

6-2011

Rediscovering Prigg v. Pennsylvania

Andrew J. Trochanowski
Union College - Schenectady, NY

Follow this and additional works at: <https://digitalworks.union.edu/theses>

 Part of the [American Politics Commons](#), and the [Political History Commons](#)

Recommended Citation

Trochanowski, Andrew J., "Rediscovering Prigg v. Pennsylvania" (2011). *Honors Theses*. 1078.
<https://digitalworks.union.edu/theses/1078>

This Open Access is brought to you for free and open access by the Student Work at Union | Digital Works. It has been accepted for inclusion in Honors Theses by an authorized administrator of Union | Digital Works. For more information, please contact digitalworks@union.edu.

Rediscovering *Prigg v. Pennsylvania*

By

Andrew J. Trochanowski

Submitted in partial fulfillment
of the requirements for
Honors in the Department of Political Science

UNION COLLEGE

June, 2011

ABSTRACT

Trochanowski, Andrew J. Rediscovering *Prigg v. Pennsylvania*. Department of Political Science, June 2011

Advisor: Prof. Clifford Brown. Special Thanks to Prof. Bradley D. Hays.

The concept of federalism serves as the foundation for the American political system. The framers laid a foundation for balancing state and national tensions; and during the antebellum era American political actors wrestled with the proper application of these concepts. This paper traces the evolution of federalist principles beginning at the founding and culminating with the commonly misperceived Supreme Court case *Prigg v. Pennsylvania* by analyzing transformative historical moments and political regimes. *Prigg v. Pennsylvania* currently exists within contemporary political and constitutional scholarly literature as a slavery case decided upon moralistic bias and the Court's commitment to the institution of slavery. Closer analysis unveils the decision in *Prigg*'s connection with the evolution of federalist principles throughout early American history. This paper attempts to uncover how institutional relationships shape governing political principles and how a variety of political actors, specifically the Supreme Court, are influenced by these relationships. The antebellum political order struggled with stabilizing sectional ideological divides and attempted to mitigate these issues by championing doctrines of political compromise. Through this paradigm, *Prigg v. Pennsylvania*'s conventional status in constitutional literature can be shifted, and instead can be used as an analytical lens for understanding the antebellum political order.

Rediscovering *Prigg v. Pennsylvania*: Articulating Federalism

Federalism has long driven the constitutional and political debates in American government. Defining this idea is useful for understanding a number of important political and constitutional episodes from early America up until and including the often mischaracterized Supreme Court decision *Prigg v. Pennsylvania*. Some contemporary political scholars tend to misinterpret past political events using their contemporary political paradigms and visions of justice. Documented history enables us to learn the language and paradigms of influential political figures and institutions in an effort to understand the governing political principles of past eras. Judging historical figures and events with twenty-first century biases clouds the reality of the application of political principles by those who have shaped this nation. Numerous contemporary paradigms, however, are useful for understanding earlier political visions. For example, Robert Dahl (1957) and Keith Whittington (2007) offer illuminating theoretical frameworks which allow us to view Courts as part of a “decision-making majority” who make judicial decisions not solely in their own vision, but also with presidential and congressional interests in mind. These inter-institutional relationships often result in the construction of the political principles which influence political action and decision making in numerous arenas.

Federalism is one of, if not the most crucial tenets of the American political order. Prior to the Constitutional Convention and ratification in 1789, states wrestled with identifying their proper role within the federal system. The failure of the Articles of Confederation exists as a primary example of how an inadequate definition of the federal-state relationship can result in constitutional and political disorder. Ultimately, through the constitutional debates and other public forums, the founders attempted to structure the duality of the American system through the ratification of the United States Constitution. This document serves as the foundation for

analyzing the federal-state problem. However, consistent visions of this relationship have not been embraced throughout our constitutional and political history and this dissertation will attempt to uncover how these conceptions of federalism have been defined and applied throughout early America, culminating in the mischaracterized *Prigg v. Pennsylvania* decision.

What is federalism? Federalism in American politics is the delineation of power and responsibility between federal and state governments. Both state governments and the federal government were understood to possess a certain level of sovereignty. The framers and other early political actors attempted to determine who held power in a variety of political areas. Early American citizens expressed loyalty to both the United States and their individual states and experienced difficulty in determining a hierarchy. A citizenry which expresses legitimate loyalty to a variety of different government authorities is bound to experience divisive political issues. The founders were cognizant of these competing loyalties and intended to create a document which would effectively delimit and monitor these relationships.

History and experience led governing institutions to explore a variety of different methods for establishing these principles. Over time, issues continued to arise over who possessed authority to draw the structural lines and where precisely these lines should be drawn. Courts, Congress, the executive, and states all expressed their desire to shape the federal-state relationship. We will analyze the period of American politics from the founding through the decision in *Prigg v. Pennsylvania*, before slavery became the primary political issue in American government, in an attempt to determine how these lines were drawn and what influence federalism had on the American political structure.

The choice of this particular American period is of note. We are able to use federalism as our primary analytical tool because of the political climate during the period in question. Using slavery as an analytical tool for viewing any of the political eras in this dissertation, especially *Prigg*, is problematic because it had yet to become the preeminent political force in American politics. Issues had arisen with slavery implications, but the issue was not yet a primary concern.

Delineating responsibility between the federal and state governments consumed the minds of early political actors, and these actions had implications across institutional lines. The initial era created the foundation through which every subsequent political actor issued their federalist paradigm; and political actors, despite the bombast, exercised varying degrees of caution in their practice and exploration of federalist principles. All of them however, felt bound by the document, regardless of how they viewed the powers within. Every political actor since the founding operate with a high level of respect for the foundational principles set forth by the governing document and the analysis which follows illustrates this reverence.

How will this paper uncover this complex and often tenuous relationship? Aside from identifying specific principles applied to transformative political events, the theoretical framework adopted stems from recent scholarship in American political development. As aforementioned, many recent scholars have begun to re-analyze the lenses we use to study political motivations for establishing structural principles (Graber 2006) (Gillman 1993) (Kahn and Kersch 2006). The rise in literature concerning institutional relationships and how their structures and limits affect their ability to institute meaningful political change suggests our common conceptions of how political principles are applied are not entirely accurate (Whittington 2007) (Gillman 1993) (Graber 2006) (Levinson 2006). By viewing certain political procedures, principles, and episodes through different theoretical frameworks we are able to

discover (or perhaps *rediscover*) aspects of these procedures, principles and episodes previously unbeknownst to us. Federalism is one of these principles. Federalism very much governs the American political system. Understanding federalism and its different applications at different political moments allows us to understand executive, congressional, and judicial responses to political controversies. Political history is filled with moments which fashioned the structural definition of federalist principles (Ackerman 1993). The evolution of federalism over a sixty year period ultimately sets the table for the jurisprudence in *Prigg v. Pennsylvania* and identifying this evolution in a number of different political regimes proves important for understanding the culture of compromise and sectional divide in the 1840s and beyond.

This dissertation will effectively analyze a few different historical periods and events during the early to mid nineteenth century to create a better understanding of how federalism operated. These include: the founding era, the Marshall Court, Jacksonian Democracy, the national regime of the 1840s, and *Prigg v. Pennsylvania*. Different political events drive these five eras, but similar principles are involved. The founding era chapter examines revolutionary principles, founding documents, the federalist versus Antifederalist debate, and some legislative debates. The Marshall Court section discusses the pillars of federalism embodied in early Supreme Court decision making. Jacksonian Democracy addresses the Supreme Court case *Worcester v. Georgia* (also decided under Marshall), the Second National Bank Veto, and the Nullification Crisis. The Tyler Regime chapter analyzes the Tyler presidency, his relationship to his party, and culminates in the Dorr Rebellion episode. The *Prigg* section, the primary example of federalist practices during the antebellum era, addresses the mischaracterization of its place in scholarly literature by applying the evolutionary principles of federalism discussed in the previous chapters to the judicial opinions within the case and especially to the political and

judicial role of Justice Joseph Story. Each of these cases will be analyzed to create a better understanding of the political and social principles of the era and will hopefully unveil how *Prigg* can be used as a lens to understand the commitments of the Court and the political principles of the 1840s and their direct connection to federalism.

The first case, the founding era, locates federalist principles in a number of areas. The federalist versus antifederalist debates animates the first public discussion of the federalist relationship embodied in the newly created Constitution. Legislative debates concerning the first national bank demonstrate an early divide in conceptions of federalism through the public opposition of Alexander Hamilton and Thomas Jefferson, which will prove important in delineating early schools of federalist thought. The founding era illustrates a time when a newborn nation tries desperately hard to define its governing principles and understands, following the failure of the Articles of Confederation, they need to get these principles right.

The analysis of the Marshall Court lays the foundation for the dissertation's argument. Early Supreme Court jurisprudence is essential to understanding early conceptions of federalism because the political branches of government often spend an enormous amount of time attempting to shape the visions the Supreme Court articulates. The structure of federalism established during the founding period and perpetuated by the Marshall Court sets the stage for the subsequent modification of these principles during later political episodes. A fair amount of attention will be drawn to major Marshall Court decisions; there also be a serious attempt to articulate the early conceptions of federalism through analysis of political writings and important legislative issues. The relationship between the Court and other institutions in the early part of American history sets the stage for how federalism evolves throughout the early to mid

nineteenth century. The jurisprudential structure of *Prigg* illustrates the level of importance Marshall Court federalist principles drove the national political debate.

The third case, Jacksonian Democracy, identifies three different influential episodes: *Worcester v. Georgia*, the Second National Bank veto, and nullification. *Worcester v. Georgia* represents Jackson's first faceoff with the Supreme Court, specifically the Marshall federalist tradition. The Second National Bank veto identifies Jackson's self perceived constitutional obligations and further establishes the transformation of federalist principles during the Jacksonian era. State nullification introduces a competing theory to Marshall Court federalism and attempts to subvert Supreme Court authority and establish a new political order (Whittington 1996). Jackson's response also delineates an important line in his attempt to fashion an area of maneuverability for states and to what extent this area is limited. This era is particularly useful because it clearly demonstrates the shifting political framework of the United States. Americans during this era are beginning to assume a new role in the American governance scheme. A new political paradigm had overtaken the executive. As Gerard Magliocca (2007) and Keith Whittington (1996; 2007) explain (albeit in different capacities), this results in a shift in the Court and national politics which affected the constitutional principles of the mid-nineteenth century. South Carolina nullification marks a shift in the change of the conceptions of federalism from the state point of view. States begin to push back against the federal government resulting in a political and constitutional tug of war. Ultimately, the federal government squashes the constitutional claim of the nullifiers, but sectional divides were rising as states began to assert what they perceived as legitimate constitutional power, shifting the political scene.

The fourth case which will be analyzed is the national regime of the 1840s, more specifically the Tyler presidency, Whig politics, and the Dorr Rebellion. The Tyler presidency's

importance to understanding federalism stems from two important episodes. The first is Tyler's alienation of his own party due to the political and constitutional traditions he revered. The second episode is the Dorr Rebellion where Tyler again issues his political and constitutional vision in response to an intrastate constitutional conflict with national implications. Stephen Skowronek (1997) and Bruce Ackerman (1993) teach us the importance of political time in analyzing articulated political principles. Skowronek (1997) notes the roles specific presidents play in creating, perpetuating, and/or destroying political and constitutional visions. Tyler's presidency exists as one of significant constitutional and political ambiguity and studying the national regime of the 1840s is necessary to understanding *Prigg's* relationship to the sectional divides which increasingly grow during the period. Political compromise exists as the status quo in American government throughout the antebellum period. Tyler's views on slavery, the veto (a view which counters Jackson's), and his own party all shape the era. President Tyler and the national regime's politics are necessary tools to understand the evolution of federalist principles and to set up the new construction of *Prigg*.

The Dorr Rebellion's relevance deserves some additional explanation. The Rhode Island controversy concerning the legitimacy of the state government involves a number of the same constitutional questions which permeated the minds of the national citizenry. State and nation were still attempting to establish their proper role in the American institutional governance scheme. Likewise, competing political theories in Rhode Island ultimately boiled down to a question of loyalty and legitimacy and the citizens were asked to decide. The significance of the Dorr episode exists not only in this basic commonality, but also in the realm of the role of federal interference. Tyler's injection into the controversy raises the question, what role, if any, should the federal government play in state political controversies? Dorr's Rebellion is interesting

because the state ultimately did not afford the people a political structural remedy for their dispute and thus the Dorrites pointed to the Guaranty clause (Article IV Section 4) for their remedy. The judicial challenge ultimately resulted in a political stalemate with the Supreme Court ruling in *Luther v. Borden* (48 U.S. 1) that the political arms of the government need decide this controversy, not the Court. This ruling is interesting when you consider Dahl's (1957) dominant regime paradigm and Tyler's unwillingness to take action unless absolutely necessary. The controversy provides yet another example of the era's uncertain political culture and offers a look into the constitutional principles of John Tyler and Justice Joseph Story. The Dorr Rebellion reflects the idea of state flexibility in governing versus the national standard, the essential component of the *Prigg* decision and federalism overall.

The final federalist episode which serves as the inspiration for this analysis is *Prigg v. Pennsylvania* (41 U.S. 539). *Prigg v. Pennsylvania* currently exists in Supreme Court jurisprudential history and among contemporary American political development scholarship as a slavery case poorly decided which perpetuated American slavery. Careful examination of the questions of federalism present in *Prigg v. Pennsylvania* provides a fresh look into the Court's reasoning. Rehabilitating *Prigg v. Pennsylvania*'s construction in the canon of constitutional law and political science can be useful for myriad reasons, but essential to understanding these reasons is identifying the commonalities between the Court's ruling and the political paradigms of the era. Mark Graber (2006, 1) in *Dred Scott and the Problem of Constitutional Evil* tackles the common political and constitutional consensus that the *Dred Scott* decision was unquestionably wrong; and writes, "The majority opinions in *Dred Scott*, while flawed, are consistent with claimed judicial obligations to respect the majority will, to follow the rules laid

down by constitution framers and previous precedents, or to be guided by fundamental constitutional values”. Importantly Graber (2006, 2) notes,

My claim that *Dred Scott v. Sandford* **may** have been constitutionally correct is likely to startle, puzzle, and probably offend readers reared on a steady diet of constitutional advocacy. No decent person living at the dawn of the twenty-first century supports the proslavery and racist policies that Stephen Douglas and Chief Justice Roger Taney championed...*Dred Scott* and this book are about the problem of constitutional evil. The problem of constitutional evil concerns the practice and theory of sharing civic space with people committed to evil practices or pledging allegiance to a constitutional text and tradition saturated with concessions to evil.

