antislavery people dreamed of a federal law to enforce the right of citizens of one state to enjoy the privileges and immunities of citizens in other states, as promised by Article 4, section 2 of the Constitution. That would mean federal protection for antislavery men spreading the word to the South.[57]

The tenets of state rights also could be harnessed to antislavery purposes. The antislavery slogan "Freedom national, slavery local" conceded an area of reserved state jurisdiction in which slavery could be sustained by state law. But on the national side of the line dividing national from state powers, freedom must be the rule. A dual federalist could hold that the power expressly delegated to the national government to govern the territories included the power to ban slavery. Thus, adherents of state rights as well as nationalism could

57. William M. Wiecek, *Sources of Antislavery Constitutionalism in America, 1760–1848* (Ithaca: Cornell University Press, 1977), 129–36, 183–84; Jacobus Ten Broek, *Antislavery Origins of the Fourteenth Amendment* (Berkeley: University of California Press, 1951), reprinted as *Equal Under Law* (New York: Collier, 1965), 41–56, 66–93; Howard Jay Graham, *Everyman's Constitution: Historical Essays on the Fourteenth Amendment, the Conspiracy Theory, and American Constitutionalism* (Madison: State Historical Society of Wisconsin, 1968), 174–85; Glover Moore, *The Missouri Controversy, 1819–1821* (Lexington: University of Kentucky Press, 1953), 42–43; Russel, 467–70; Don E. Fehrenbacher, *The Dred Scott Case* (New York: Oxford University Press, 1978), 100–10, 138–54, 189–92; Dumond, 238–41.

unite on the key plank of the Republican platform. Indeed, there was enough ambiguity among nationalists about the scope of delegated national powers to mask potential differences. So the Republican party, made up of old Whig nationalists and former Democratic dual federalists, could acknowledge in its 1860 platform the obligation to preserve "the rights of the States . . . inviolate . . . , and especially the right of each State to order and control its own domestic institutions . . . exclusively, 'rights' essential to that balance of power on which the perfection and endurance of our political fabric depends."[58]

However, dual federalism also provided strong arguments for Americans who sought to avoid or defuse the slavery controversy, a fact that enabled the largely state-rights Democratic party to maintain harmony longer than the Whig party, which had a nationalist northern wing. Rejecting the state-sovereignty notion that the federal government was merely an agent of the states, bound to protect anything recognized as property by the sovereign states, state-rights proponents stressed the neutrality of the national government. "[I]t is a violation of the fundamental principles of this government to throw the weight of federal power into the scale, either in favor of the free or the slave states," they insisted.[59] By positing a strict separation between the spheres of state and national authority and by defining slavery to be within the state sphere, dual federalists could argue that northerners bore no responsibility for the institution, and at the same time they could reassure southerners that the national government retained no power over it. Thus, in *Groves v. Slaughter,* Chief Justice Taney and other justices insisted that the introduction or exclusion of slaves from any state was within a state's sovereign police powers and beyond Congress's power to regulate interstate commerce.[60] Democratic administrations also conceded the

58. The phrasing comes from the second and fourth resolutions. Kirk H. Porter and Donald Bruce Johnson, *National Party Platforms, 1840–1956* (Urbana: University of Illinois Press, 1956), 32; Wiecek, 209–27; David Turley, "Moral Suasion, Community Action and the Problem of Power: Reflections on American Abolitionists and Government, 1830–1861," in Rhodri Jeffrey-Jones and Bruce Collins, eds., *The Growth of Federal Power in American History* (DeKalb: Northern Illinois University Press, 1946), 25–35 at 33–35; Foner, *Free Soil, Free Labor, Free Men,* 73–87.

59. Stephen A. Douglas quoted in *Created Equal? The Complete Lincoln-Douglas Debates of 1858,* ed. Paul M. Angle (Chicago: University of Chicago Press, 1958), 369.

60. See the opinions of McLean, Taney, and Baldwin in Groves v. Slaughter, 15 Pet. 449 at 503–17 (1841). One of the Taney court's major concerns was how to insulate slavery from the federal government's power over interstate commerce. See the discussion of these cases in Harold M. Hyman and William M. Wiecek, *Equal Justice Under Law: Constitutional Development, 1835–1875* (New York: Harper & Row, 1982), 78–82, 101–102.

primacy of state laws making it illegal to circulate antislavery publications and instructed local postmasters to obey them.[61]

But what of congressional power over the District of Columbia and the territories? Surely that implicated the national government, and thus all Americans, in the sin of slavery. Desperate to find some common ground between their party's northern and southern wings, leading Democrats found a solution in the dual federalist doctrine of "popular sovereignty." By that doctrine, the people of the territories and the District of Columbia had the same right to domestic self-government as the people of the states. With the exception of the power to establish the forms of territorial government, Congress had no more power over the domestic institutions of the territories than it had over those of the states.[62] Like dual federalism in general, its application to the territories permitted northern Democrats to reassure their constituents that they were free of responsibility for slavery. "If the people of any other territory desire slavery let them have it. If they do not want it let them prohibit it. . . . It is the business of her people and none of yours," insisted Douglas, who

61. Paradoxically, in 1835 Andrew Jackson proposed that Congress pass a federal law making circulation of abolitionist materials through the mails a criminal offense—an exercise of federal power that could be justified only under a nationalist or state-sovereignty theory of federalism. But Calhoun opposed the measure, proposing instead that postmasters be obligated by federal law to obey state laws and to help enforce them—an exercise of federal power that was plainly founded on state-sovereignty principles and could not provide a precedent for a nationalistic interpretation of the postal power. See Dumond, *Antislavery,* 207.

62. Michigan Senator Lewis Cass and Illinois Senator Stephen A. Douglas, the doctrine's chief expositor, insisted that the national government derived no power to govern the territories from the clause of the Constitution authorizing it to make rules for the territories and property of the United States (Article 4, section 3). That merely referred to the land and physical property owned by the government, not to people. Congressional power to erect territorial governments was implied by its power to admit new states and extended no further. Cass first fashioned the notion of popular sovereignty in the territories in a published letter to A. P. Nicholson. It is printed in *History of American Presidential Elections, 1789–1968,* ed. Arthur M. Schlesinger, Jr., 4 vols. (New York: Chelsea House, 1971), 2:906–12; Cass, in the *Congressional Globe,* 33 Cong. 1st Sess., 456–58, appendix, 270–79 (Feb. 21, 27, 1854); Douglas, "The Dividing Line Between Federal and Local Authority: Popular Sovereignty in the Territories," *Harper's New Monthly Magazine,* 19 (Sept. 1859), 519–37. See Robert W. Johannsen, "Stephen A. Douglas, Popular Sovereignty, and the Territories," *Historian* 22 (May 1960), 378–95; Russel, 472–74; Fehrenbacher, 195–97. A more compelling dual federalist argument for popular sovereignty in the territories is Durbin Ward, "Popular Sovereignty in the Territories," in Ward, *Life, Speeches, and Orations of Durbin Ward* (Columbus: A. H. Smythe, 1888), 25–48.

by the late 1850s had become the doctrine's leading exponent.[63] This, in turn, reinforced the Democrats' general commitment to toleration of social, religious, and ethnic diversity among white people—the central element of their party creed. Douglas summed it up: "I deny the right of Congress . . . to force a good thing upon a people who are unwilling to receive it."[64]

ANTEBELLUM FEDERALISM IN PRACTICE AND LAW

To a lawyer, the fact that the great nationalistic decisions of the Marshall court have been cited by the Supreme Court to sustain modern uses of national power suggests that nationalism has always been the law of the land. That is, a theory of federalism substantially similar to modern nationalism, which scouts the notion of reserved state rights, was the dominant and correct theory of federalism in the years before the Civil War.