Similarly, *Prigg v. Pennsylvania*, commonly lumped with incorrectly decided, immoral judicial opinions, possesses elements directly related to its contemporary political order, conceptions of American constitutionalism perpetuated by the framers and other political figures, and the federalist jurisprudential tradition perpetuated by Chief Justice John Marshall. *Prigg*, viewed through this lens, can be useful in understanding the effects of constitutional reverence and the influence of federalist principles in the early 1840s on the political order. This in itself is a major shift in thought concerning the “last of the three major slavery cases of the 1840s” (Maltz 2009). Earl Maltz (2009) importantly draws out the connections to early Supreme Court jurisprudence in reference to Story’s decision making, and offers an explanation for his reasoning in this vein, but stops here. Maltz fails to draw the larger connection, namely, *Prigg* is interesting not only because of its shared connection with the Marshall Court vision of federalism, but ultimately articulates its own vision in response to its contemporary political era. Maltz animates the principles, but does not extend them. *Prigg* is both the culmination and prime example of how federalist principles had evolved throughout the 1800s.

Jurisprudential frameworks are often applied to court decisions in an effort to glean judicial intentions. Two modern models are often applied to understand judicial decision making: the attitudinalist model and the post positivist model. The modern attitudinalist model,

articulated by scholars Harold Spaeth and Jeffrey Segal (2003), holds that Supreme Court justices decide cases on primarily ideological grounds, with institutional factors and incentives playing a much more minor role and *stare decisis* playing almost no role. Many of the scholars which analyze *Prigg* through the slavery lens tend to acquiesce in this model (knowingly or not). A second theory, judicial post positivism, offers a model wherein judges decide cases as strategic actors accounting for both preferences of fellow judges and commitments to other institutions (Epstein and Walker 2004). *Prigg v. Pennsylvania*, as we will see, does not fit clearly into either of these judicial molds, but exists as a complex combination of legal theory, political principles, and judicial strategies reflective of its political era.

Each of these case studies provides a look into how each governing regime, across multiple institutions revered, interpreted, and applied federalist principles across institutions and political boundaries. The principle of federalism experiences shifts throughout the early to mid nineteenth century. First, we have the overall concept of federalism. Underneath this concept is the early United States period which results in two separate conceptions of federalism: Hamiltonian federalism and Jeffersonian federalism. Following the establishment of these two conceptions, Marshall Court federalism arises as a result of the Federalist retreat into the judiciary following their defeat in the election of 1800. As time progressed, the Marshall Court's rulings began to perpetuate the early Hamiltonian mold and dominated the accepted conceptions of the federalism doctrine. Marshall Court federalism essentially ruled until the 1828 election, when Andrew Jackson swept into power on a very different constitutional vision with a very different constituency, reminiscent of the Jeffersonian mold. Jackson was very much his own man politically and constitutionally. Many of his political inclinations reflected the Jeffersonian mold, but his exercise of federal power reflected a more Hamiltonian vision. Nonetheless,

Jackson's repudiation of the Marshall order, influence on conceptions of federalism and the continued fractionation of American politics in the 1840s led to the rise of the Whigs and paved the way for *Prigg*, the final step in early to mid nineteenth century federalism evolution. *Prigg* invokes tenets of both the Marshall mold and the Jacksonian era, hence its relevance to the overall doctrine.

"Hamiltonian Federalism" is essentially an affinity for federal supremacy predicated on a number of different elements. The first of which, is the letter of the constitution, but not in a strict constructionist sense. Hamiltonian Federalists believe the language of the Constitution locates political authority and within this authority, federal political bodies are given a level of flexibility in exercising this authority. Hamiltonian Federalists tip the balance of dual sovereignty in the favor of the federal government, and greatly value a cohesive Union, especially as the United States evolved into the 1840s and 1850s. Conversely, "Jeffersonian federalism" levies significantly more power in the hands of the states and severely limits the federal government's authority outside the letter of the Constitution, conceptions shared to a degree by Andrew Jackson, probably more so by John C. Calhoun. Again, these are wide generalizations which will be more clearly delineated in the coming chapters.

Why then, is *Prigg* of such importance? Why is it the ultimate example of federalism in the American political order? Along with its traditional slavery categorization, *Prigg* also exists in another Supreme Court tradition, that of compromise. Story's decision fashioned an area for state non-enforcement of slavery. This area created by Story is the area which connects to the larger federalist context and gives *Prigg* its historical weight. John Marshall and his Supreme Court attempted to limit a state's ability to oppose acts of the federal government in response to a rising political paradigm which aimed to levy more power on the state level. Joseph Story

acquiesced in this same tradition. Once Marshall left the Court, Story became the beacon of early Northern federalism perpetuated by Marshall. Interestingly however, Story fashions a political corner for state inaction in regards to the slavery issue and uses pillars of the Marshall tradition to support this claim. However we are left with the question, how does this area for state maneuverability reflect the larger political and federalist context?

This dissertation, through the previously enumerated case studies, will attempt to unveil how the federal government throughout this early period did not adhere to a strictly federal or strictly state vision of government. The main concern of governing bodies was to find an “area of maneuverability” for state governments while upholding the federal order. The slavery question during the 1840s was one of national importance. Sectional tensions were rising following nullification and an increasingly fractionated political system and the North was still attempting to balance its disdain for slavery while maintaining the Union structure. Slavery during the 1840s had not consumed the national political order as it would in the years following *Prigg*, but the tradition of compromise in response to slavery practiced in American politics up to this point (see framing debates on slavery, Missouri Compromise, etc.) mostly mitigated major crises. Joseph Story, very much aware of this tradition, acted accordingly in *Prigg*. The federal government’s rules and laws reign supreme, but the states must be afforded an “area of maneuverability” or a political area to perpetuate their vision on certain issues. This describes the overall era’s vision of the federal-state relationship.

Each of the political areas treated exhibit this principle. Marshall supports federal supremacy, but affords states an out in *Gibbons v. Ogden*. Andrew Jackson in *Worcester v. Georgia* supports the federal government’s right of noninterference in the case of Indian Removal. Jackson also vetoes the Second National Bank. Importantly, Jackson demarcates a line

in defining the state-federal relationship in the nullification controversy. John Tyler affords the people of Rhode Island, through his deference to the Rhode Island legislature and state supreme court, and strict adherence to enumerated constitutional principles room to adjudicate their political and constitutional issue. And finally, Joseph Story does not require states to enforce the Fugitive Slave Act of 1793 through the constitutional power vested in Article IV, Sec. 2.

Prigg may have intensified the slavery issue moving forward, but it also illustrates how affording states room to operate on issues of national importance can sometimes side step major conflict. Many personal liberty laws enacted by northern states requiring their law enforcement authorities *not* to aid in slave recaption severely weakened the earlier legislation. The more stringent Fugitive Slave Act of 1850 which, in effect overturns the *Prigg* precedent, and required all states to aid in slave recaption and certainly has been labeled a catalyst for exacerbating the slavery problem in the United States. Additionally, following *Prigg*, slavery continued to permeate the national consciousness. The Mexican War very clearly concerned issues of slavery and the Kansas-Nebraska Act in 1854 which undoes the earlier Missouri Compromise results in the literal unraveling of the American political order. All of these episodes illustrate the degree to which slavery became *the* national problem following *Prigg*. But considering its own historical era, the political principles practiced by the governing regime, and the Court's desire to uphold a vision of federalism consistent with the evolution of the principle through the history of the early United States, *Prigg v. Pennsylvania* resoundingly articulates the governing principle of the 1840s: States must be given room to politically operate, under the federal system. Story's decision on what would become the most important moral, social, economic, and political question of our nation's history into the 1850s and beyond—slavery—exists as the primary tool for understanding the federal government and state relationship during the 1840s.

Prigg also has larger implications for understanding where interpretative constitutional authority ultimately rests. The issue of political power and legitimate interpretative authority is of constant political debate. Contemporary scholarship presents theories supporting executive, congressional, judicial and state authority to interpret. At the root of the interpretative question is still the state-federal relationship. Almost every interpretative theory analyzes issues regarding the power play between states and the federal government. This dissertation, along with contemporary scholarship does make one point especially clear, the Supreme Court is not the final arbiter of constitutional interpretation. Political powers, as evidenced during the Marshall period and early America, the Jackson era, the Tyler regime, and the Dorr issue all play a role in defining the federal relationship. Executives, legislative bodies, states and the courts have an intricate institutional relationship which ultimately defines constitutional meaning. *Prigg's* pertinence to the era of the 1840s demonstrates the level to which institutional factors influence the federal-state relationship. *Prigg* uses the political and judicial weapons at its disposal to perpetuate a vision of federalism clearly aimed at quelling federal-state institutional differences, while fashioning areas for both to operate. Understanding the American political system through the lens of inter-institutional dynamics facilitates the idea that the American constitutional order is a conglomerate of competing political influences. Each branch of government and the states use constitutional grounds to support various visions of governance and the decision in *Prigg v. Pennsylvania* exists as the primary manifestation of competing political and constitutional influences to establish a baseline for federal and state political interaction.

Through this lens, *Prigg v. Pennsylvania* and its pertinence to understanding federalism and the 1840s political order should be vindicated. Story's lines of reasoning reflect a judicial commitment to preserving dominant political principles and perpetuating the era of compromise,

despite his own political affiliations. *Prigg* establishes an important caveat in the American federalist system as a result of applying traditional federalist conceptions in a different political era. Federalism drove the politics of early America into the 1840s and *Prigg* exits as the ultimate example of this relationship.

Chapter I: Understanding Federalism in the Founding Era

Early Federalism

Doctrines of federalism in American political thought began to appear immediately following the American Revolution. Faced with constructing a new government in place of the British tyranny the revolutionary forces despised, the founders needed to articulate and apply governing principles which would effectively guide their desired democratic state. The framing of the Constitution coupled with the solidification of early American government by early presidents and legislatures set the table for the later establishment of federalist principles by the Supreme Court. However early American political minds, in an attempt to define what constituted federalism, left a great deal unsolved, creating room for the evolution of federalist principles as time progressed.

Much of the early discussion of the federal-state relationships can be attributed to a central phenomenon in American politics, the concept of dual sovereignty. The debates surrounding the Constitution attempted to answer a seemingly unanswerable question: where does citizen loyalty lie, with their states or the newly formed united government? Dual sovereignty was an immensely difficult idea for citizens to grasp and politicians to define. Leading up to the American Revolution, loyalties among citizens were mostly tied to their colonies. Most interstate agreements existed as a result of the monarchical system governing them. Colonies were unified by the common rejection of the English hand on colonial interests. The American Constitution attempted to alleviate these ties to a colonial or state entity and shift the framework of citizen minds from local to national. American cohesion, the founders believed, could be achieved if the people could view themselves as Americans first and state

citizens second. Statists and unionists drove much of the political debate in early American republic and the freshly formed American institutions were forced to grapple with these competing interests. Early administrations attempted to alleviate tensions and their actions combined with Marshall Court jurisprudence championed a solidification of the multi-tiered federal system created by the Constitution with federal authority existing at the top of the political and legal order.

The public debates of the Federalists and Antifederalists during the framing provide an important lens for understanding the early competing theories of government which pervaded the minds of the American public. These substantive debates attempted to articulate clear principles of government and provide justification for the creation of the United States Constitution in its earliest forms. More important than the generalities of the debate are two distinct issues present in the debate. The first is the idea of federalism articulated in the Federalist Papers. The second is the debate surrounding the Courts and their power within the separate, but coequal branch structure. The third is doctrines of federalism located in legislative debates surrounding early American institutions and principles including the First National Bank, and the Alien and Sedition Acts.

First, we must attempt to define the over arching idea of federalism. Federalism, as a framework for government, is a system wherein the laws and authority of the national government supersede the laws and authority of the states. Below this larger concept, two early schools of federalist thought dominated the early republic, Hamiltonian federalism and Jeffersonian federalism. The Hamiltonian view sees the Constitution of the United States as a charter by the people for the people, under which national government allegiance trumps state

allegiance. Jeffersonian federalism views the Constitution in a different light. Jefferson and more states' rights oriented political thinkers wanted to levy significant more power in the hands of the states. Jefferson articulates this position in his Kentucky Resolution in response to the Alien and Sedition Acts of 1798, which will be stated later. Social compact theory, a phenomenon integral to understanding constitutional commitments in each of the case studies of this dissertation also stems from the responses to the Alien and Sedition Acts.

The constitutional framers did not enter the debate with the goal of creating a “federal state” (Madison *Federalist* 39). The framers were attempting to define the relationships between nation and state that would ultimately be called federalism. The Federalist and Antifederalist debate represents two divergent views on these relationships. Their public banter set the foundation for today's conceptions of federalism and the usefulness of the idea for academic consideration. Federalism in its earliest form was essentially a framework of political thought aimed at transferring the idea of sovereignty from the state level to a citizen level. Once this transformation occurred, individuals could see themselves as members of the national community working for the good of the new republic first, and members of their states second. The Constitutional Convention of 1787 aspired to couch this idea in the letter of a written constitution and lay a federal foundation for early American government.

As James Madison described in Federalist No. 39, “the idea of a national government involves in it, not only an authority over the individual citizens, but an indefinite supremacy over all persons and things, so far as they are objects of lawful government” (Madison *Federalist* 39). Federalist 39 is essential to understanding not only federalism itself, but the politics of the Federalist Party. Additionally, Hamilton describes in Federalist 29 how militias with a federal

connection can, “guard the republic against the violences of faction or sedition” and notes, “if the power of affording it be placed under the direction of the union, there will be no danger of a supine and listless inattention to the dangers of a neighbour, till its near approach had superadded the incitements of self preservation to the too feeble impulses of duty and sympathy” (Hamilton *Federalist* 29). Hamilton treats national defense as an issue of great importance, stressing a cohesive national unit as essential to preventing against a “state of disunion” among the American states (Hamilton *Federalist* 26). Alexander Hamilton, James Madison and John Jay’s influence on the establishment of early American government laid the foundation for the federalist Supreme Court jurisprudence. Madison articulates his desire in Federalist No. 10 to create a “national government run by republican statesmen ‘whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations’” (quoted in Gillman 1993, 31).

Madison continues to provide a framework for a federal state in Federalist 45. Madison writes,

But if the Union ... be essential to guard them [states] against those violent and oppressive factions which embitter the blessing of liberty, and against those military establishments which must gradually poison its very fountain; if, in a word the Union be essential to the happiness of the people of America, is it not preposterous, to urge as an objection to a government without which the objects of the Union cannot be attained, that such a Government may derogate from the importance of the Governments of the individual States? (Madison *Federalist* 45).

State influence must be limited if cohesion is to be established and the Union is to succeed according to Madison. Madison believes in a more “co-equal authority” in certain regards, (taxation as explained in Federalist 34), but ultimately relies on the familiar federalist contention that federal power should, in effect, trump state authority as understood under the constitution.