The foregoing discussion should indicate the error of that view. Prewar nationalism did not clearly differ from state rights on the key question of whether the Constitution reserved to the states an area of jurisdiction against the use of delegated national power. But more than that, it is simply erroneous to suggest that antebellum nationalism was the accepted understanding of federalism. In practice, it was the states that were dominant in the federal system. As Harry Scheiber has pointed out, when looking at what he calls *real power* as distinct from *formal authority,* the congruence between what Americans believed to be the functions of government and the reach of effective state authority made the states the effective policymakers in the antebellum United States.[65] Not only did the states exercise power, but after the Democratic party took control of the national government, with its leaders adhering to either dual federalist or state-sovereignty constitutional doctrines, the national government repealed those programs most clearly identified with nationalism—the national bank, the protective tariff, and support for internal improvements. Constitutional issues were a major part of the political

63. Angle, *Created Equal?* 367.

64. Ibid., 17. For toleration as the central element of the Democratic creed, see Joel H. Silbey, *A Respectable Minority: The Democratic Party in the Civil War Era, 1860–1868* (New York: Norton, 1977), 25–27.

65. Harry N. Scheiber, "Federalism and the American Economic Order, 1789–1910," *Law and Society* 10 (Fall 1975), 67–71, 86–96. See also Harold M. Hyman, *A More Perfect Union: The Impact of the Civil War and Reconstruction on the Constitution* (New York: Oxford University Press, 1973), 7–14; Paludan, 11–20.

debates from the 1830s through the 1850s, and it may be said that Americans voted their preference for state rights and state sovereignty. Abraham Lincoln perceived the reality. Democratic majorities had reviewed the Supreme Court's great nationalist decision of *McCulloch v. Maryland,* he observed in 1858, and they had "reversed it as completely as any decision ever was reversed—so far as its practical operation is concerned."[66]

In terms of formal authority, nationalism was no longer in the ascendant after the 1830s. Marshall's court began to waver in the face of vigorous state-rights and state-sovereignty opposition in the late 1820s and 1830s, even before the Democratic ascendancy made Taney chief justice.[67] At least twelve of the sixteen justices who served with Taney from 1835 to 1860 were Democratic devotees of dual federalism or state sovereignty. For the past few decades it has been usual for constitutional historians to minimize the change this wrought in constitutional adjudication. But despite some nationalistic decisions—especially the doctrinal basis for a national commercial law propounded in *Swift v. Tyson*—the Taney court was characterized primarily by dual federalism, regularly employing language that suggested a clear division of authority between the state and national governments.[68] Its holding in the infamous *Dred Scott* case that black Americans were not citizens of the United States was the culmination of this line of reasoning. State and national citizenship was distinct, the Court held, with national citizenship fixed at the time of the founding and unaffected by the extension of state citizenship to excluded groups.[69] In 1861 the Court reconfirmed Story's dictum in the *Prigg* case that the national government could not impose duties on state officers. No branch of the national government could force a state governor to fulfill his constitutional obligations, Taney insisted in *Kentucky v. Dennison.* "[S]uch a power would place every state

66. Angle, *Created Equal?* 355.

67. Charles Grove Haines, *The Role of the Supreme Court in American Government and Politics, 1789–1835* (New York: Russell & Russell, 1960), 579–613; William H. Hatcher, "John Marshall and States' Rights," *Southern Quarterly* 3 (April 1965), 207–16; Francis N. Stites, *John Marshall: Defender of the Constitution* (Boston: Little, Brown, 1981).

68. Swift v. Tyson, 16 Peters 1 (1832). See New York v. Miln, 11 Pet. 102 (1837); Baldwin's undelivered opinion in the Miln case, in Baldwin, 181–97; Groves v. Slaughter, 15 Pet. 449 (1841); Prigg v. Pennsylvania, 16 Pet. 539 at 644–49 (1842) (Wayne concurring); ibid., 662–63 (McLean concurring); *The Passenger Cases,* 7 How. 283 (1845); *The License Cases,* 5 How. 504 (1847); Peck v. Jenness, 7 How. 612 (1849). See also Scheiber, 78–84.

69. Dred Scott v. Sandford, 19 How. 393 (1857).

under the control and dominion of the general government. . . . [T]he Federal Government, under the Constitution, has no power to impose on a state officer . . . any duty whatever and compel him to perform it.''[70]

In the same way, there was both practical and formal support for state-sovereignty concepts of federalism. The exercise of the sovereign authority of the state in defiance of national law had been successful in important instances. The most clear-cut victory was Georgia's successful defiance of the Supreme Court in the Cherokee Indian controversy.[71] Prior to the war, South Carolina was able to prevent the introduction of proceedings in the federal district courts on behalf of black seamen, who by law were forbidden from debarking in the state.[72] While South Carolina secured no formal support from other states during the Nullification Crisis, the practical consequence was reduction of the tariff. Threats of southern secession in 1850 helped force the Compromise of 1850 without provoking firm northern reaction. Harold Hyman has indicated how close the secession crisis came to forcing yet another compromise in 1861.[73] Moreover, the general antebellum state-centeredness that provided an environment conducive to dual federalism was equally hospitable to state sovereignty, and when the southern states did secede, the vast majority of white southerners decided that in a final conflict they owed their primary allegiance to the state rather than to the national sovereignty.

Even in law, there was significant formal support for state sovereignty. Early in its career, the Supreme Court had declared that it was the separate states, not a new nation, who had declared independence and claimed sovereignty in 1776.[74] The doctrine of state

70. Kentucky v. Dennison, 24 How. 66 at 107 (1861).

71. Haines, 596–605; Ulrich Bonnell Phillips, *Georgia and State Rights: A Study of the Political History of Georgia from the Revolution to the Civil War, With Particular Regard to Federal Relations* (Washington, D.C.: n.p., 1902), 66–86. Georgia also defied federal authority in acquiring the lands of the Creek Indians. Phillips, 39–66. Alabama engaged in similar defiance to acquire Creek lands in 1832. J. Mills Thornton III, *Politics and Power in a Slave Society: Alabama, 1800–1860* (Baton Rouge: Louisiana State University Press, 1981), 29–30.