While Madison and the founders aimed to create “neither a national nor a federal Constitution, but a composition of both” Madison ultimately conceded, “in its foundation it is federal, not national” and this foundational moment creates a framework for later political thinking. (Madison *Federalist* 39). Ultimately, “the logic underlying virtually the entire constitution structure derived from the basic goal of delegitimizing factional political and encouraging the belief that legitimate government exercised power disinterestedly to advance a transcendent welfare” (Gillman 1993, 31). The Federalist system championed by the authors of the Federalist papers offered an structure to protect “against the effects of the occasional ill-humors in the society” and provide for the nation strictures on government which would simultaneously unify the nation and preserve some sense of individuality (on a personal, citizen by citizen level) (Hamilton *Federalist* 78).

This position was challenged by many Antifederalists of the era, most notably Robert Yates, as Brutus in the Antifederalist Papers. Yates countered that a federal form of republican government would vanquish need for “any intervention of the state governments, between the Congress and the people, to execute any one power vested in the general government, and that the constitution and laws of every state are nullified and declared void, so far as they are or shall be inconsistent with this constitution, or the laws made in pursuance of it, or with treaties made under the authority of the United States” (Yates, *Brutus* 1). Antifederalists championed a confederated form of government wherein the states possessed “concurrent”, to borrow a phrase from the Virginia and Kentucky Resolutions, “authority” on not only constitutional issues, but essential problems posed to the national government, including taxing authority, commerce authority, etc.

The Antifederalists championed a limited “federal” state because of the perceived diminishment of state sovereignty. The federal state set up by the framers would ultimately, “in a word, prove finally to dissolve all the power of the several state legislatures, and destroy the rights and liberties of the people; for the power of the first will be all in all, and of the latter a mere shadow and form without substance, and if adopted we may (in imitation of the Carthaginians) say, *Delenda vit America* (Yates, *Sydney* 45). The Antifederalist believed fervently that the newly constructed constitution possessed major flaws which could ultimately lead to the downfall of the government and possibly a spiral into civil war (an eerily accurate prediction) (Anonymous, *Philanthropos* 1). It should be noted however that, “Anti-Federalists...distinguished themselves from the Federalists by their political caution, not by their lack of nationalism. An uneasy combination of political caution and nationalism, however, turns out to be the key to the Federal Farmer’s political thought and...the Antifederalist position” (Ericson 1993, 29).

Moreover, Brutus directly challenged the federal government’s authority under the necessary and proper clause and stated “This [new] government is to possess absolute and uncontrollable powers, legislative, executive and judicial, with respect to every object to which it extends...” under this provision (Yates, *Brutus* 1). Brutus extrapolates his complaints concerning the necessary and proper clause to connect with the “very extensive” power and jurisdiction of the Court. Brutus notes the federal courts, “in the course of human events it is to be expected that they will swallow up all the powers of the courts in the respective States” (Yates, *Brutus* 1). Brutus believed the power levied to the executive, the Court, and Congress would “entirely annihilate all the State governments, and reduce this country to one single government”. Brutus argued that under the rules prescribed to the federal government the aggrandizement of power

“will operate in the Federal legislature to lessen and ultimately to subvert the State authority.”

Brutus argues the federal structure does not provide for the state maneuverability he desired but that “this Constitution wants to be a complete consolidation of the several parts of the union into one complete government, possessed of perfect legislative, judicial, and executive powers, to all intents and purposes...” (Yates, *Brutus* 1).

Brutus’ criticisms strike a resounding chord with even those of limited constitutional understanding and possess an interesting connection to later conceptions of the federal-state relationship. Article I Section 8 is the lifeblood of *McCulloch v. Maryland*, the most notable pro-federal Marshall Court decision in our constitutional canon. This decision and its merits will be discussed later, but the purview of the framers federalist understandings illustrates the vitality of discerning the federal-state relationship in American government.

Throughout the American colonial experience, many Americans viewed state allegiance as superior to any single body, including the British monarch. The American Revolution began to shift this paradigm and the earlier idea of unified states fostered the later republic (Wood 2009). One cannot understand the political discourse in early America without understanding the debate over sovereignty. Who interprets the constitution? Whose laws dominate? The framing of the Constitution attempts to answer these questions through the establishment of the early republican government. Fortunately for scholars of constitutionalism, the framing document contains many flaws which throughout American history have been exploited by various branches of government and states. The power fixed by the Constitution afforded the judicial branch the opportunity to speak first on many of these issues, and the Marshall Court’s early influence created principles of federalism which would frame debates for years to come.

Much of the apprehension and caution toward a centralized national government stems from the colonial experience. As Gordon Wood (2009, 355) explains, when the framers envisioned their new form of republican government in 1776 “No American revolutionary even imagined the possibility of creating a strong continental-sized national republic similar to the one that was established by the Constitution a decade later...The only central authority that most American could conceive of was ‘a firm league of friendship,’ or a confederation, among thirteen individual states...held together by a kind of treaty in which each state retained ‘its sovereignty, freedom and independence’”. As the Constitutional debates illustrate, this vision of republicanism was unrealistic and impractical. The failed experiment of the Articles of Confederation necessitated some need for federal/national power to consolidate the new nation. Under the Articles, “the instability, injustice, and confusion introduced into the public councils, have, in truth, been the mortal diseases under which popular governments have everywhere perished” and it was believed that the creation of the Constitution would overcome the instability perpetuated by the Articles (Hamilton *Federalist* 10).

Federalism as a fundamental principle of American government was canonized in political and constitutional lore by the ratification of the Constitution in 1789. Upon the adoption of the Bill of Rights in 1791, it becomes clear that the rights of states possess a markedly important role in the debate over the power of the national government. These ideas in abstraction i.e. all three branches together provide a context for the real battleground for federalist principles in the Marshall Court. Before delving into the jurisprudence, the early presidencies and their effects on national unity and ideology should be considered.

The Early Executive and Political Issues

General George Washington, once elected president of the newly constituted United States, assumed an interesting executive role. Washington's politics are often overlooked, but Washington's leadership style and early political maneuvering played an extraordinarily important role in the formative years of the United States. Washington's military success during the Revolution granted him immense respect from political colleagues and ordinary citizens alike. This respect led him to first his appointment as commander in chief of the Continental Congress in 1775 and later to the first American presidency. Once the Constitution was ratified in 1789, the electors unanimously chose Washington as the nation's first president (Greenstein 2009).

Greenstein (2009, 16) notes, "Washington was acutely aware that his every presidential action was likely to establish a precedent and noted 'many things which appear of little importance in themselves...may have great and durable consequences from their having been established at the commencement of a new general Government.'" Washington's understanding of his political position resulted from his upbringing in an English common law tradition. Precedent in English common law is exceedingly important because of its lack of a written constitution. Consequently, precedential actions as understood by Washington would effectively shape the new nation and his understanding of executive power in this tradition. He understood the intense debate which had surrounded the newly formed government he now led and this understanding was epitomized through his cabinet appointments. Washington appointed both Alexander Hamilton and Thomas Jefferson to key positions within the executive branch. The level-headed Washington understood the magnitude of this political moment and his methodical style galvanized the nation and solidified early American government. Interestingly, these two political figures would lead the way on forming federalist principles through their clashes on

major political issues, especially the first Bank of the United States, and lay the foundation for how later political actors would understand and apply political principles.

A number of practical concerns with perpetuating a state of unity in the early republic affected early politics. The initial American government understood the significance of presenting the United States as a unified national state to foreign entities. One of the most prominent issues was the idea of a national economy. National leaders wished to consolidate state economic power in a national economy. They believed the absence of economic unity would invite foreign nations to play states against one another for economic advantage. This competition would effectively drive both a political and economic wedge between states. Economic consolidation and presentation to the international community of a single, unified national entity would not only strengthen the American government at home, but would quell the economic games many foreign nations hoped to play. The federal state ultimately created by the Constitution (which, consequently, was created during a national “recession”) worked to effectively unify state political and economic interests.

Under the Adams Administration, foreign policy also affected early American politics. Following the Jay Treaty, France began to attack American merchant ships and refused to accept the newly appointed American ambassador. Yet, Congress was unwilling to begin a military buildup for fear of war. As Lucas Powe (2008, 34) states, “The Federalists weren’t entirely sure what they intended the army for; it was more the case that they simply wanted one. While an army might be necessary if there were threat of war, once that passed, a standing army contravened the Founding’s republican principles.” The Federalists were simply interested in unifying the newly formed American nation and viewed the dispute with France as an

opportunity to do so. Powe (2008, 34) adds, “Unfortunately for the Federalists and ultimately for the Courts, the Federalists, in an effort to create what Hamilton called ‘national unanimity,’ decided to use the war hysteria to rid themselves of Republican newspapers.” Enter the Alien and Sedition Acts.

The Alien and Sedition Acts presented problems not only for the Court, but for Federalist politics in general. Backlash to this legislation was widespread, not only among political elites, but among national publications and their readers, the American citizenry. The backlash resulted in the creation of both the Virginia and Kentucky Resolutions by James Madison and Thomas Jefferson, respectively and “both states declared the Acts unconstitutional and pledged to “maintain[] unimpaired the authorities, rights, and liberties, reserved to the states respectively, or to the people” (*Virginia Resolution of 1798*)” (quoted in Hays 2010, 17). These resolutions attempted to challenge the national executive authority they viewed had infringed on the American right to free press (among other violations). The resolutions represented an early political moment where American constitutionalism was directly challenged, and this sent a resounding warning throughout the federal government. Ultimately the election of 1800 swept out the Federalists, the legislation expired, and Jefferson deemed the constitutional debate over the acts “dead by the voice of a nation.” But this early nation-state controversy advanced an ideal which would continue to arise and is indicative of early American political controversy and sets the stage for a solidification of federalist principles by the Marshall Court.

The constitutional weight and significance of the Alien and Sedition act exists in its differentiated construction of the principle of federalism. The Alien and Sedition Acts represent a political structure for federalism through legislation, rather than simply an ideological

commitment or expression of the principle. The creation of these acts and the responses they generated illustrate the federalist dichotomy arising in the early republic period. The acts do more than simply convey a belief in a principle, but they attempt to establish this principle in federal law. The Alien and Sedition Acts directly relate to federalist doctrine because competing constitutional and political minds almost immediately repudiate their existence. Arguably the most vocal voice in opposition to the legislation was Thomas Jefferson, who offers his constitutional vision in the Kentucky Resolution. Jefferson states his belief in the Constitution of the United States as a social compact, an agreement among states, not people, since the states ultimately ratified the document. Through this construction Jefferson explains, “That the principle and construction contended for by sundry of the state legislatures, that the general government is the exclusive judge of the extent of the powers delegated to it, stop nothing short of despotism; since the discretion of those who administer the government, and not the constitution, would be the measure of their powers: That the several states who formed that instrument, being sovereign and independent, have the unquestionable right to judge of its infraction;...”(*Kentucky Resolution of 1799*).

Jefferson very clearly articulates his vision of the federalist system. Namely, states created this system not as an instrument to crush state interests in the name of the federal government, but as an instrument used to govern the states in a limited manner. States possess rights not only to operate politically under this system, but possess constitutional power to check the actions of the federal government. Madison writes in the Virginia Resolution, “That this Assembly doth explicitly and peremptorily declare, that it views the powers of the federal government, as resulting from the compact, to which the states are parties; as limited by the plain sense and intention of the instrument constituting the compact; as no further valid that they are

authorized by the grants enumerated in that compact; and that in case of a deliberate, palpable, and dangerous exercise of other powers, not granted by the said compact, the states who are parties thereto, have the right, and are in duty bound, to interpose for arresting the progress of the evil, and for maintaining within their respective limits, the authorities, rights and liberties appertaining to them” (*Virginia Resolution of 1798*). The Virginia and Kentucky Resolutions publicly voice a discomfort with the federal government’s legislative position. Both Madison (an author of the Federalist Papers ironically) and Jefferson believed this legislative action promoted federal government authority inconsistent with contemporary political and constitutional philosophies. Political actors in the era of the Alien and Sedition Acts conversely used their installation as a moment to repudiate the measures of the Hamiltonian federalist vision, but the idea that federalism can rear its head in these structural manners is vital to understanding the political order and various uses of the principle of federalism.

Prior to the Alien and Sedition Acts in 1798, however, one of the most controversial debates of the Early Republic surrounded the creation of the First National Bank. President Washington turned to both his Treasury Secretary Alexander Hamilton and Secretary of State Thomas Jefferson for opinions on policy implications, economic implications and constitutionality. Examining this debate offers explicit articulations of the divergent federalist visions of these two politically influential men. Hamilton’s report on the Bank’s constitutionality suggests, “To deny that the government of the United States has sovereign power, as to its declared purposes and trusts, because its power does not extend to all cases would be equally to deny that the State governments have sovereign power in any case, because their power does not extend to every case”. Hamilton continues, “The main proposition here laid down, in its true signification is not to be questioned. It is nothing more than a consequence of this republican

maxim, that all government is a delegation of power. But how much is delegated in each case, is a question of fact, to be made out by fair reasoning and construction, upon the particular provisions of the Constitution, taking as guides the general principles and general ends of governments”. Hamilton locates the enumerated provisions of the Constitution of the United States as “guides” and notes that implied powers “are to be considered as delegated equally with express ones” (Hamilton 1791).

Hamilton specifically takes on the “Secretary of State’s” interpretative constitutional practices when he discussing the meaning of the necessary and proper clause. Hamilton writes,

The whole turn of the clause [necessary and proper] containing it indicates, that it was the intent of the Convention, by that clause, to give a liberal latitude to the exercise of the specified powers. The expressions have peculiar comprehensiveness. They are thought to make all laws necessary and proper for carrying into execution the foregoing powers, and all other powers vested by the Constitution in the government of the United States, or in any department or officer thereof... To understand the word as the Secretary of State does, would be to depart from its obvious and popular sense, and to give it a restrictive operation, an idea never before entertained. It would be to give it the same force as if the word absolutely or indispensably had been prefixed to it. (Hamilton 1791).

Hamilton very clearly articulated a number of important political and constitutional differences here. The Secretary of the Treasury repudiated Jefferson’s notion that language strictly limits the American federal authority. Hamilton believed constitutional language located authority and broad discretion be levied to the government once this location was made. Jefferson’s contention that linguistic structures specifically inhibited the federal government’s authority was, in Hamilton’s mind, an absurdity. Hamilton cites the framing debates which he contended included the language with the intention of the permitting broad authoritative latitude.

On federal-state relationships, Hamilton writes “The circumstance that the powers of sovereignty are in this country divided between the National and State governments, does not afford the distinction required. It does not follow from this, that each of the portion of powers delegated to the one or to the other, is not sovereign with regard to its proper objects. It will only follow from it, that each has sovereign power as to certain things, and not as to other things” and Hamilton believes the establishment of a national bank incorporates federal power to collect and levy taxes, create corporations, lend and borrow money, and regulate interstate commerce (Hamilton 1791). Hamilton’s principles for bank establishment stem from his interpretative framework combined with political preferences and this combination shapes early conceptions of the federal-state relationship.

Much of Thomas Jefferson’s qualms with the bank stem from Hamilton’s constitutional assertions, especially in relation to the term necessary. Jefferson delineates between “necessary” federal power and “convenient” federal power. Jefferson writes, “If has been urged that a bank will give great facility or convenience in the collection of taxes, Suppose this were true: yet the Constitution allows only the means which are "*necessary*," not those which are merely "*convenient*" for effecting the enumerated powers”. Thomas Jefferson regards Hamilton’s vision for federal power as an incredibly dangerous aggrandizement of centralized power, severely limiting state maneuverability writing, “If such a latitude of construction be allowed to this phrase as to give any non-enumerated power, it will go to everyone, for there is not one which ingenuity may not torture into a *convenience* in some instance *or other*, to *some one* of so long a list of enumerated powers.” Jefferson believed Hamilton’s view not only limited state maneuverability, but warned that adherence to this dangerous practice “would swallow up all the

delegated powers, and reduce the whole to one power, as before observed. Therefore it was that the Constitution restrained them to the *necessary* means, that is to say, to those means without which the grant of power would be nugatory” (Jefferson 1791).

Jefferson’s vision of constitutionality rested on the principle that the federal government was created to protect and facilitate state interests, not squash them. The federal-state relationship was not one of hierarchy, but of equal interaction and begged the question, “Can it be thought that the Constitution intended that for a shade or two of *convenience*, more or less, Congress should be authorized to break down the most ancient and fundamental laws of the several States; such as those against Mortmain, the laws of Alienage, the rules of descent, the acts of distribution, the laws of escheat and forfeiture, the laws of monopoly?” (Jefferson 1791). Thomas Jefferson’s believed Hamiltonian constitutional principles were grossly unjustified. He concluded in his message to Washington, “Nothing but a necessity invincible by any other means, can justify such a prostitution of laws, which constitute the pillars of our whole system of jurisprudence. Will Congress be too strait-laced to carry the Constitution into honest effect, unless they may pass over the foundation-laws of the State government for the slightest convenience of theirs?” (Jefferson 1791). Jefferson clearly fashions a vision of the United States in a vastly different light than his political colleague and these differences in principles would drive the evolution of federalism into the later antebellum period. Future governing regimes would continue to debate the constitutionality of the national bank. Future governing regimes would wrestle with the federal-state relationship, and modify principles in an attempt to alleviate major political problems.

The War of 1812 and economic policies of early executives created yet another political controversy which drove the federalist discourse. Once again states were presented with unfavorable federal policies they vehemently opposed and attempted to assert constitutional authority a la the Virginia and Kentucky Resolutions. A conglomerate of New England states opposed the federal government's actions convened in Hartford, Connecticut which became known as the Hartford Convention. Ironically, the dissenters in Hartford were not traditionally federal decentralization proponents. Some of the most prominent Federalist Party members attended and supported the movements in Hartford. The Federalists in Hartford suggested serious amendments to the American constitution, none of which would be entertained seriously by the Democratic-Republican Congress. Nonetheless, this convention exists as yet another example of state actions suggesting the federal government recognize their right to constitutionally dissent and drove the exploration of the role of federalist principles despite its limited legislative effect (Wood 2009).

Additionally, the early Republic was faced with numerous other issues which tested the governing capacity of the newly created institutions. Taxing power, police powers, creation of a national bank, coining currency, creation of state militias and navies, other economic concerns and eventually slavery (which is certainly considered at the framing, but truly rears its ugly head as the nineteenth century progresses) all enter the fray due to the perceived ambiguity of the framing document. As Robert McCloskey (2010, 8) explains, the "Constitution posed more questions than it answered" and many of these issues navigated their way through the American institutions and ultimately arrived at the Court.

Here lies the Court's institutional and political influence, where because "the Constitution makers postponed some of the most vital question confronting them, the Constitution and the Supreme Court inherited the quasi-religious symbolic quality attached to the doctrine of 'higher law,' but the dogmas of popular sovereignty also continued to survive and flourish and therefore influence constitutionalism," an idea essential to understanding early American politics and their connection to *Prigg* jurisprudence (McCloskey 2010, 9). The duality of the American mind be it "popular sovereignty and fundamental law" or "federal/national and state" permeates American political culture at the framing and throughout the antebellum period driving it mostly in favor of the federal government. Thus, discerning the federal-state relationship drove early political discourse and set the stage for the Marshall Court's canonization of certain federalist principles within the judicial institution.

Chapter II: The Marshall Court and Federalism

Understanding the Supreme Court and Regime Politics

Before identifying the nuts and bolts of Marshall Court federalist jurisprudence, it is necessary to frame the institutional operation of the Supreme Court itself. The Court's operative influence stems not from autonomous power, as a litany of scholarship has articulated, but as part of the larger political system or "decision-making majority" (Dahl 1957). Dahl (1957, 11) writes, "At its best the Court operates to confer legitimacy, not simply on the particular and parochial policies of the dominant political alliance, but upon the basic patterns of behavior required for the operation of democracy". The politics of the early Court set the stage for "foundations of judicial supremacy" (or lack thereof), but more importantly reinforce the idea of a political institution working "concurrently" with the other branches. Robert McCloskey (2010, 15) notes, "Americans have always experienced a peculiar difficulty in accommodating themselves to one of the least contestable observations made—that the Supreme Court is a willful, policy making agency of the American government." Once this observation is accepted, it becomes easier to view the Court's institutional effectiveness on the overall political climate.

Keith Whittington (2007, 26) explains, "The Court cannot stand outside of politics and exercise a unique role as guardian of constitutional verities...The more fundamental problem is that the Court's judgments will have no force unless other powerful political actors accept the importance of the interpretive task and the priority of the judicial voice. The substantive influence of the Court and its usefulness as an academic tool for understanding the American governance scheme stems from the principles it articulates through judicial decisions which, although couched in legal interpretation, largely represent a political ideology or at the very least

some set of political principles. Whittington (2007, 27) continues “the American judiciary has been able to win the authority to independently interpret the Constitution because recognizing such an authority has been politically beneficial to others”. The political principle over which the Marshall Court exerted considerable influence is clearly federalism and the solidification of the American national state. Federalism’s presence in early American political debate connects directly with the Marshall Court legal articulation of said principle and Dahl’s understanding of Court action ultimately explains the Court’s “friendliness” to the dominant political regime. Essentially, “the authority of the federal judiciary is rooted in concerns for electoral success and coalitional maintenance and the complications for political action created by the American constitution system of fragmented power. Within boundary constraints set by other political actors, the judiciary has enjoyed significant autonomy in giving the Constitution meaning” (Whittington 2007, 27). The Supreme Court’s political role in the early American republic lays a foundation for not only later Court jurisprudence, but national and state political authority. The political influence of the Court is the defining characteristic of the institution. As Whittington (2007, 26) explains “Constitutional law rests within a larger field of constitutional politics, and the scope and the substance of constitutional law will be shaped by that politics” and Marshall Court federalist jurisprudence applied in the *Prigg* era reflect this mold.

Bradley Hays (2010) aptly notes in his study of the influence of state interposition on American constitutional politics, “Federalism is more than a reflection of national regime politics and Supreme Court jurisprudence.” These two ideas shape the principle, but do not adequately provide substantial scholarly answers. Identifying the principle is important, but understanding its role in the greater American political system at substantial historical moments can offer a new understanding of classic political thought. The “analytical utility” of federalism and application

of these principles to other areas ultimately provides the lens for understanding governmental behavior (Gerring 2001).

Introducing the Marshall Court

The early Court's responses to the national government-state relationship are important because these decisions cement early visions of federalism in the legal institution and provide a framework for the Court of the 1840s. Federalist principles shaped economic issues, liberty issues, slavery jurisprudence and many other facets of the American political system. That said an important concept which lies at the heart of federalism is the concept of dual sovereignty. Clearly the conflicting framing ideologies speak to the early controversy surrounding this concept. As Robert McCloskey (2010, 37) identifies, "Marshall faced his great task of augmenting the judicial power and shaping the Constitution into a charter for nationalism."

The early Court, like the early executive, needed a political capability to solidify its institutional position. The capability stemmed from the ambiguity of the framing document in terms of judicial power. So, when considering the national-state relationship in the legal arena, the Court was afforded the first opportunity to settle dual sovereignty disputes. McCloskey (2010, 37) characterizes the Court's early responsibility as a "balancing feat" where "each case raises the question of the Court's authority together with that of nation-state relationship, and the Court must always decide one question in the light of the other, taking care that its nationalist zeal does not compromise its own status or that claims for judicial power are never so extreme as to vitiate the crusade for nationalism." Again, although it may appear the Court's authority rested mostly in a strictly legal manner, with the Judiciary Act of 1789 and Marshall's usurpation of judicial review in *Marbury v. Madison*, the Court assumed a political institutional role. The

question that has plagued constitutional scholars since the framing is a simple one: who interprets? Unfortunately (for some, but fortunately for the careers of fellow constitutional academics) this simple question does not appear to have a simple answer. Additionally, this question early in American history presented the republic with a quandary that has continued to plague the American political system.

The debate surrounding legitimate constitutional interpretation creates a political framework for the Court. Despite its usual historical contextualization as a non-partisan body, when more closely analyzed its political position is important. The Court must act politically to achieve institutional legitimacy by the mere fact that its competing branches are wholly political bodies. Despite Gerald Rosenberg's (1991) contentions that the Court lacks the ability to drive widespread political transformations, hence its usual lockstep with the dominant regime i.e. Dahl (1957), the Court in practice operates as a political institution. A political institution is defined as a body whose operation in the governance scheme reflects policy points and some sort of electoral commitment (in this case the survival of their institution in early America). This understanding of the Court is essential when considering the context of the Marshall Court and McCloskey (2010, 15) notes, "had judges like Marshall been a little more inclined toward abnegation and a little less inclined toward *politics*, the uncertainties would be very different, the tale would be of another order. But then the country it was told about would not be the historical United States".

John Marshall and the Early Republic

A comprehensive understanding of early conceptions of federalism is incomplete without addressing the background of the man who can be credited with creating not only the

constitutional issues of the 1840s, but many of those which still exist today. John Marshall played an important political role prior to his appointment to Chief Justice. Certainly most of his institutional role and influence is measured by his judicial decision making, but his role as an early “judicial statesmen” offers an interesting look into the politics behind the jurisprudence. A political career which began in the Virginia House of Delegates in 1782, Marshall was later elected to the House of Representatives in 1799 and appointed Secretary of State under the second president John Adams. Prior to Marshall’s ascendancy into national politics, he anchored the Federalist movement in the state of Virginia. In addition to these political roles, Marshall served in the Revolutionary War effort and found himself surrounded by the great political minds of Virginia. As a rising political mind in the 1790s, Marshall found himself involved in the major political questions of the era. Through this involvement he gained a larger understanding of the political moment. Marshall watched firsthand as the early nation was designed this would certainly shape his later judicial action (Newmyer 2001).

Marshall was elected to the state’s ratification convention and was an ardent supporter of the initial Constitution. An essential caveat to this support was the apparent “distinction Marshall drew between the worlds of law and politics” (Newmyer 2001, 102). R. Kent Newmyer notes two developments which ultimately molded the political and judicial mind of John Marshall, a “Washington-Adams Federalist in Jeffersonian Virginia”. The first was the “unexpected emergence of political parties” a phenomenon politicians on both spectrums abhorred. Newmyer notes, “Marshall and Adams feared for the future” upon the realization that “party government was there to stay” (Newmyer 2001, 102). Nevertheless, the earliest political controversies “were translated into questions of constitutional interpretation and argued out in the language of constitutional law” (Newmyer 2001, 103). This is where Marshall’s political role informs the

pattern of his decision making. Despite the personal resistance Marshall may or may not have had toward the “politicalization of the Constitution” or a general entanglement of law and politics, his jurisprudence reflects a very different pattern. For one, Marshall sought unanimity in his decision writing in an effort to strengthen its political weight. I do not refrain from prefacing “weight” with “political” because as my following analysis of Marshall’s jurisprudence will unveil, despite his use of legal jargon and meticulous care taken by the Court not to divulge political commitments, erudite analysis of Marshall’s decision making spoke to very distinct political principles. Like Washington, a man Marshall stoutly admired, John Marshall was very much aware of the institutional role he was afforded after his nomination to chief justice, an idea his jurisprudence reflects.

Marshall’s jurisprudence exhibits two obvious patterns. First, the number of opinions he wrote himself. Of the 46 Court decisions concerning federalism from 1801-1805, Marshall’s first four years as chief justice, Marshall penned 42 himself. The four Marshall did not write he recused himself (Maltz 2010). Aside from Marshall’s insistence of writing these early legal explanations himself, his insistence on unanimity was of equal importance. Again, Marshall understood the historical moment of which he was a part and knew single, consolidated opinions would hold more institutional weight than fractionated legalistic principles. This desire not only reflects Marshall’s understanding of the Court’s importance post-*Marbury v. Madison*, but concurrently exhibits the entanglement of politics and law Marshall accepted while a member of the Court. Marshall’s legal definitions provide an analytical window for understanding Marshall’s political framework and the Court’s position as a political institution.

As contemporary historians have adequately explained, following the Federalists defeat in the election of 1800, Federalist Party political figureheads, most notably John Marshall among others, retreated into the federal judiciary. This began a string of landmark Supreme Court decisions which effectively transformed the constitutional order by establishing formal national government supremacy through jurisprudential precedent. *Marbury v. Madison*, arguably Marshall's most famous decision (or infamous depending on your American constitutional paradigm) offers the first look into the judicial politics of John Marshall, but more importantly the earliest conceptions of American federalist principles as defined by Supreme Court jurisprudence.

Rather than provide an in-depth scholarly treatment to every landmark Marshall Court decision (scholars whose talents exceed my own have adequately done this work) and locate the federalist emanations in each, the cases can more properly be lumped into political and constitutional categories in an effort to understand the federalist principles of the Marshall Court within certain arenas that relate specifically to *Prigg*. While the categories are broad, they focus the theoretical principles I attempt to articulate and create a more comprehensive connection between the Marshall Court and the later Court. The first is early judicial review. The question of legitimate constitutional interpretative authority plagued the Marshall Court (and scholars today) throughout the period of the early Republic. Many early Court decisions draw an inordinate amount of attention to the justification of judicial review, but these attempts at justification only occurred after the usurpation of judicial authority articulated in *Marbury v. Madison*.