72. Carl B. Swisher, *The Taney Period, 1836–64*, Volume 5 of *The Oliver Wendell Holmes Devise History of the Supreme Court of the United States* (New York: Macmillan, 1974), 378–82.

73. Harold M. Hyman, ''The Narrow Escape from a 'Compromise of 1860': Secession and the Constitution,'' in *Freedom and Reform: Essays in Honor of Henry Steele Commager*, ed. Harold M. Hyman and Leonard W. Levy (New York: Harper & Row, 1967), 149–66.

74. Ware V. Hylton, 3 Dall. 199 at 224 (1796).

sovereignty was widely articulated in state courts. Spencer Roane's Virginia opinions helped lay the foundation of state-sovereignty thought.[75] Georgia's defiance of the Supreme Court in the Cherokee Indian cases was also through the medium of the state courts.[76] In fact, denial of the supremacy of the federal courts was widespread among state courts.[77]

By the late 1850s Taney's Supreme Court was trying to fashion a hybrid doctrine of federalism that combined elements of dual federalism and state sovereignty. The Court distinguished between the sovereign powers the Constitution delegated to Congress under Article 1 and the powers and obligations apportioned between the national government and the states in Article 4. The Court treated Article 4 as a compact among sovereign states, somehow different than the rest of the Constitution. Thus, the Court's explication of distinct national and state citizenships in the *Dred Scott* decision comported with dual federalism, but the process by which the United States government received authority over the territories in Article 4 embodied a compact among the sovereign states. Therefore, the government of the United States was merely an agent that held the territories in trust for the people of the states. Congress had no power to discriminate against the property of the people of any state, a limit confirmed by the Fifth Amendment's guarantee that no person could be deprived of property without due process of law. On the contrary, it was obligated to secure the property of all equally.[78] In the wake of *Dred Scott,* proslavery lawyers prepared to argue that the same theory required that Article 4's privileges and immunities clause be read to guarantee the right of slaveholders to bring their property North for "temporary" sojourns.[79]

In *Kentucky v. Dennison,* Taney referred to the "separate nations" that ratified the Constitution, engaged in state-sovereignty rhetoric regarding the duties which ties of affection and respect imposed on them, and declared that the provision of Article 4 requiring states to return fugitives from other states' justice was "a compact binding

75. Note, "Spencer Roane," passim.

76. State v. Tassels, Dudley 229 (Ga. 1830).

77. J. A. C. Grant, "The Nature and Scope of Concurrent Powers," *Columbia Law Review* 34 (June 1934), 995–1040; Scheiber, 84–86.

78. Dred Scott v. Sandford, 19 How. 393 (1857). For a full explication of the complex way in which Taney distinguished congressional power over the territories, delegated in Article 4 of the Constitution, from Congress' sovereign powers, see Fehrenbacher, 367–84; Bestor, 167–72.

79. Lemmon v. People, 20 N.Y. 562 (1860).

them to give aid and assistance to each other in executing their laws, and to support each other in preserving order and law." In other words, northern states were obligated to help southerners protect slavery by returning to southern justice those who had violated laws sustaining it—in effect extending the enforcement of southern slave codes northward.[80] Since Taney's opinion was delivered in March 1861, after southern states had passed ordinances of secession, his denial of national authority to impose any obligation on state officers smacked as strongly of state sovereignty as it did of dual federalism.

LINCOLN, DOUGLAS, AND FEDERALISM

Even as the Supreme Court turned to state-sovereignty and state-rights doctrines to support the cause of slavery, the growing conviction that its expansion must be checked undermined the appeal of state-rights constitutionalism in the North. Stephen A. Douglas was most strongly identified with the application of state-rights doctrine to the slavery question, and Abraham Lincoln most directly confronted Douglas on the issue. Even before he became president, therefore, Lincoln was central in presenting to the voters the Republican position on slavery and the federal system.

Lincoln represented the old Whig nationalist wing of the Republican Party. More fervently than any other Whig, he linked American economic development to American principles of egalitarian liberty. He was, as Gabor S. Boritt has written, the primary expositor of the American Dream of individual liberty, social mobility, and material prosperity.[81] Naturally, he had supported the national bank, the protective tariff, and national internal improvements. He pronounced as "absurd" the argument that the "necessary and proper" clause authorized Congress to enact only such legislation as was "indispensible" to carrying out its expressly delegated powers. Sustaining Congress's power to charter a national bank, Lincoln generally followed Hamilton and Marshall, although his justification was somewhat narrower. The true rule was that "*some* fiscal agent is *indispensibly necessary;* but . . . we are left to choose that sort of agent, which may be most *'proper'* on grounds of expediency."[82] Like any

80. Kentucky v. Dennison, 24 How. 66 at 100. See Hyman and Wiecek, *Equal Justice Under Law,* 191–93; Paul Finkelman, "The Nationalization of Slavery: A Counterfactual Approach to the 1860s," *Louisiana Studies* 14 (Fall 1975), 213–40.

81. Gabor S. Boritt, *Lincoln and the Economics of the American Dream* (Memphis: Memphis State University Press, 1978), passim and especially 158–61.

82. Roy P. Basler, ed., *The Collected Works of Abraham Lincoln,* 9 vols. (New Brunswick: Rutgers University Press, 1953–1955), 1:171–72, 480–90 (hereafter cited as *Collected Works*).

nationalist, he believed that the Constitution delegated the national government the power to regulate slavery in the District of Columbia and the territories.[83] And despite his distaste for the measure, he conceded that the Fugitive Slave clause of the Constitution authorized congressional legislation to secure its enforcement.[84]

In his great debates with Douglas and his public addresses between 1858 and 1860, Lincoln manifested both his nationalism and its limitations. Throughout the debates, Douglas eloquently appealed to state-rights doctrines of federalism. His emphasis on the state side of dual sovereignty made him sound almost like a state-sovereignty man, possibly to increase his appeal to southerners as a potential candidate for the presidency. He referred to the Union as a "confederacy" and as "the confederation of the sovereign states." It was "a confederacy of sovereign and equal states"—not people—"joined together as one for certain purposes." Agitation over slavery was not a debate over issues among a single people; it was "a combination of one half of the states to make war upon the other half."[85]

Douglas articulated his dual federalism forcefully. The line between national and state authority was clear and fixed, and where the state had jurisdiction, it was exclusive. "I go for maintaining the authority of the federal government within the limits marked out by the Constitution, and then for maintaining and preserving the sovereignty of each and all of the states . . . , in order that each state may regulate and adopt its own local institutions in its own way, without interference from any power whatsoever," he orated. Federalism was characterized by tension. In some areas the interests among the states were so different, so mutually antagonistic, that they could not be reconciled in any national forum. Thus, to Douglas, the line between state and national authority did not separate what was local and what was national so much as it separated what could be harmonized nationally and what could not. As Douglas put it, "[A]ny political creed is radically wrong that cannot be proclaimed in every state" of the Union.[86]