Marbury addresses the question which has plagued constitutional theorists since the decision was handed down, which American institution possesses the legitimate right to

constitutional interpretation? For *Prigg*, this question is essential in discerning why states on both sides of the slavery issue reacted to the decision the way they did. If we understand the constitutional culture of the American governance scheme as similar to the framework in which we understand the general conceptions of federal government, i.e. coequal branches of government, this will aid the connection *Prigg* shares with its own political culture. Using a Supreme Court decision as an analytical tool for understanding American politics in and of itself requires an adequate unpacking of the previous jurisprudence and its relation to the political issues of the era and *Marbury v. Madison* justifies (to a certain extent) the role the early Court plays in American politics.

When Marshall writes, “It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each” he essentially accepts Publius’ interpretation in Federalist 78 concerning the true function of the Court (he also cites a belief in a substantive right emanating from Article IV) (*Marbury v. Madison* 1803). An essential aspect to the *Marbury* decision is Marshall’s lack of legal citation for this right. Yet, judicial review is still prominently accepted as a legitimate doctrine in our understandings of American constitutionalism. Marshall’s language used for establishing the Court’s “province and duty” echoes that of Federalist politics and rests on his beliefs concerning “the basis, on which the whole American fabric has been erected” (*Marbury v. Madison* 1803). Marshall locates the Supreme Court’s authority through his theoretical explanation of what a written constitution means, specifically our constitution. He credits written constitutions with forming the fundamental and *paramount* law of the nation” (emphasis added) which create the “fundamental principles of society” and through his vision Marshall develops a

foundation for the institutional development of the United States Supreme Court (*Marbury v. Madison* 1803).

Marbury's relationship to early federalism emanates from the assertion of constitutional authority fashioned by Marshall. Again, despite its intuitive leap, the Supreme Court has been widely accepted as the final word on constitutionality in American government. This understanding contextualizes the importance of using Court decision making as a tool for understanding American political development. Once Marshall had asserted the Court's constitutional authority, he attempted to solidify the influential position of his institution through a myriad of Court decisions perpetuating his vision of a federalist America.

The second category of Marshall Court jurisprudence is that of federal authority. This categorization, while broad addresses a number of different specific national-state issues which can be painted with this broad general brush. The first case I will analyze, *McCulloch v. Maryland* probably exudes the most prominent federalist agenda of Marshall's early decisions and is essential to understanding the early political principles of the United States because it directly challenges a debate which concerned the early Framers. *McCulloch v. Maryland* decided in 1819, asked the Court to decide the constitutionality of Maryland's attempts to tax bank notes not chartered in Maryland, which at this time were notes created by the Second Bank of the United States. Marshall adeptly invokes the necessary and proper clause (*U.S. Constitution* Article I, Section 8) and established the federal right to create a bank and squash state laws in pursuance of an asserted federal constitutional right. As Robert McCloskey (2010, 43) explains, "*McCulloch* is the decision...most important to the future of America, most influential in the

Court's own doctrinal history, and most revealing of Marshall's unique talent for stately argument."

More important than the jurisprudential weight of the holding, are its political implications for the doctrine of federalism. *McCulloch* represents an early national-state controversy which cuts to the core of Marshall's vision of American government. States' rights advocates bemoaned the creation of the bank and certainly would not support a decision justifying its existence, yet Marshall believed "that a national government restricted in its powers...would be incapable of the great tasks that might lie before it" and thus, "set down the classic statement of the doctrine of national authority" (McCloskey 2010, 43). Marshall's decision in *McCulloch* prominently echoes the Federalist vision he yearned to protect after the dissolution and political power loss of his former party. Central to Marshall's understanding of the national regime is his contention that "the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create;" a clear and direct condemnation of Maryland's practices.

Marshall contends "the question is, in truth, a question of supremacy" and "if we apply the principle for which the state of Maryland contends, to the constitution generally, we shall find it capable of changing totally the character of that instrument" which effectively "would transfer supremacy in fact to the states" *McCulloch v. Maryland* 1819). This language clearly echoes the early federalist rejections of a state's ability to usurp some sort of federal authority and exists as a clear attempt to "enhance national power in all respects, partly because this would simultaneously restrict the power of the states, but partly too because they anticipated awesome

tasks for the nation and wanted to insure that it was constitutionally equipped to deal with them” (McCloskey 2010, 42).

Marshall understood the direction of the American government, or rather he wanted to fashion the direction of the American government. When Marshall states, “As the laws of the Union are to become the supreme laws of the land; as it is to have power to pass all laws that may be necessary for carrying into execution the authorities with which it is proposed to vest it” he unveils his framework of the American federalist state. Marshall’s invokes the legitimacy of the “authors of those excellent essays” noting had they been asked “whether they contended for that construction of the constitution, which would place within the reach of the states those measures which the government might adopt for the execution of its powers; no man, who has read their instructive pages, will hesitate to admit, that their answer must have been in the negative” (*McCulloch v. Maryland* 1819). He remarks earlier how “the arguments of the Federalists are intended to prove the fallacy of these apprehensions” in reference to the “embarrassment of state taxation” of a federal arm. Marshall seems to treat the papers of his Federalist colleagues as near legal justification for federal action.

His constant references in *McCulloch* to the “authors of those excellent essays” clearly suggests the great extent to which the Federalist political framework pervaded Marshall’s judicial mind, similar to the construction R. Kent Newmyer gives Marshall’s thought as alluded to earlier. Marshall goes as far to consider the Federalist Papers as “entitled to great respect in expounding the constitution” (*McCulloch v. Maryland* 1819). One might suggest his invocation of these ideas results from the ratification of the articles and because these were largely the creation of the Federalist minds and the constitutional question in *McCulloch* stems from this

particular section, but given Marshall's political past and association with the Federalist political movement it is difficult to deny Marshall's partisanship.

A second important Supreme Court decision concerning federal authority decided in the Marshall Court era was *Martin v. Hunter's Lessee* (*Martin v. Hunter's Lessee* 1816). Denny Martin sought to recover a body of land in Virginia he inherited from Lord Fairfax and contended that his rights were secured under the Treaty of Peace with Great Britain in 1783. Virginia's highest appellate court had denied his and other British citizens' land rights in *Fairfax's Devisee v. Hunter's Lessee* (*Martin v. Hunter's Lessee* 1816). However, on remand of that case the Virginia court refused to abide by the Supreme Court's ruling and held unconstitutional the portion of Section 25 of the Judiciary Act of 1789 which extended federal jurisdiction over decisions of state supreme courts. Martin then appealed to the Supreme Court. (O'Brien 2008, 801). *Martin's* significance to *Prigg* and federalism exists in two areas. First, the majority decision was notably penned by Justice Joseph Story, not John Marshall.

As aforementioned, Marshall yearned to author as many early Court decisions as possible because of his institutional awareness and as a byproduct of the unanimity he often achieved on the Court. Notably, in *Martin*, because of Marshall's connection to Lord Fairfax, a party in the case, Marshall recused himself and chose Joseph Story to write the opinion of the Court. Story's involvement in *Martin* is significant because Story also would go on to write the *Prigg* decision. Story's language in *Martin* foreshadows the principles he later champions in *Prigg*. The second central aspect of the *Martin* opinion is Story's perpetuation of "federal federalism" or "Hamiltonian federalism" which mirror's Marshall's adjudicative patterns and in effect contributed to the Supreme Court's institutional solidification in early America.

The federalist underpinnings of Story's jurisprudence in *Martin* emanate from the language and style of his writing. Justice Story spends an enormous amount of time in *Martin* establishing the procedural and legal validity of the Court's opinion. This is of particular importance because *Martin* directly presents the Court with the dual sovereignty dichotomy and offers the Court an opportunity to establish precedent on the issue via its judicial capacity. Story asserts his juridical framework through Supremacy Clause citation, other textual evidence and a number of "historical facts" which effectively codify the Court's institutional legitimacy and establishes a preeminent authority in the federal court system. The first of these "historical facts" asserts the Court's ability supersede the Virginia court system's decisions through the extension of the Court's appellate jurisdiction as a result of the original "exposition of the constitution". Story insists the founding document supports the Court's jurisdiction *and* review authority via an originalist framework and through Marshall's codification of judicial review through *Marbury* and Section 25 of the Judiciary Act.

Story shares the Marshallian paradigm of federal government authority and Earl Maltz (2009, 35) states "beginning with his treatment of *Martin v. Hunter's Lessee* Story issued a long series of opinions emphasizing the power of both Congress and the federal courts, at times exceeding even John Marshall himself in his zeal to expand federal power". Story, like Marshall, considers the constitution an arm of the people, or social *contract*. This political lens was used by early Federalists in an effort to shift the framework of the dual sovereignty debate. Hamilton explains in Federalist 27, "by extending the authority of the federal head *to the individual citizens* of the several states, will enable the government to employ the ordinary magistracy of each, in the execution of its laws" (Hamilton *Federalist* 27). Interestingly, in *Prigg*, Joseph

Story's constitutional construction partly shifts, but greater attention to this sentiment will be addressed later.

The importance of Story's construction in *Martin* is essential to understanding the regime politics of early America. As noted earlier, national regimes affect the constitutional order and as Thomas Jefferson famously remarked federalist politics "retired into the judiciary". Story, a staunch Northern federalist, was appointed through the Federalist regime. *Martin v. Hunter's Lessee's* jurisprudential effectiveness and articulation of "historical facts" stem from its connection to this national regime. Another of Story's historical assertions speaks directly to this point. Story understands the Court possesses "an appellate jurisdiction in a great variety of cases brought from the tribunals of the most important states in the union, and that no state tribunal has ever breathed a judicial doubt on the subject, or declined to obey the mandate of the supreme Court". Hamilton in Federalist 80 states that Courts can rule "To all cases in law and equity, arising under the Constitution and the laws of the United States. This corresponds with the two first classes of causes, which have been enumerated, as proper for the jurisdiction of the United States" and Story's judicial maneuvering in *Martin* mirrors Hamilton's argument. Additionally, Story believed that the breadth of their decision making has an ability to "place the doctrine upon a foundation of authority which cannot be shaken" (Hamilton *Federalist* 80).

Story's contentions echo the concerns of John Marshall and the Federalist political contingent of the era. Earl Maltz (2009, 14) explains that "*Martin* firmly established the position of the Supreme Court as the ultimate arbiter of federal law in the American constitutional system". Within the two major questions addressed by the Marshall Court, *Martin* falls within the category of the dual sovereignty debate. *Martin* represents a crucial institutional moment for

the Court and the American governance scheme as a whole. Not only does the case directly address the hierarchy of the American judicial system, but the issues and subsequent decision clearly represent a theory articulated by the early Federalist minds. And the only way to preserve the governing capacity of the new republic and create a firm institutional basis for Court maneuvering, Supreme Court justices of the Marshall era believed they must perpetuate the framers understanding of the proper federal order.

The issue of federal authority also rears its head in both *Sturges v. Crowninshield* and *Houston v. Moore*. *Sturges* addressed a New York bankruptcy law which allowed debtors to list their assets, assign their property, and discharge debts for the benefit of their creditors in an effort to avoid prosecution. The petitioner argued the state had violated federal authority enumerated in Article I Sec. 8. Although Marshall rejected this specific line of argumentation he “observed ‘whenever the terms in which a power is granted to congress, or the nature of the power, require that it should be exercised exclusively by congress, the subject is as completely taken from the state legislature, as if they had been expressly forbidden to act on it’” (Maltz 2009, 16). Marshall was more than willing to accommodate a federal congressional right over any state’s perceived legitimacy, indicative of the political principles Marshall wished to defer exclusively to federal hands.

Houston v. Moore presented the court with another opportunity to define their institutional decision making. *Houston v. Moore* concerned a challenge to a Pennsylvania statute that vested state courts with the authority to try and punish violators of a federal law which prescribed penalties for those who refused to serve in the militia. The Pennsylvania statute prescribing state courts with the authority to punish federal offenders violated the core

government lineage the Marshall Court championed. Justice Bushrod Washington explained that when Congress and the states wanted to legislate in the same arena, the federal scope outweighed the state action. Coordinate authority in a constitutionally enumerated congressional arena did not exist in the mind of Justice Washington or the rest of the Marshall Court. The Court continued to perpetuate, even in seemingly insignificant cases of the time, a vision of federalist closely connected with its appointed era. The preservation of federal authority in the early republic was a premier tenet of the Marshall Court and these four cases speak directly to this point (*Houston v. Moore* 1820).

The second arena where the Marshall Court left its institutional stamp was interstate commerce. The interstate commerce “category” encompasses the essential federalist controversy of the era, police powers. Where does federal authority end and state begin? The first most prominent early answer the Supreme Court professed came in *Gibbons v. Ogden*. Robert Fulton and Robert Livingston were granted by the New York legislature a monopoly on the operation of steamboats in the state’s waters. They in turn licensed Aaron Ogden to exclusively operate a ferry between New York City and various ports in New Jersey. Ogden sought in New York courts an injunction against Thomas Gibbons, who ran a competing ferry between New York City and Elizabethtown Point, New Jersey. Gibbons believed his boats were licensed under a 1793 act of Congress for vessels “employed in the coasting trade and fisheries.” New York courts upheld Ogden’s claims on the grounds that the 1793 act covered only coasting vessels and Congress had not passed legislation specifically regulating steamboats. Gibbons then appealed to the Supreme Court, which held that monopoly granted New York interfered with Congress’s power to regulate interstate commerce.

Commerce clause jurisprudence has long been used as a tool for understanding larger trends concerning the Court. The Supreme Court tends to exercise influence in this area which permeates the constitutional order and shapes political principles. Commerce clause jurisprudence in early America “took an increasingly prominent role in the struggle over the shape of American federalism” (Maltz 2009, 17). Why? Because commerce clause controversies spoke directly to the dual sovereignty and police powers issues. “Police Powers” in its jurisprudential sense are directly invoked throughout this line of cases. Dual sovereignty exists as the larger political question as states were attempting to understand their authority and role in the newly created federal system. What powers, if any, did states hold in certain political arenas and how far would the institutions of the federal government go to curb their state authority? *Gibbons* provides the Court’s preeminent response. The idea of dormant federal power, which slightly arose in *Sturges*, appears directly in the instance of *Gibbons*. The importance of dormant federal authority arising in *Gibbons* is noteworthy because of Howard Gillman astutely recognizes “Marshall *went out of his way* to declare (in *dicta*) that the federal government’s authority to regulate interstate commerce precluded any state regulation on the topic” (Gillman 1994, 882).

The Court analyzed the effects a state granted monopoly had on American interstate commerce. Marshall believed this granted venture had a disproportionately negative effect on American interstate commerce and this idea effectively established the idea of a “dormant commerce clause” in constitutional lore. If an intrastate move negatively affects the greater interstate system Congress retains the right to regulate. Marshall writes, “No direct general power over these objects is granted to Congress; and, consequently, they remain subject to state legislation. If the legislative power of the Union can reach them, it must be for national

purposes...to some power which is expressly given” (*Gibbons v. Ogden* 1824). “Commerce”, Marshall described, “is traffic, but it is something more; it is intercourse” and the result of this intercourse provides Congress with the constitutional authority to exert its “plenary authority”. Marshall in *Gibbons* explains “If Congress has the power to regulate it, that power must be exercised whenever the subject exists. If it exists within the states, if a foreign voyage may commence or terminate at a port within a state, then the power of Congress may be exercised within a state” (*Gibbons v. Ogden* 1824). Howard Gillman (1994, 880) illuminates, “By declaring his willingness to strike down federal laws that addressed topics other than those listed in Article I Section 8 Marshall made it clear that he believed that courts could void legislation even though a law may not violate a specific constitutional prohibition or require the judiciary to violate the Constitution in the fulfillment of its constitutional responsibilities under Article III”. Coincidentally, Marshall rejects the argument that a Congressional regulatory authority over interstate commerce runs into state police powers. Marshall writes,

So, if a state, in passing laws on subjects acknowledged to be within its control, and with a view to those subjects, shall adopt a measure of the same character with one which Congress may adopt, it does not derive its authority from the particular power which has been granted, but from some other, which remains with the state, and may be executed by the same means. All experience shows that the same measure, or measure scarcely distinguishable from each other, may flow from distinct powers; but this does not prove that the powers themselves are identical (*Gibbons v. Ogden* 1824).

But, as Maltz astutely recognizes, “Marshall was careful to distinguish state laws that directly regulated interstate commerce from measures such as ‘inspection laws, quarantine laws, [and] health laws,’ which, although perhaps having ‘a remote and considerable influence on commerce,’ he nonetheless described as ‘forming a portion of that immense mass of legislation, which embraces everything within the territory of a State, not surrendered to the federal

government” (Maltz 2009, 18). Constitutional law academia generally considers these “inspection, quarantine laws, [and] health laws” as general state police powers. The distinction may be small, but its pertinence to *Prigg* is essential. Story in *Prigg* goes on to dynamically purport a new version of state police power authority, within the context of the slave issue.

Marshall’s federalist ideologies in *Gibbons* although omnipresent in the above excerpts, are most clearly exhibited when he writes, “In our complex system, presenting the rare and difficult scheme of one general government. Whose action extends over the whole, but which possesses only certain enumerated power, and of numerous state governments, which retain and exercise all power not delegated to the Union, contests respecting power must arise” (*Gibbons v. Ogden* 1824). Marshall exhibits a willingness to seize the constitutional and institutional moment. Similarly in *Willson v. Blackbird Creek Marsh* Marshall articulates his construction of concurrent authority, a phenomenon which pervades American politics further during the nullification crisis, and somewhat opens the door for a state’s right to legislate. The Delaware legislature had authorized a corporation to build a dam across a small creek. Interestingly, as Earl Maltz identifies, the vessel which contested the construction of the creek was licensed under the same statute in question under *Gibbons* nonetheless, the Court upheld the constitutionality of the state’s right to build the dam. The Court argued that if the construction of the dam is effectively used as an instrument of interstate commerce, its construction is constitutional. Here, Marshall affords the state an opportunity to assert legislative authority so long as it positively affects the greater federal good. Additionally, in Marshall’s mind legislative authority rested with Congress and in *Brown v. Maryland* he articulated further federal rights to regulate. Marshall contended that federal power in interstate commerce should be left exclusively in the hands of Congress. Thus, the paradigm of Marshall’s decision making can be described as wholly federal, affording

a state an opportunity for individual regulation only if this regulation exists as a subservient measure to federal authority in a particular constitutional arena.

Maltz writes, “Obviously none of the decisions from *Martin* through *Willson* had a direct impact on issues related to slavery. Nonetheless, the principles underlying those decisions provided critical jurisprudential background for the Court’s consideration of a variety of issues that were central to the sectional conflict—issues that first came before the Court in the early 1840s” (Maltz 2009, 19). Maltz is certainly correct in his stress of the impact of the Marshall Court jurisprudential background as foundation for the background of the 1840s, but I wish to take this sentiment a step further. The Marshall Court federalism does more than simply provide legal background for the era. Story and the *Prigg* Court utilize these purported principles to effectively define what scholars consider “slavery jurisprudence”. Marshallian federalism was utilized by the Supreme Court in 1842 as a tool for establishing a legitimate judicial decision which placated sectional divides due to a willingness to identify with the dominant political regime of the era. *Marbury*, *Martin*, *McCulloch*, and *Gibbons* establish the framework which Joseph Story would later utilize in a different political moment to achieve a certain political goal.

Political Constructions of the Marshall Court

Marshall Court jurisprudence, in the areas of federal authority and interstate commerce/police powers, clearly articulates a distinct set of institutional principles designed to effectively mediate the national-state competition of the early republic. The Marshall Court’s institutional assertions of federal power were consolidated in early jurisprudence and established national sovereignty over state sovereignty. As R. Kent Newmyer (2006, 42) explains, “The government of the United State occupies the high ground in the American federal system—

because and here Marshall the conservative sounded the democratic theme—‘it is the government of all; all its powers are delegated by all; it represents all, and acts for all.’ Marshall sincerely believed in divided sovereignty, but he also believed that the American people and not the states created the constitution.”

This distinction is important for understanding how the Court views the constitution. Social compact theory v. social contract theory often drove the debate concerning the constitution and subsequently national authority. Understanding the Constitution as a social compact yields additional legitimate power to the states because the constitutional agreement is viewed as one among states, not people. Contrarily, understanding the Constitutional as a social contract shifts the debate. Now the constitution can be understood as an arm of the citizenry, an agreement among individual American citizens concerned with unifying the states. The distinction may seem small, but this shift not only creates a different understanding of American governance among the people, but more importantly (for our purposes) in the Court. Once the Court understands the Constitution through a theoretical paradigm, it can effectively adjudicate according to its framework. Thus, the Marshall Court and its members, understanding the Constitution as an agreement among the *people* through the enumeration, “We the people of the United States, in order to form a more perfect Union...do ordain and establish this Constitution for the United States of America”, are able to fashion legal argumentation so as to limit state power (*U.S. Constitution*, Preamble).

Through the lens of the Court, their adjudicative procedures establish nothing unordinary because through their theoretical construction the decisions they levy comply with the established American constitutional order. As Keith Whittington (2007, 2) acknowledges “the

judiciary believed it ‘must of necessity expound and interpret that rule.’ It was the ‘very essence of the judicial duty’ to determine the meaning of the Constitution and law aside those statutes that contradicted fundamental law. ‘The Constitution is either a superior or paramount law’ subject to judicial interpretation and application or it is ‘absurd’.” This legal and constitutional construction paved the way for Court assertions of federal authority, beginning with the controversial move in *Marbury* and continuing through the jurisprudence I have outlined.

Clearly from the outset, the newly formed Marshall Court’s intentions, because of their connection with the Federalist founding contingent, were aimed at quelling state usurpations of power and preserving the federal order. Howard Gillman (1994, 880) explains, “Marshall’s Constitution was not a document that was designed to allow powerholders to do whatever they pleased subject only to a handful of clear-cut limit. It was a blueprint for a multi-tiered political system in which power and responsibilities were delegated and distributed among competing institutions and levels of government and which established judicially enforceable boundaries of authority between and among these various institutions.” This construction of federalism would go on to effectively govern the American governance scheme through the 1840s and probably provides the most accurate description of the theoretical goal of federalism while addressing its practical use.

Keith Whittington (1996, 2) explains that “although the Courts are important in defining and enforcing the limits of federalism, exclusive focus on judicial pronouncements as the source of understanding constitutional meaning is misguided.” Essentially, the Courts act as a vital foundation, but “political actors must bring external values and interests to bear in order to add specificity to an inherently indeterminate text and changed received understandings of its

implication” (Whittington 1996, 2). Whittington’s understanding of the constitutional order as a politically driven and molded phenomenon helps place Marshall Court jurisprudence in its proper politico-historical position and facilitates understanding of Court action and general political trends.

Early Federalists for example, stressed two basic tenets when advocating support of the constitution: “1) the union is necessary to secure the political happiness of the American people; 2) an energetic federal government was necessary to preserve the union” (Ericson 1993, 51). Later political moves by the elected Federalist political order, notably the Alien and Sedition Acts, which again resulted in the Virginia and Kentucky Resolutions, support the notion that the political order drives the constructions of the era’s contemporary social principles. The Virginia and Kentucky Resolutions, while important in their own right, act as a prelude to the discussion of state constitutional interpretative authority which burst onto the political scene in the early 1830s. Marshall’s decision in *Worcester v. Georgia* and the confrontation between President Jackson and the Supreme Court serves as a prominent example of Whittington’s assertion that external political forces must be adequately analyzed to properly understand not only the limits of federalism, but the Court’s relationship to the political regime.

Marshall’s decision in *Worcester* established a precedent of tribal sovereignty asserted by the Court with which the executive branch disagreed, and disagreed publicly. This controversy will more adequately be analyzed in the following chapter, but it should be noted that Marshall’s decision in *Worcester* recognized a federal right to legislate in the arena and repudiated the state of Georgia’s authority to intervene in Indian affairs. Marshall continued his traditional jurisprudential patterns in *Worcester*, but more important than his decision was the political

reaction to it, which notes a political changing of the guard in the United States and begins the shift from the federalism championed by early Federalists and Marshall to the more fractionated view established by the 1840s political climate and the Taney Court in the *Prigg* decision. We see, however, the Marshall Court attempting to delineate federalism by solidifying principles set forth by early federalists. Marshall used the judicial institution to perpetuate his vision of these principles and tipped the power structure in favor of the federal government.

Chapter III: Andrew Jackson and a Transforming Constitutional Order

Federalism in the Jacksonian Era

The Election of 1824 generated a transformative shift in American politics. Andrew Jackson, despite receiving the most popular and electoral votes, failed to win the American presidency and John Quincy Adams took the reins of American government. Regardless of Jackson's election, the voting pattern of the American people represented a shift in political principles. Jackson's existence in American politics as a champion of common man ideals and the response of the American electorate to his rhetoric demonstrate the new conceptions of government absorbed by the political regime in the mid 1820s. The Election of 1828 officially brought Jackson to political power and offered him the opportunity to perpetuate his political and constitutional vision.

Andrew Jackson exists within constitutional literature as an avowed repudiator of early conceptions of Hamiltonian/Marshall federalism. Some traditional scholarly treatments pit Jackson directly against the Marshall Court and paint him as a strong executive interested only in constitutional politics which would benefit his political vision. Jackson's significance to constitutional theory and the political principles of not only his own era, but also the *Prigg* era, cuts deeper than simply antagonism to Marshall and other early contentions. As previously discussed, understanding the paradigm of federalism is imperative to understanding the political system of the United States. Simultaneous sovereign connections to both state and nation drove the debate surrounding constitutional issues throughout early America. Keith Whittington (1996, 18) describes "Jacksonian" federalism as a "compromise between the centrist and radical positions" stressing a "dual concern" predicated upon "preserving the rights of the several states

and the integrity of the Union” (Jackson 1833). Jacksonian democracy on the whole can be understood within this framework, and this framework represents the evolution of national federalist principles following the Marshall Court.

Three essential Jacksonian political moments demonstrate the evolution of federalism. The first, the Supreme Court decision of *Worcester v. Georgia*, pits Andrew Jackson directly against the federal institution primarily insistent on establishing a wholly federal order. Georgia believed in a reserved right to negotiate with Indian tribes within its boundaries, but Marshall and his federalist companions disagreed and decided the right was held exclusively with Congress by Article I Section 8. The *Worcester* decision and its principles at first blush mirror the framework and style of early Marshall Court decisions. This characterization generally holds true, but the importance of the *Worcester* case lies in the friction between the Court and Jackson which resulted, not simply the applicable jurisprudence. Marshall established his views of federalism in his decision and Jackson subsequently challenged and effectively vacated the Marshall ruling. Jackson felt Georgia held a sovereign right to negotiate with Indian tribes established within Georgian borders and believed this was a constitutionally viable argument. Georgia could exercise this power within the framework of Jacksonian federalism (*Worcester v. Georgia* 1832).

Similarly, the second Jacksonian political moment, the Second National Bank veto, further extends the constitutional vision of Andrew Jackson. Jackson’s language in the veto exudes feelings of discontent with the old Marshall order and furthermore cites a necessity to preserve a state sovereign right because too much of a consolidated national force “makes government weak” (Jackson 1832a). The Bank existed as a wholly federal institution which

impeded state progress in the eyes of the Jackson and its destruction was essential to the survival of the federal system and the devolution of political power to the states. As federal executive, Jackson championed this theory while maintaining national power. The issue of the national bank plagued Jackson throughout his presidency and would later play an important role in the politics of the early 1840s.

Nullification provides the third illustration of federalist principles in the Age of Jackson. South Carolina, through the voice of political dissident John Caldwell Calhoun, introduced a competing theory to Marshall Court federalism and attempted to establish a state opportunity at constitutional interpretation. This new paradigm on constitutional interpretation attempted to revisit Madison and Jefferson Virginia and Kentucky Resolutions. Much of Calhoun's political thought arose through the revival of these earlier ideas. South Carolina wanted to distance itself from the federal order and establish a state check on the national system. Jackson's rejection of the theory, despite his general support of states' rights in a broader sense, occurred as a result of the advocacy of secession by Calhoun were the government not prepared to acknowledge South Carolina's legitimate authority. Jackson held a desire to preserve the Union paramount to a desire to support state authority. Jackson considers attempts to dissolve the federal hierarchy and locate sovereign authority solely in states "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" (Jackson 1832b). This federalist conception allows us to understand the "centrist" federalism Whittington describes and demonstrates the evolution of the national-state relationship into the 1830s and 40s.

Essential to understanding the role of Andrew Jackson in antebellum constitutional politics is observing the political moment which he came to power. Stephen Skowronek (1993) identifies presidential political cycles as an integral element of understanding the political and constitutional order and frames political history into three distinct categories: reconstruction, articulation and disjunction. Certain political figures are afforded an opportunity at reestablishing the political order due to a previous administration whose political discourse and actions were disconnected from the perceived needs of the nation. Andrew Jackson exists as one of these political figures. By 1828, the nation yearned for a return to Jeffersonian principles seemingly lost following the “disjunction” of John Quincy Adams. Jackson represented a return to the perceived successful political order of 1800 based on “the disruption of current governing arrangements,” and a “repudiative message and disruptive effect providing a vast reservoir of authority for independent action” and consequently an attempt to apply Jeffersonian federalism to a wholly Marshall/Hamiltonian federalist order (Skowronek 1993, 131).

Worcester v. Georgia: Jackson and the Marshall Court

Disseminating federalist evolution during the Jacksonian presidency requires an analysis of the tension between President Jackson and Chief Justice John Marshall. Both of these influential figures held vastly different views of the role of government and enjoyed a rather tenuous relationship throughout their concurrent government service. Politics and the Court jurisprudence are not mutually exclusive contrary to many current contentions. Marshall and Jackson’s relationship speaks directly to how the federal executive can influence the Court, and how the Court responds to an antagonistic dominant regime.