To try to impose some uniform policy in those controversial areas meant either disruption or despotism. It was illicit to propose using even delegated national power—that over territories or the power to admit new states—in such a way as to affect state policy in those

83. *Collected Works,* 1:75, 2:20–22, 398, 3:522–35.
84. Lincoln to Salmon P. Chase, June 20, 1859, ibid., 386.
85. Angle, *Created Equal?* 19, 55, 195, 364.
86. Ibid., 55, 364.

areas. It was illicit for citizens of one state to try to affect policy decisions, such as that over slavery, in the sole jurisdiction of another. "You must allow the people . . . to decide for themselves whether they desire a Maine liquor law or not; you allow them to decide for themselves what kind of common schools they will have; what system of banking they will adopt, or whether they will adopt any at all," Douglas insisted. "[T]he Union was established on the right of each state to do as it pleased on the question of slavery, and every other question; and the various states were not allowed to complain of, much less interfere, with the policy of their neighbors." To decide such divisive issues in a national forum would amount to "abolishing the state legislatures, blotting out state sovereignty, merging the rights and sovereignty of the states in one consolidating empire, and vesting Congress with the plenary power to make all the police regulations, domestic and local laws, uniform throughout the limits of the Republic."[87]

The notion of federalism that emerged from Lincoln's response was radically different. While Douglas conceived of the states as the constituent elements of the Union, Lincoln spoke in terms of a national community. Slavery had not raised a controversy among the states, as Douglas characterized it, but a controversy that agitated, not these states or these peoples, but "this people," or "the American people."[88] Lincoln described the Union as consisting of "families of communities," a phrase that seems calculatedly ambiguous.[89] Slavery presented not only a threat to the Union but a wrong "to the nation," a construct Douglas never utilized.[90]

Lincoln's view of what must be decided in the national forum was exactly the opposite of Douglas's. Like all state-rights constitutionalists, Douglas regarded tension among rival state interests as characteristic of the federal system. Some interests were so fundamental that the framers had determined to keep issues involving them out of national politics, he believed. To Lincoln, only that state diversity which promoted unity and harmony was healthy. "The great variety of the local institutions in the states, springing from differences in the soil, differences in the face of the country, and in the climate, are bonds of union. . . . If they produce in one section of the country what is called for by the wants of another section, . . . they are not matters of discord but bonds of union, true

87. Ibid., 16–20, 51–55, 201–2, 364.
88. *Collected Works*, 3:409; Angle, *Created Equal?* 35, 76.
89. *Collected Works*, 3:405, 409.
90. Ibid., 3:435.

bonds of union. But can this question of slavery be considered as among these varieties in the institutions of the country?" he asked.[91]

The differences that raised tensions across the country concerned the nation and had to be harmonized to prevent disruption. In Lincoln's view, the states retained final jurisdiction over precisely those subjects which did *not* raise controversies among them. States retained final jurisdiction only over "all those things that pertain *exclusively* to themselves—that are local in their nature, that have no connection with the general government."[92] To Lincoln, the line between state and national power lay between those subjects of local import and those of national consequence. Just as "each individual is naturally entitled to do as he pleases . . . so far as it in no wise interferes with any other man's rights," so "each community, as a state, has a right to do exactly as it pleases with all the concerns within that state that interfere with the rights of no other state," he argued. But "that general class of things that does concern the whole" was within the province of the general government.[93]

Therefore, Lincoln held that slavery was a national issue for the same reason that Douglas insisted it must remain exclusively a state issue. "When have we had any difficulty or quarrel amongst ourselves about the cranberry laws of Indiana, or the oyster laws of Virginia, or the pine lumber laws of Maine, or the fact that Louisiana produces sugar and Illinois flour?" Lincoln asked.[94] Slavery, on the other hand, had produced discord ever since Americans had come to suspect that it was not, as the Founding Fathers had believed, on the road to ultimate extinction. This presented "a question of vast national magnitude. It is so much opposed in its nature to locality, that the nation itself must decide it."[95]

Despite his broad notion of what was in the national province, Lincoln had pledged "no interference" with state power over slavery. But while Douglas took the dual federalist view that using delegated national powers to affect slavery would constitute impermissible interference, Lincoln plainly did not. When he pledged "no interference," Lincoln meant only no *direct* interference. The immediate instance of the disagreement was whether the national government could utilize its authority to regulate the territories to preclude the holding of slaves. Douglas said no, and Lincoln countered yes. Closely

91. Angle, 119.
92. *Collected Works*, 3:409.
93. Ibid., 34.
94. Angle, 387.
95. *Collected Works*, 3:409; Angle, 119–20, 387–88.

linked was the question of whether a territory could be denied admission to the Union upon presenting a ratified proslavery constitution. Could Congress use its power over the admission of new states to force those states to modify their domestic institutions? Douglas catechized Lincoln on the issue, and although Lincoln reluctantly conceded he would vote to admit such a state, it was clear that he did not think the Constitution precluded him from doing otherwise. Douglas also queried Lincoln on whether he was pledged to abolishing slavery in Washington, D.C., and banning the interstate slave trade. Lincoln answered that he would not do either, as a matter of expediency. But he affirmed the constitutional power of Congress to end slavery in the District and withheld opinion on congressional power to ban the slave trade.[96]

Lincoln also rejected Douglas's so-called Freeport Doctrine, which relied on dual federalist principles. Trying to reconcile popular sovereignty over slavery in the territories with the *Dred Scott* decision, which held that Congress could not ban slavery in the territories, Douglas pointed to the strict line between national and local jurisdiction posited by dual federalism. The Court had merely held that Congress could not prevent a slaveowner from taking his property *into* a territory, he insisted. Once there, he and his property were subject to local law, over which states and territories had final, sovereign authority. Congress had no power to protect the property right by overriding state or territorial laws. Lincoln responded that wherever the Constitution granted an individual a right, Congress not only had the power to enact legislation securing that right but was obligated to do so if its enjoyment were obstructed. Thus, as a United States senator, Lincoln himself would be obligated to sustain the Fugitive Slave Law. But under the same principle, if Americans did have a right to carry slaves into the territories, as the Court had held in *Dred Scott,* then Congress was obligated to effect that right by legislation if the territorial legislatures by action or inaction tried to nullify it.[97]

This argument attacked Douglas's Freeport Doctrine and allowed Lincoln to endorse the Fugitive Slave Act, popular in southern Illinois, as a matter of constitutional obligation rather than personal preference. Thus he offered the least possible offense to more radical antislavery people. But Lincoln's argument had far-reaching implications for national power to attack slavery within the federal system.