Questions surrounding Native American sovereignty provided the Marshall Court with an opportunity to establish itself as an institution publicly misaligned from the Jacksonian regime. *Worcester v. Georgia* serves as the most prominent example of a “dominant regime” versus Court showdown during the Jacksonian era and offers an important look into the relationship among John Marshall, the Supreme Court itself, and Andrew Jackson. President Jackson passed in 1830 the Indian Removal Act in an effort to quell the issues in the state of Georgia surrounding the large presence of Cherokee Indians. Coupled with the federal legislation, Georgia law required white men living within Cherokee boundaries to obtain a license and register with the state government as citizens of the United States, despite their residency under Cherokee jurisdiction. Samuel Worcester was prosecuted under this 1830 Georgia statute for failing to comply and was convicted and sentenced to hard labor for four years. Worcester argued this prosecution by Georgia violated the U.S. Constitution, past agreements between the United States and Indians (i.e. the Treaty of Hopewell) and previous acts of Congress exerting explicit authority to regulate trade with Native American entities. The constitutional claim, Marshall’s response, and Jackson’s reactions unveil the political influence this case had on the constructions of federalism during the era.

Referring to Native American relationships, the Constitution explicitly states, “Congress shall have the power to regulate Commerce with foreign nations and among the several states, and with the Indian tribes” (*U.S. Constitution* Article I Sec. 8). However, economic concerns were not explicitly present in the *Worcester* controversy, in fact the controversial statute in play was an oath statute present in the Georgia law, and thus Marshall felt it necessary to establish his ruling within a broader base of federal government-Native American interactions. More essential than simply the relationship between Native Americans and the United States government to

Marshall was the idea of tribal sovereignty, or Native American independence. Marshall's opinion in *Worcester* contains a litany of federal positions on the matter and the reason for this extension is twofold: 1) Marshall understood the magnitude of this political moment. As Gerard Magliocca (2007, 42) explains, "Those who lived through 1832 thought they were seeing a turning point in constitutional law that rivaled the founding" due to the political power Andrew Jackson had begun to assert in other political areas. 2) Marshall wished to perpetuate what he perceived as the proper doctrine of federalism present in the American political system, of which Jackson and Georgia were in violation. Marshall subsequently issued an opinion addressing not only the specific constitutional questions involved, but larger themes concerning the role of government. The address of these larger themes created an extended framework for Marshall Federalism, and a provided a lens for future Court jurisprudence.

Leading up to and following the framing, as described in chapter one, the concept of federalism struggled to maintain a distinct definition. States' rights oriented political leaders retained one definition, Federalist political leaders retained another. Amidst this struggle, John Marshall and the Supreme Court attempted to establish legal doctrine reflecting the proper role and applicability of this foundational concept. *Worcester* arises during a period of political transformation. A new political regime i.e. the Jackson administration had arrived which understood constitutional principles, specifically federalism, in a much different light. Consequently John Marshall, always cognizant of political time, adds the *Worcester* opinion to his litany of federalist decisions in response to an antagonistic federal executive. Marshall notes that the laws of Georgia, "interfere forcibly with the relations established between the United States and the Cherokee nation, the regulation of which, according to the settled principles of our constitution, are committed exclusively to the government of the union" (*Worcester v. Georgia*

1832). More importantly however, than Marshall's willingness to support the Cherokee claims and further establish the doctrine of federalism, is the political influence on the opinion.

As aforementioned, Marshall goes far beyond the required legal answers of the controversy and issues, what Magliocca (2007, 45) calls a "preemptive opinion" A "preemptive opinion" is a "form of aggressive response founded on the Court's willingness to create a new doctrine that is specifically targeted at the reformer's agenda" where "the justices generally reach conclusions that are valid under existing precedent but restate those tenets in a grossly exaggerated manner that is more about negating the views of the rising generation than honestly evaluating the legal authorities" (Magliocca 2007, 43). Dominant regime politics play an integral role in the creation of such opinions. Such opinions can only be issued "when intergenerational tensions are at their peak" and the rise of the Jackson administration resulted in a clash with traditional political norms (Magliocca 2007, 43). Concurrently, Skowronek's view of presidential regime transitions and the role the Marshall Court initially played during the Jefferson administration. Skowronek believes that when a constitutional and/or political order reaches "disjunction", a new "reconstructive" regime enters American politics because of the opportunity afforded to them as a result of a deteriorated and fractured political system. Jackson's regime very clearly introduces a new version of politics into the American political system due to the failures of previous administrators. However, just as Marshall Court attempted to strike back against Jeffersonian federalism and a state oriented national political paradigm, Marshall strikes against the Jacksonian regime. Magliocca and Skowronek's frameworks can help identify institutional relationships between political regimes and courts and what results these relationships produce in terms of federalist principles.

Andrew Jackson's reconstructive regime came to power on the basis of "breaking a knot of aristocratic corruption and restoring integrity of republican institutions", and a restoration of Jeffersonian principles (Skowronek 1993, 131). These ideas would immediately threaten the champion of the legal Federalist movement, John Marshall. Marshall needed to re-solidify the institutional legitimacy of the Court and re-establish a Hamiltonian federalist governance scheme. The interesting difference however, was now Marshall had established jurisprudence as a safety net, which allowed Marshall to take a more political approach to establishing a new constitutional order and imposing his doctrine of federalism on the American governance scheme, rather than the more legal approach he used earlier. As Magliocca (2007, 44) illuminates, "a narrow holding in *Worcester* would not have had an impact on the broader constitutional debate. The Court wanted to turn public opinion against the Removal Act...and wanted to counter the Jacksonian argument that the Tribes had no sovereign rights and that states should have the primary role in setting Native American policy". Considering these ideas, the Court acted as a truly political institution. The jurisprudential arguments of Marshall were certainly consistent and valid, but his approach and political considerations support the concept that the Court acts as a political force, especially considering the principles of federalism he perpetuated in the past versus the more Jeffersonian vision Jackson was beginning to articulate.

While the decision in *Worcester* was an attempt to repudiate the new governing regime, it also applies a political position present in its era, namely a reversion to and perpetuation of Hamiltonian federalism. *Worcester* attempted to levy jurisprudential federalist strictures on the regime it rejects. However, Jackson recognized the political move Marshall was making and used his politics and belief in independent branches of government to direct his reaction to the decision. Jackson made clear "the Court's constitutional understandings were not authoritative

for the other branches of the national government” by telling Congress in 1831 they had no authority to govern Indian tribes wholly existent within one state, in this case Georgia (Whittington 2001, 34). Jackson used Marshall’s decision, despite his disagreement, to his own political advantage. Jackson articulated a vision of federalism wherein the federal government need not act as a direct result of judicial decision making, especially if the issue in question infringed on a state’s right to rule within its own borders, as Georgia attempted to do with its citizen licensing act. Whittington (2001, 34) categorizes Jackson’s relationship with the Court as one he “was happy to enlist in support of his own policies, such as revenue collection in the resistant South Carolina...and was clear that the Court’s constitutional understandings were not authoritative for the other branches of government” an idea he would assert again in the Second National Bank controversy.

Consequently, the Jackson regime recognized Marshall’s move and asserted its authority in order to protect the political and constitutional beliefs the executive championed. Political myth claims Jackson retorted “John Marshall had made his decision; now let him enforce it!” in response to this decision, but regardless of the vitality of this quote, Jackson’s constitutional paradigm was clear. Whittington correctly draws a parallel between Jackson and Jefferson’s constitutional vision through a departmentalist framework. Just as Jackson asserted independent branch authority in his response to Marshall, Jefferson asserted similar authority in his response to *Marbury*. Whittington (2007, 33) explains that Jefferson believed coordinate branches should be “‘equally independent in the sphere of action assigned to them.’ and the idea that the Supreme Court exists within the American governmental scheme as the “ultimate arbiter of constitutional meaning” was a “very dangerous doctrine indeed”.

Clearly the institutional divide between the Court and the executive expanded as a result of Marshall's antagonism and since the Court extended no remedy for the Cherokee nation, Georgia nor Jackson needed to react. This inability for the Court to effect change fits interestingly in the mold of dominant regime politics. Not only do Jackson's alleged statements unveil the limited enforceability capacity of the Court, but the effective ignorance of the ruling in a sense delegitimizes the Court's role in the political sphere. Absent support from the dominant regime, the Court possesses little to no political effectiveness. As *Worcester* and its response illuminates, rejecting the dominant political paradigm does not bode well for institutional legitimacy. Robert Dahl (1957, 564) makes clear in his article *Decision Making in a Democracy* "What is critical is the extent to which a court can and does make policy decisions by going outside established "legal" criteria found in precedent, statute, and constitution. Now in this respect the Supreme Court occupies a most peculiar position, for it is an essential characteristic of the institution that from time to time its members decide cases where legal criteria are not in any realistic sense adequate to the task". Marshall's decision, through the eyes of Jackson, "makes a policy decision by going outside established 'legal' criteria found in precedent, statute, and constitution" (Dahl 1957, 564).

Similarly, Magliocca acknowledges this through his attempt to categorize *Worcester* as a "form of aggressive response founded on the Court's willingness to create a new doctrine that is specifically targeted at the reformer's agenda" where "the justices generally reach conclusions that are valid under existing precedent but restate those tenets in a grossly exaggerated manner that is more about negating the views of the rising generation than honestly evaluating the legal authorities" (Magliocca 2007, 43). This paper, however, is not entirely concerned with the relative magnitude of the decision on the constitutional order and its effect on national policy,

but rather with elucidating the principles articulated as a result of this relationship. Clearly in *Worcester* there are two competing constitutional factions, Marshall and Jackson which help shape doctrines of federalism. When Marshall's writes, "The Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress. The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States," he very clearly and explicitly embraces the constitutional vision of the Hamiltonian order (*Worcester v. Georgia* 1832). Through Marshall and Hamilton's paradigm, when the letter of the constitution locates a specific authority for the federal government, only the federal government can exclusively levy that right; and state actions which exist in conflict with this right are effectively null and void. Jackson's response very clearly was one of disdain for Marshall's constitutional vision, but again he invokes a departmentalist framework in an effort to combat what is, in his view, a gross misuse of federal judicial power and attempts to combat the perpetuation of Hamiltonian vision with the departmentalist method. Nonetheless, his assertion of judicial unenforceability effectively renders the decision useless.

Departmentalism, as Whittington notes, is not a guiding principle but it is useful for understanding how leaders justify divergent constitutional visions. It arises, "not as a basic prerogative of the presidential office, but rather as a structurally dependent resource" (Whittington 2007, 77). This theory aids in disseminating the relationship which sits at the foundation of this thesis namely: the "dynamic nature of the Constitution, which in turn requires recognizing the relationship between politics and the Constitution" (Whittington 2007, 79).

Marshall and Jackson's disagreement created an opportunity for Jackson to create a new federalist vision, one where he asserts federal executive power independently from the judiciary in an effort to protect state legislatures. In effect, Marshall's choice to rule against the dominant regime in *Worcester* allowed Jackson to facilitate the evolution of federalist principles.

An antagonistic Court only aggravates the political regime, as evidenced during the New Deal; and generally speaking the ideology of the Court is immediately shifted as a result of self-awareness or judicial appointment. In the case of Jackson, he eventually appointed Roger B. Taney, and with this new appointment, a new era of judicial statesmanship emerged, one which aligned with the reconstructive Jacksonian policies. Additionally, one could argue the Court learns its lesson following *Worcester* and the reaction of the other institutions. Justice Story, the majority opinion writer in *Prigg*, and a staunch Northern federalist, pushes aside his political constructions to a degree and issues a decision directly reflective of the political era. Story stays true to his federalist roots, but offers a new construction of these roots to mold itself within in the political paradigms of the 1840s.

The lesson learned from *Worcester v. Georgia* stems from the political conversations of the Supreme Court and the national executive. Chief Justice John Marshall wanted to combat the Jacksonian regime view on Native American sovereignty by allocating legislative power in the hands of the federal government and limiting a state's ability to comply with Cherokee removal. *Worcester* plays a pivotal political and judicial role in fashioning federalist principles. Its attempt to subvert the dominant regime represents the Court's desire to embrace a political role through jurisprudential means. This role however, failed to produce any meaningful change due to its lack of alignment with the dominant political regime. Interestingly, John Marshall did not require

federal marshals enforce the freedom of Samuel Worcester for his refusal to register within the Cherokee territory (an intriguing connection to Story's move in *Prigg*) which effectively limited any enforceability for any political institution. Nonetheless, Marshall asserted a political position inconsistent with the Jackson political vision and it is this interplay which results in fractionated federalist principles moving forward.

The National Bank: A Constitutional Battleground in Jacksonian America

Andrew Jackson's discontent with the functionality and mere existence of the national bank created a wave of political controversy during the tail end of his first term and throughout his second. Jackson stood in staunch opposition to the disparate economic effects he believed the existence of the bank had on the American people. This political regime believed it governed on principles which effectively represented the common man. The extension of suffrage during the 1820s aided the election of Jackson and he believed it was his duty to fulfill and protect the rights of his electorate. The Bank, Jackson argued, placed too much economic prosperity with the few wealthy and damaged the economic future of regional and local banks and negatively effectively the majority of the American citizenry (Schlesinger 1945). At the economic and policy level, this contention seems plausible, but the actions of Jackson and the era's connection to constitutional principles and the shifting political paradigms of the first third 1800s exist within the constitutional justification Jackson used to support his federal authority. This justification provides us with another articulation of Jackson's federalist principles and demonstrates his varying commitment to these principles.

The Bank Veto's pertinence to constitutional constructions of the 1830s exists on a number of levels. The Veto sets forth a new doctrine of constitutional legitimacy and "would

become a foundational text for the next constitutional regime” (Magliocca 2007, 53). First and foremost, Jackson despised the bank of policy grounds. The bank disproportionately aided the wealthy, thus in his eyes should not be sustained. This idea cut directly against the foundational principles of Jacksonian democracy. Prior to Jackson’s contentions of unconstitutionality, the bank had been found constitutionally viable by the Court via the “necessary and proper” clause as established in *McCulloch v. Maryland*. Jackson challenged this by adopting a Jeffersonian construction of constitutional authority concerning the bank and directly challenged the Court’s reasoning and authority in *McCulloch*, stating “It is neither necessary nor proper to transfer its legislative power to such a bank, and therefore unconstitutional. By its silence, considered in connection with the decision of the Supreme Court in the case of *McCulloch* against the State of Maryland, this act takes from the States the power to tax a portion of the banking business carried on within their limits, in subversion of one of the strongest barriers which secured them against Federal encroachments” (Jackson 1832a).