96. Angle, 140–43, 342–43.
97. Ibid., 152, 218–20, 229, 346–47, 356, 395–96.

It would apply to the guarantee in Article 4 that citizens of each state were entitled to all the privileges and immunities of citizens of the other states. If *Dred Scott,* which held that blacks could not be United States citizens, were reversed and state citizenship were allowed to determine national citizenship, as Lincoln advocated,[98] then the national government would have the power to secure the rights of citizens of South Carolina to black citizens of Massachusetts visiting the state or moving there. It could legislate to override state laws barring black citizens of one state from entering others. In Lincoln's view, the national government would have not only the power but also the obligation to enforce the right of northern citizens to go South to institute federal court suits challenging such discriminations, a right denied those trying to challenge the Negro Seamen's laws. Given Lincoln's view that a right could be obstructed by a local government's mere failure to secure it, the national government would have the power to secure all the basic rights listed in the only court case on the subject, *Corfield v. Coryell.*[99]

For all the nationalism implicit in Lincoln's responses to Douglas's state-rights arguments, however, he manifested the ambivalence that characterized antebellum nationalism in general. Lincoln's denials that he was attacking state rights, especially the states' ultimate jurisdiction over slavery, were far more explicit than his avowals of constitutional nationalism. It is clear from Lincoln's strategy in responding to Douglas's state-rights arguments that he recognized their appeal to Illinois voters, regardless of his own convictions. "I hope nobody has understood me as trying to sustain the doctrine that we have a right to quarrel with . . . any of the slave states, about the institution of slavery," he said. Douglas was "but fighting a man of straw when he assumes that I am contending against the right of the states to do as they please about it." He did not want to give Douglas "an opportunity to make himself eloquent and valiant against us in fighting for their rights." Lincoln had "neither the inclination to exercise, nor the belief in the existence of the right to interfere with the states . . . in doing as they pleased with slavery or any other existing institution. . . . [T]he rights of the states . . . are assailed by no living man." The charge that Republicans would blot out the states was all "nonsense."[100]

98. Ibid., 268.

99. Corfield v. Coryell, 7 F. Cas. 548 (C.C.E.D. Pa., 1823) (No. 3230). Justice Bushrod Washington held that a citizen of one state, upon entering another state, was entitled to the right of entry, the general right to enjoyment of life and liberty, the right to own property, and the right to maintain actions in court.

100. Angle, 35, 354, 389.

The Lincoln-Douglas debates provided no ringing nationalist rhetoric. No nationalist auditor or reader could turn to Lincoln's words for quotations of Websterian grandeur. Plainly, Lincoln understood the appeal of state rights to Illinois voters, and he did not dare attack the doctrine openly and frontally. Despite his attacks on the dual federalist limitations that Douglas tried to impose on national power over slavery, Lincoln left the clear impression that he also agreed that there was some core of state jurisdiction and state integrity beyond the power of the national government to trespass.

LINCOLN, THE REPUBLICANS, AND FEDERALISM

While Lincoln tentatively articulated his nationalism and Douglas forcefully expounded the state-rights basis of popular sovereignty, the Supreme Court's decisions and reasoning, especially in *Dred Scott,* confirmed the conviction of southern adherents of state sovereignty that theirs was the correct understanding of the federal system. "Southern opinion . . . is now the law of the land . . . , and opposition . . . is now opposition to the Constitution," they avowed.[101] Thus armed, they insisted that Congress pass a slave code for all the territories. In the national Democratic party nominating convention of 1860, they demanded that the platform commit the party to that position. In effect, state-sovereignty Democrats declared war on state-rights constitutional doctrine as Douglas and other northern Democrats had applied it to the territories. In doing so, southern Democrats were demanding that northern Democrats give up their best defense against the Republican attack—the response that northerners bore no responsibility for the institution because it lay entirely outside national jurisdiction. Acquiescence was suicidal, as well as a surrender of constitutional conviction. The result was the disruption of the Democratic party and the victory in the presidential election for Abraham Lincoln, the Republican party, and the doctrines of federalism for which they stood.

The crisis of the Union revived the openly nationalistic rhetoric of the great Whigs, and few were as able expositors as Lincoln. American nationality transcended the contractual arrangement embodied in the Constitution, he insisted. As Mark Neely has demonstrated, Lincoln did not find the sources of American nationality in the misty colonial past, as did Webster and as would postwar nationalists influenced by European organic nationalism. Lincoln

101. Augusta (Ga.) *Constitutionalist,* quoted in Fehrenbacher, 418.

dated the Union to the Revolution. He considered the Articles of Association and the Declaration of Independence, rather than the Constitution, as the founding documents.[102] But those documents and the Constitution reflected Americans' deeper nationality—a nationality sustained by "the mystic chords of memory," which united its people, and by the natural topography of the United States, which created a natural market and required union to secure free access to world trade for all its inhabitants. "[O]ur permanent part; . . . the land we inhabit; . . . our national homestead . . . demands union, and abhors separation," Lincoln argued. "In fact, it would, ere long, force reunion, however much of blood and treasure the separation might have cost."[103]

Lincoln's concept of nationality demolished the underpinnings of state-sovereignty constitutional theory. Quite simply, "[T]he Union is older than any of the States." The states did not create the Union; an American people created both states and Union, and the states never had any existence outside that Union. Thus, "This country, with its institutions, belongs to the people"—not the states—"who inhabit it." They might alter its government through amendment or revolution, but whether creating the Union or destroying it, it was they, not the states, who were its constituent elements. To Lincoln, it was not the southern states but individual southerners who were in rebellion, and he could ask the question, "By what principle . . . is it that one-fiftieth or one-ninetieth of a great nation, by calling themselves a State, have the right to break up and ruin that nation?"[104]

Lincoln articulated the constitutional nationalist argument most concisely in his address at Gettysburg, through which it has been etched in the national consciousness. The United States was not a league, nor was it created by constitutional compact. Rather, "*four score and seven* years ago"—in 1776—"our fathers created a new *nation*." The states neither created it, nor was it their agent. It was a government "of the people, by the people, for the people."[105]

But when white southerners seceded, formally justifying their action on state-sovereignty principles, not only nationalist Republicans but state-rights northern Democrats rallied to the flag. In doing so, they not only manifested a patriotic love of their country; they

102. *Collected Works*, 4:195, 253, 433–35; Mark E. Neely, Jr., "Lincoln's Nationalism Reconsidered," *Lincoln Herald* 76 (Spring 1974), 112–28.

103. *Collected Works*, 4:271, 5:529.

104. Ibid., 4:196, 269, 433–35.

105. Ibid., 7:22–23.

also acted on their understanding of the federal system—a state-centered doctrine, to be sure, but one devised in reaction against state-sovereignty claims, one that insisted that the United States was a sovereign nation, and one that rejected the legitimacy of nullification and secession. The Civil War was not only a war between the doctrines of state sovereignty and nationalism; it was also a war between state sovereignty and state rights.

The northern response to the outbreak of war indicated the degree to which the states rather than the nation were the repositories of effective governmental power. The national government had a force of 16,000 troops under arms. If exigencies required a larger force, the states were supposed to supply men to be officered by the national officers corps. As the author of the standard work on the organization of the Union army observed, the defense of the nation had rested on "the state-rights principle [as] applied to the army."[106]

As Buchanan and his Cabinet dithered, northern state governors organized for war. State legislatures firmed militia laws and raised appropriations to replenish supplies. Governors ordered militia units brought up to full strength and equipment refurbished. As he organized his government, Lincoln urgently pressed the governors to redouble their efforts. When hostilities erupted, it was Massachusetts's militia that rushed to secure the nation's capital and Pennsylvania's governor who immediately promised 100,000 reinforcements. On April 15, 1861, Lincoln made his first requisition upon the states, requesting 75,000 men and officers, organized and supplied by the states, with only the assurance of future reimbursement by the national government. With tens of thousands of men volunteering, the governors begged the hapless War Department to accept more troops. As state-raised, housed, clothed, and fed recruits waited, Washington was unable to send officers to muster them into a centralized national service, to arm them, or to take over their support. With the federal government unable to provide weapons, the states went into the arms market themselves. The central government was so weak that governors along the Upper South and Mississippi Valley had to take steps to secure their own borders. They prepared to launch their own invasions, deeply worried that the struggle would degenerate into a war between the border states. Not until May 1861 did Lincoln begin to create a national army that was still made up of state units but under a centralized command

106. Fred Albert Shannon, *The Organization and Administration of the Union Army, 1861–1865*, 2 vols. (Cleveland: Arthur H. Clark, 1928), 1:15, 17.

and subject to national laws and regulations. Even this theoretical centralization of authority did not effect a true nationalization of the army. As historian William B. Hesseltine pointed out, the "clustered prerogatives" of states' rights remained. "In 1861 the militia was a people's army, and the state governments were the people's governments. . . . Although Abraham Lincoln called for volunteers in the name of the Union, the people would answer only through their states."[107]

This state-centeredness posed a major problem for military organization. Effective though the states were in organizing the armed forces, successful war required centralized control, direction, and administration. Americans' state-centeredness delayed the development of that essential centralization, and state officers often actively worked to frustrate it. Governors and local officials resisted orders to transfer troops against their judgment. They tried to force changes in military policy and administration and to exercise influence over assignments and promotions. Yet some of the most exasperating instances of local refusals to cooperate were the result of frustration with the sputtering military bureaucracy's inability to fulfill promises or assure fair distribution of military burdens.[108]

Although the development was slow, the exigencies of war did turn the United States forces into the most effective instrument of national authority that the government possessed. By war's end it was firmly administered, armed, and directed by national authority.[109] As other institutions of the national government remained subject to the constraints of state authority, the army was the one institution that could be relied on to enforce national policy. For that reason, Republicans would turn to the army to administer Reconstruction when the war was over.[110]

Throughout the war, local authorities utilized state institutions and relied on state-rights doctrine to resist national policies they opposed. As local citizens refused to obey the draft, state courts ruled the measure an unconstitutional extension of national authority. They

107. William B. Hesseltine, *Lincoln and the War Governors* (New York: Alfred A. Knopf, 1955), 128–66 (quoted at 166); Shannon, 1:15–48, 114–16.

108. Hesseltine, *Lincoln and the War Governors,* 181–203.

109. Shannon, passim.

110. See generally James E. Sefton, *The United States Army and Reconstruction, 1865–1877* (Baton Rouge: Louisiana State University Press, 1967), especially his comment on the Army's availability on p. 5; Benjamin P. Thomas and Harold M. Hyman, *Stanton: The Life and Times of Lincoln's Secretary of War* (New York: Alfred A. Knopf, 1962), 305–307, 436–613 passim.

also declared unconstitutional Lincoln's suspension of the privilege of the writ of habeas corpus and his subsequent detention of draft resisters, and they entertained suits for damages against federal officers who acted under their authority.[111] A governor like New York's Horatio Seymour, independently elected and head of a virtually autonomous government, could attack the constitutionality of a variety of key national wartime initiatives, especially the draft, by drawing on state-rights doctrines of federalism. When draft resisters rioted in the streets of New York, instead of taking vigorous action to suppress the rioters, he demanded that Lincoln suspend the enforcement of the draft.[112] One can hardly imagine what the great Copperhead, Clement L. Vallandigham, might have been able to do, had he been elected governor of Ohio in 1863.

Of course, the war ultimately served to invigorate the national government. But the expansion of centralized authority took place slowly and not until the futility of acting through the states had become apparent.[113] Still, by the war's end the national government exercised direct power not only in the military sphere but in promoting economic development, fostering education, and regulating the financial system. The practical effect of this new energy was to begin a process of economic nationalization that slowly created the national market regulated largely by national power that we have today—a *Blueprint for Modern America,* as one scholar aptly referred to Civil War legislation.[114]

Lincoln played a leading role in this process. It became clear during the war that he rejected the dual federalist principle that the Constitution reserved an area of state jurisdiction against delegated national power. He proposed using the war power to build a railroad through the border states. He indicated his belief that Congress had power to subsidize the building of a canal around Niagara Falls.[115] Over and again he proposed using Congress's spending power to promote voluntary emancipation.[116] In the constitutionally delegated

111. James G. Randall, *Constitutional Problems Under Lincoln* (New York: D. Appleton, 1926), 157–59, 186–89, 252–56, 268–74; Hyman, *A More Perfect Union,* 221–23, 238–44; Richard D. Younger, *The People's Panel: The Grand Jury in the United States, 1634–1941* (Providence, R.I.: Brown University Press, 1963), 110–12, 119–21.

112. Hesseltine, *Lincoln and the War Governors,* 281–86, 297–304.

113. Randall, *Constitutional Problems Under Lincoln,* 405–7.

114. Leonard P. Curry, *Blueprint for Modern America: Nonmilitary Legislation of the First Civil War Congress* (Nashville: Vanderbilt University Press, 1968). For a monumental discussion, see Hyman, *A More Perfect Union.* On the army, see Shannon, *Organization and Administration of the Union Army.*

115. *Collected Works,* 5:37, 7:48.

116. Ibid., 5:29–30, 48, 144–46; Boritt, 235–41.

war powers of the president, Lincoln's Solicitor of the War Department, William Whiting, found authority for national action in the heart of state jurisdiction. Lincoln acted upon that interpretation, decreeing emancipation behind Rebel lines despite his earlier concession that slavery was an untouchable domestic state institution.[117]

Congressional Republicans seemed equally willing to repudiate state-rights principles of federalism. In creating a national banking system, they rejected dual federalist limitations on the national taxing power, utilizing it to suppress state-chartered banks. They harnessed the constitutionally delegated power over federal lands to support education and subsidize internal improvements through land grants. They used the postal power to subsidize the building and maintenance of roads, telegraph, and steamship lines. They reinstated the protective tariff, utilizing the tax power and the power to regulate foreign commerce to promote economic development. Under the war power they justified confiscation, emancipation, construction and operation of railroads and telegraphs, relief of populations devastated by war, and supervision of labor relations during the transition from slavery to freedom.[118]

As a practical matter, the legislative programs begun during the Civil War and continued afterward marked a turning point in the history of American federalism. The national government's assumption of control over the distribution of currency and, to a large degree, banking facilities gave it the key role in determining macroeconomic policy. Inevitably, struggles over expansion and contraction of the currency and redistribution of the nation's imbalanced credit facilities focused on Washington. The protective tariff reinforced the national government's importance in the distribution of economic resources. Lobbyists and businessmen flooded the city whenever adjustments were made in the crucial schedules.

But despite the invigoration of national authority, the Civil War did not establish the dominance of modern constitutional nationalism, and that in turn limited the reach of national authority. The national government only slowly took any role in regulating the relations between business and consumer and employer and em-

117. William Whiting, *The War Powers Under the Constitution of the United States* (43d ed., Boston: Little, Brown, 1871; originally published in 1862 as *The War Powers of the President and the Legislative Powers of Congress, in Relation to Rebellion, Treason, and Slavery*); *Collected Works*, 2:311, 492–93. See Hyman and Wiecek, *Equal Justice Under Law*, 228–62 for a general discussion of the robust use of national power during the war.

118. See Curry, *Blueprint for Modern America*.

ployee. Those matters would remain firmly within state jurisdiction until the twentieth century. Despite the effort made during Reconstruction, it would take even longer before the national government successfully undertook the protection of basic civil rights and liberties.

The Civil War discredited state sovereignty, ever after associated with treason and slavery. The notion that the people, rather than the states, created the Constitution and the idea that a nation underlay the Constitution itself became widely accepted. But while the war killed the state-sovereignty doctrine of federalism, the doctrine of state rights survived. Although state-rights doctrine gained great force from the conviction that the Constitution was a compact among the states, it did not depend on that conception and could survive its demise. No matter who created the Constitution, adherents of state-rights constitutionalism could point to the Tenth Amendment as the guarantee of an area of reserved state jurisdiction. The continued vitality of dual federalism was manifest in the widespread and bitter denunciation of the Republicans' use of national power during the war, not only by Democrats who adhered fully to state-rights tenets, but also by such conservative nationalists as former Supreme Court Justice Benjamin R. Curtis.[119] More significantly, Republicans themselves wavered as the potential of their policies to alter fundamentally the balance of federalism became clear. As early as 1861, Senator James Grimes, an ex-Democrat who had helped found the Republican party worried, "We are gradually surrendering all the rights of the states & [their] functions & shall soon be incapable of resuming them."[120]

The painful fact was that secession and war had raised the prospect that had seemed inconceivable when Douglas predicted it in his attacks on Lincoln. How could the Union be restored without blotting out the states? How could the rights of freedmen be secured without the national government assuming the day-to-day protection of citizens in their ordinary rights?

The war made the inconceivable conceivable to many Republicans. As early as the summer of 1861 many claimed that rebellion *had* blotted out the southern states. If there were no states, then there could be no reserved state jurisdiction, no local institution that the national government could not reach. Govern reconquered southern

119. See Hyman, *A More Perfect Union*, 156–70, 207–62; Randall, passim; Paludan, 109–69; Silbey, 62–88.

120. Senator James W. Grimes to Senator Lyman Trumbull, October 14, 1861, Trumball Mss., Manuscripts Division, Library of Congress, Washington, D.C.

territory through the military and then establish territorial governments for them, subject to direct congressional control, they urged. But others recoiled from so revolutionary a proceeding. Individual state offices may be vacant because of the treason of their occupants, but the states remained and retained their rights. All that was necessary was for loyal men to take those offices and exercise their powers.[121]

Lincoln was among the latter. He acted on his understanding in July 1861, recognizing the loyalists who claimed state offices as the legal government of the state.[122] Congress endorsed Lincoln's interpretation by admitting Virginia's representatives to Congress. Many Republicans hoped that North Carolina and Tennessee would soon be restored to constitutional normality on the same basis.[123]

The sentiment in Congress shifted rapidly as hopes for quick military victory faded and as few southern unionists rallied to the Union cause. By 1862 most Republicans agreed that war justified some period of direct national control of the southern states. Lincoln remained more conservative than his party's mainstream on how long such control should last and how far it should go. But like nearly all Republicans, he was willing to exercise national power in areas of traditional state jurisdiction to a degree unimaginable a few years earlier.[124]

Like most Republicans, Lincoln reconciled the revolutionary wartime use of national power with traditional American federalism by stressing the temporary nature of the war powers. "I felt that measures, otherwise unconstitutional, might become lawful, by becoming indispensable to the preservation of the constitution, through preservation of the nation," he explained.[125] By justifying national action as outside the Constitution, or as exercises of the war power, Republicans believed they had saved the peacetime Constitution from contamination. With war's end they hoped they could return, as Senator Grimes had urged, "to the original condition of things, and allow the States to take care of themselves as they have been in the habit of taking care of themselves."[126]

121. Herman Belz, *Reconstructing the Union: Theory and Policy During the Civil War* (Ithaca: Cornell University Press, 1969), 1–13.

122. *Collected Works,* 4:427–28.

123. *Congressional Globe,* 37 Cong., 1 Sess., 6 (July 4, 1861), 101–109 (July 13, 1861); Belz, *Reconstructing the Union,* 16–17, 28–32.

124. Belz. 1–125.

125. Lincoln to A. G. Hodges, April 4, 1864, in *Collected Works,* 7:281.

126. Grimes in the *Congressional Globe,* 39 Cong., 1 Sess., 2446 (May 8, 1866). See Benedict, "Preserving the Constitution: The Conservative Basis of Radical Reconstruction," *Journal of American History* 61 (June 1974): 66–69.

For nationalists such as Lincoln and most Republicans, this meant returning not to the crabbed constitutionalism of Democratic state rights but to the nationalist constitutionalism of Marshall, Clay, and Webster. They wanted a capacious view of national power, but they could not shake off the notion that there must be *some* line the federal government could not cross. That line certainly was reached when it came to direct control of the institutions of the states. One can see this conviction in Lincoln's handling of confiscation and emancipation. Military exigencies might justify both measures, but a clear distinction had to be maintained between what was justified under the war power and what would amount to an unconstitutional invasion of state jurisdiction. When General John C. Frémont confiscated property and emancipated slaves in Missouri in 1861, Lincoln reversed that decision. Frémont's action had been "*purely political,* and not within the range of *military* law," he insisted. "If a commanding General finds a necessity to seize the farm of a private owner, for a pasture, an encampment, or a fortification, he has the right to do so. . . . But to say the farm shall no longer belong to the owner, or his heirs forever . . . is purely political, without the savour of military law about it. And the same is true of slaves. . . . [T]heir permanent future condition . . . must be settled according to laws made by law-makers, and not by military proclamations."[127] He made the same point to General Benjamin F. Butler, after Butler sought voter approval to establish a broad-ranging program of municipal services and employment. "If you, as Department commander, find the cleansing of the City necessary to prevent pestilence in your army—street lights, and a fire department, necessary to prevent assassinations and incendiarism among your men and stores—wharfage necessary to land and ship men and supplies—a large pauperism, badly conducted, at a needlessly large expense to the government, . . . you rightfully may, and must take them into your own hands. But you should do so on your own avowed judgment of a military necessity, and not seem to admit that there is no such necessity, by taking a vote of the people on the question. Nothing justifies the suspending of the civil by the military authority, but military necessity. . . . And whatever is not within such a necessity should be left undisturbed."[128]

Lincoln justified his Emancipation Proclamation entirely on military necessity. That was why he limited its operation to areas behind

127. Lincoln to Orville H. Browning, September 22, 1861, in *Collected Works,* 4:531.
128. Lincoln to Butler, August 9, 1864, ibid., 7:487–88.

enemy lines, he told Salmon P. Chase, who expressed disappointment that it did not apply to Confederate areas under Union occupation. If he applied it where there was no military necessity, "[would] I not give up all footing upon constitution or law? . . . Could it fail to be perceived that without any further stretch, I might . . . change any law in any state?"[129] He was never confident that the Emancipation Proclamation as a war measure worked a permanent divestiture of slaveholders' claims to their slaves, although he avowed that as president he would never return anyone freed under its terms to servitude.[130] He refused to sign the Wade-Davis Reconstruction Act of 1864 because it required the abolition of slavery, which intervened in the domestic institutions of the states beyond what military necessity required.[131]

The same concern for state jurisdiction characterized Lincoln's approach to Reconstruction, even after he conceded the process required more than mere substitution of loyal for disloyal state officers. As commander in chief he could provide for temporary military governance of Confederate state territory. He could combine the threat to enforce confiscation laws with the promise of amnesty to encourage southerners to resume their national allegiance. But he could not directly organize state governments; he could not order the incorporation of abolition into the state constitutions. He could only invite southerners to take oaths of allegiance and to reorganize their own governments. If those constitutions did not comport with freedom, as commander in chief he might continue to hold southerners in the grasp of military power. But he eschewed constitutional power directly to impose the terms of state constitutions or laws, despite the authority and indeed the obligation that the Constitution imposed on the national government to secure republican forms of government to the states. Nationalist constitutional theory suggests that in the circumstances of the Civil War, the guarantee clause implies broad national power to restructure state institutions. But when Republicans claimed such power for Congress and passed the

129. Lincoln to Chase, September 2, 1863, ibid., 6:428–29. See also ibid., 6:29, 408–409, 428, 7:49, 282.

130. Lincoln allowed that the courts might have to decide the legal consequences of the Proclamation, ibid., 7:51. He urged passage of the Thirteenth Amendment to render doubts moot, ibid., 8:254. To give the Proclamation more hope of permanent effect, he required southerners seeking to reorganize state governments to take an oath to uphold it, ibid., 51. But he made clear that he would never reimpose slavery on anyone freed under the Proclamation or congressional confiscation laws, ibid., 7:51, 507, 8:152.

131. Ibid., 7:433.

Wade-Davis Reconstruction Bill pursuant to it, Lincoln refused to sign, killing the measure with a "pocket veto."[132]

Despite this disagreement, congressional Republicans proceeded on much the same theory, claiming the same power as the president to hold southerners in the grasp of war until they "voluntarily" erected state governments dedicated to freedom. They, too, refused to justify Reconstruction legislation on a nationalist interpretation of the guarantee clause. Of course, the voluntariness of southern action was illusory in the context of military occupation. But the point was not to give southerners a freer hand in Reconstruction but to maintain the constitutional basis for state autonomy once the military was withdrawn.[133]

The Republican commitment to what Phillip Paludan has called "state rights nationalism"[134] did more than protect the structures of state government from permanent national control. It led them to try to preserve their traditional areas of jurisdiction as well. This was manifest in the program through which Republicans sought to secure basic civil and political rights to the freedmen. In the Thirteenth, Fourteenth, and Fifteenth Amendments, they made clear that they were delegating broad power to the national government to secure freedom. The amendments authorized Congress to make all laws "appropriate" to assure that the states did not deny civil and political rights, thus writing the nationalist definition of "necessary and proper" into the amendments themselves. Nonetheless, Republicans carefully left primary authority to protect persons and property with the states, authorizing the national government to act only when they failed to fulfill their responsibilities.[135]

Ultimately the continuing commitment to the notion that there was some residuum of sovereign state jurisdiction proved the undoing of Reconstruction and national efforts to protect citizens' rights in the South. In law, that commitment was reflected in the decisions of the Chase and Waite Supreme Courts, which strictly distinguished between the rights of state and of national citizenship, and strictly

132. Proclamation of Amnesty and Reconstruction, December 8, 1863, in *Collected Works*, 7:53–56. See also ibid., 7:50–52; Belz, *Reconstructing the Union*, 223–27; Benedict, *A Compromise of Principle: Congressional Republicans and Reconstruction, 1863–1869* (New York: Norton, 1975), 70–83.

133. Belz, *Emancipation and Equal Rights: Politics and Constitutionalism in the Civil War Era* (New York: Norton, 1978), 75–107; Benedict, *A Compromise of Principle*, 70–83; Benedict, "Preserving the Constitution."

134. Phillip S. Paludan, "John Norton Pomeroy: States' Rights Nationalist," in Paludan, *A Covenant with Death*, 218–48.

135. Belz, *Emancipation and Equal Rights*, 108–22.

construed national power to enforce civil and political rights against private, nonstate infringement.[136] In politics it led to the reaction against national "interference" in southern domestic affairs and to the restoration of "home rule" in the 1870s. Americans simply could not tolerate a federal system in which federal district attorneys, marshalls, and troops undertook the responsibilities of state officials, and in which the President of the United States regularly decided who would serve as governors and legislators in sovereign states.[137]

By saving the Union, by securing political power to those who wanted to create a national economic market, by promoting the nationalization of a variety of American institutions, the Civil War created an environment in which the triumph of modern constitutional nationalism may have been inevitable. But the war itself did not mark that triumph. American commitment to state rights remained powerful and continued to shape constitutional nationalism until the realities of a national economy and a fundamentally national society led to the still challenged dominance of modern nationalist doctrines of federalism in the twentieth century.

136. See Michael Les Benedict, "Preserving Federalism: Reconstruction and the Waite Court," *Supreme Court Review* 1979:39–79.

137. William Gillette, *Retreat from Reconstruction, 1869–1879* (Baton Rouge: Louisiana State University Press, 1979), passim; Paludan, 237–73; Hyman, *A More Perfect Union*, 516–42.