Jackson’s language suggests a vision of devolved, Jeffersonian federalism with a significant caveat for executive constitutional interpretation. Jackson cites this doctrine to support his claims and explains, “True strength consists in leaving individuals and States as much as possible to themselves—in making itself felt...not in its control but in its protection; not in binding the states more closely to the center, but leaving each to move unobstructed in its proper orbit” (Jackson 1832a). President Jackson wanted to repudiate past notions of judicial supremacy and set forth doctrines of flat hierarchy and coordinate branches of government with a departmentalist, independent twist as necessary (see *Worcester* response above). Jackson inherently challenged the constitutional claims set forth in *McCulloch* and “renounced the assumption of executive deference to the Court on questions of constitutionality”, similar to his

stance regarding *Worcester* (Skowronek 1993, 142). Jackson offered new assertions of authority concerning executive deference to Congress as well. The National Bank existed as an arm of the executive branch to Jackson, thus “he asserted a presidential prerogative over legislative action that affected that branch” (Skowronek 1993, 142). Important to note is who Jackson believed possessed this constitutional authority. Federal entities possessed the sole right to interpret the constitution as Jackson would again publicly set forth during the nullification crisis. States deserved protection under this construction, but interpretative power ultimately rested with only federal branches, which allows us to understand how Jackson demarcates the federal-state relationship in a larger context.

Similar to the departmentalist framework Jackson invokes when he fashioned his response to *Worcester*, he stated, “The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judge, and on that point the President is independent of both” (Jackson 1832a). Jackson believed “by making our federal government strong, we make it weak” and believed that dissolving monopolistic federal power over monetary policy achieves a larger political goal of greater state sovereignty within the federal system (Jackson 1832a). Jackson believed “traditional faith in federal action was wrong” and contradicted not only his own political values, but what he understood as the political values of the national regime. By vetoing the Bank, Jackson “made a clean break with the single most important institutional link between the federal government and the national economy” (Skowronek 1993, 142). Jackson inherently understood state desires to retain a level of state sovereignty and attempted to cater to this desire through his repudiation of the bank, and afford states an area of legislative maneuverability, a tenet of *Prigg* era federalist constructions. Jackson

continues the legacy of fashioning a corner for state legislative operations under the federal umbrella.

The political implications of Jackson's constitutional assertions should also be noted. As a point of policy, Jackson despised the national bank. The National Bank reflected the Hamiltonian federal order Jackson was seeking to break down. Hamilton's constitutional defense of the Bank to George Washington in 1791, identified in chapter one, illustrates the constitutional implications of this federal institution. Consequently, Jackson's political opposition to the Bank resulted in his constitutional repudiation. Just as Jefferson used a constitutional argument in an attempt to dispel its legitimacy, Jackson uses the wholly executive tool of the veto, with a constitutional argument attached, to stop the charter. Jackson politicizes the Bank, and then breaks down its legitimacy through his constitutional vision, a vision committed to preserving state maneuverability in the economic sector. The political-constitutional connection Jackson makes strengthens his political opposition to the Bank. The Constitution's language was an extremely important political tool for Andrew Jackson and his opposition to the Second National Bank illustrates his ability to manipulate political concerns into strong constitutional arguments.

Jackson's views were not met without opposition. The congressional triumvirate of Henry Clay, Daniel Webster, and John Calhoun vehemently opposed Jackson's assertions of executive authority. Henry Clay had initially called for the extension of the bank in an effort to politically alienate Jackson. Jackson's response to the bank, Clay believed, would inevitably isolate Jackson from a faction of his party and end his future political career. Clay went as far as to

state “should Jackson veto it, I will veto him” implying his determination to extend the bank and successfully challenge Jackson (Clay 1832).

Following Jackson’s veto, Daniel Webster also published a reply to his political foe discrediting the new constitutional construction and writing “It remains, now, for the people of the United States to choose between the principles here avowed and their Government. These cannot subsist together. The one of the other must be rejected” (Webster 1832). Additionally, John C. Calhoun believed Jackson’s contentions did not exhibit enough of a states’ rights position and identified principles similar to his later contentions during the nullification crisis (Schlesinger 1945).

Jackson’s expressions of constitutional authority in the Bank Veto effectively established a new constitutional order and this is reflected by responses from prominent political figures. Magliocca (2007, 59) quotes John Marshall following the re-election of Jackson in 1832 as saying, “I yield slowly and reluctantly to the conviction that our Constitution cannot last...The union has been prolonged thus far by miracles. I fear they cannot continue”. Jackson had asserted that each branch “be guided by its own opinion of the Constitution”, an inherent attack on the Constitution Marshall supported. The challenge of the bank effectively “repudiated the whole framework of government in which the Bank was embedded” and “rejection of the bank was tantamount to open defiance of both judicial and congressional authority” (Skowronek 1993, 142). Jackson’s Bank veto slowly began hammering away at Marshall Court federalism by specifically discrediting a pillar of the old federalist order in *McCulloch*. New constitutional authority was being asserted and the old constitutional order had been ideologically destroyed making room for the development of a new federal government and state relationship. Jackson’s

efforts “set the stage for a durable, programmatic division in American politics over the role of the national government generally and the presidency in particular (Skowronek 1993, 144). Importantly, Jackson “retained all along a coherent and compelling narrative about this place in history” and no matter what institutional barriers were thrown in his way in an attempt to maintain the political order of the past Jackson countered with repudiative action (Skowronek 1993, 143). Jackson’s “order-shattering threat” opened the door for new constitutional players and his “repudiative authority became a battering ram for change” and soon enough states realized the potential power and authority in constitutional interpretation (Skowronek 1993, 143).

The Nullification Crisis and the Shift of a Political Order

1832 was a politically volatile year for the Jackson administration. The Supreme Court handed down the decision of *Worcester v. Georgia* in an attempt to challenge Jacksonian politics. Nicholas Biddle and Henry Clay attempted to extend the charter of the national bank as a political move against Jackson. And finally, John C. Calhoun of South Carolina attempted to nullify federal law over Southern economic activity. Responses like Calhoun’s in 1832 speak to the level which the political paradigm of the United States had begun to shift. South Carolina’s outright resistance to a federal tariff policy and attempt at usurpation of constitutional interpretative authority represents a major turning point in American politics. This political controversy had been brewing since 1828, but by 1832 and into 1833, the nullifiers were prepared to take action. A political opposition to Andrew Jackson led by John C. Calhoun, Jackson’s former vice president, attempted to nullify the tariff acts of 1828 and 1832 on the policy grounds that the acts “placed them [the Southern States] in regard to taxation and

appropriations in opposite relations to the majority of the Union” (Calhoun quoted in Bancroft, 114). The act of 1828 or “Tariff of Abominations”, enacted under John Quincy Adams, disproportionately damaged the economic interests of the Southern states. The government was attempting to shore up industrial industries of the North, which in turn had a disproportionate effect on industries in the South. Jackson’s attempt in 1832 to create an economic compromise resulted in the Tariff of 1832, but its practical application did little to quell the concerns of Calhoun and his South Carolinian contingent. An economic downturn in the Southern economy resulted following the institution of these tariffs and Calhoun subsequently moved to act, effectively nullifying both tariffs on November 24, 1832 on the grounds that,

Congress of the United States by various acts, purporting to be acts laying duties and imposts on foreign imports, but in reality intended for the protection of domestic manufactures and the giving of bounties to classes and individuals engaged in particular employments, at the expense and to the injury and oppression of other classes and individuals, and by wholly exempting from taxation certain foreign commodities, such as are not produced or manufactured in the United States, afforded a pretext for imposing higher and excessive duties on articles similar to those intended to be protected, (Calhoun 1832).

Calhoun’s South Carolina Ordinance of Nullification introduced a theory of constitutional authority formed on the basis of concurrent majorities, a principle present in the earlier Virginia and Kentucky Resolutions and addressed in chapter one. The noted difference between the two exists in their application. Interposition suggests states can limit national policy enforcement, a policy President Jackson may have been sympathetic to (although this is unclear). The language describing state interposition is almost identical to the language asserting judicial review, but stops at voiding federal statutes and focuses on simply leaving statutes unenforced. Calhoun’s theory essentially establishes a new veto point within the federal hierarchy, a position Jackson certainly rejected. As we recall, Jackson made clear in the Bank Veto the flat hierarchy

of interpretation he endorsed. This hierarchy consisted of only federal institutions and afforded no opportunity for interpretative authority to the states. Calhoun effectively introduces a competing authority to the federalist paradigm and attempts to establish a new political order.

Calhoun's new theory aimed at protecting individuals outside the dominant political regime. He argued, "it may be fully understood by the government of the United States, and the people of the co-States, that we are determined to maintain this our ordinance and declaration, at every hazard, do further declare that we will not submit to the application of force on the part of the federal government, to reduce this State to obedience" (Calhoun 1832). Calhoun's nullification attempts to extend federalism to the next level, where a state's interpretative ability equals that of the federal government. His disagreement with the executive demonstrates a discontent with the movements of the governing regime attempting to vest constitutional legitimacy exclusively within the national system, more specifically within the executive. States do not solely exist as entities under the umbrella of the Union, but exist as important interests to American society with a legitimate right to consent to the actions of the government through Calhoun's paradigm. Calhoun believed through this new interpretative lens, the government can reach higher levels of consensus creating a system superior in operation to the current structure. The radical elements of this new construction are important and its implications for the development of federalist principles are apparent. Calhoun's nullification theory equates federal institutions with state governments. This idea shatters traditional founding conceptions of the federal government structure. To levy substantial power in the hands of the states would result in an upheaval of the American constitutional interpretive system. These structure shattering elements exist as the antithesis of Hamiltonian federalism. The emergence of this paradigm thus forced constitutional and political actors to reevaluate the federal-state relationship.

John Calhoun established the state right to interpret under social compact theory, a theory which will reemerge in the discussion of *Prigg*. Calhoun believed through social compact philosophy, the constitution was constructed as an agreement among states, thus these interests need be first and foremost addressed. Furthermore, should the government not address these interests, not only would the statutes in question be constitutionally void, but “this State will henceforth hold themselves absolved from all further obligation to maintain or preserve their political connection with the people of the other States; and will forthwith proceed to organize a separate government, and do all other acts and things which sovereign and independent States may of right do” (Calhoun 1832).

Following Calhoun’s ordinance, Jackson wasted no time responding. Two weeks later Jackson drafted and published his “Proclamation Regarding Nullification”. The question of which level of government ultimately held constitutional interpretative authority had been answered by Jackson in the Bank Veto, but with state interests arising, new assertions needed to be made. Jackson adamantly opposed the theory’s Calhoun and his colleagues set forth, labeling them an “impracticable absurdity”, and “Vain provisions! Ineffectual restrictions! Vile profanation of oaths! Miserable mockery of legislation!” (Jackson 1832b). Jackson explicitly rejected each of Calhoun’s assertions, constitutional interpretative authority, enforceability decisions, social compact theory, and secession and was indignant in his categorizations of the ordinance. Jackson demonstrated a firm belief in the preservation of the Union paramount to any state’s discontent with federal legislation. This belief illustrates where Jackson drew his federalist line. Jackson very much governed with a desire to preserve state sovereignty and legislative maneuverability, but upon threats of states equating their power with that of the federal government and promoting secession, Jackson’s belief in federal unity triumphed.

Jackson disagreed strongly with the notion that the states possessed this coequal interpretative authority and subsequent ability to diffuse the Union through secession explaining in his response to nullification “the power to annul a law of the United States, assumed by one State, *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*” (Jackson 1832b). Jackson took this a step further and addressed Calhoun’s invocation of social compact theory, noting “the Constitution of the United States, then, forms a government, not a league, and whether it be formed by compact between the States, or in any other manner, its character is the same”. This quote should be particularly analyzed for its contradictory nature. It could be argued through social compact theory that states both possess coequal interpretative authority or have forfeited that right through their negotiation and acceptance of the Constitution, an argument made in *Prigg*. Interestingly, South Carolina accepted the latter, Jackson the former, and crisis ensued. Notably, this crisis was settled politically, outside the Courts and since 1832, Calhoun’s assertions have been essentially vacated. But this quote’s connection with federalist principles runs deeper. Much of the debate surrounding constitutional interpretative authority stems from questions of power derivation and constitutional formation. Jackson’s response casts aside contentions of which entities levied the power to the federal government. As far as Jackson was concerned, once the federal government was created it existed as the preeminent governing body. The transfer of power created a power structure and that structure could not be compromised. It was now up to the federal government to levy state power as they viewed appropriate. This could explain why Jackson acquiesces in executive power aggrandizement, while fashioning the majority of his political objectives with state interests in mind, but this is a question for a

separate paper. The result of these actions, however, is important for this analysis. Jackson both aggrandized executive power and publicly stated his commitment to wider state authority under the federal system. Jackson's statement that the derivation of constitutional power is "in its character the same" regardless of the source, sheds light into how he views the federalist system. Jackson believes in a strong federal government which possesses the ability to create or remove strictures on state authority as it sees fit. His response to nullification ultimately defines his view of the federal-state relationship.

Jackson attempted to carve out a vision of federalism which "struck a balance between an appropriate concern for states' rights and a desire to preserve a permanent and supreme national government" (Whittington 1996, 14). Nullification was decidedly rejected as a legitimate constitutional authority, but Jackson did in fact recognize the policy arguments South Carolina made and stated, "The effect of those laws was confessedly injurious, but the evil was greatly exaggerated by the unfounded theory you were taught to believe" (Jackson 1832b). It should be noted however that Jackson did desire to devolve power to the states. Whittington (1996, 14) argues Jackson "insisted we find traces of both popular and consolidated government, and federative government". Jackson's strong nationalism resulted in his rejection of this authority, but he made it clear he was not a repudiator of states' rights. He just sought proper application of these rights. Following the crisis, "Instead of his earlier cautions that the federal government should be careful of the states in pursuing its policies, Jackson stressed his willingness energetically to defend to defend the states and their interests" (Whittington 1996, 18). Jackson viewed any threat of disunion as counterintuitive to basic American principles in his adamant rejection of nullification, yet following the crisis "he offered only minimal warning against

disunion” which notes a reversion back to his centrist views of federalism (Whittington 1996, 18).

As aforementioned, while the doctrine of nullification was effectively vacated the nullification crisis points to a shift in a doctrine of American federalism. Local authorities for the first time since the Virginia and Kentucky Resolutions were attempting to pave a road for dual authority. Jackson’s second inaugural address, following the crisis called for “the preservation of the rights of the several states and the integrity of the union” (Jackson 1833). Whittington believes “while nationalist and secessionist sentiment continued in the North and South, a new center solidified between them that dominated state and national politics” and it can be effectively argued that the majority opinion in *Prigg* echoes similar political themes in its applicability. As Bradley Hays (2010) documents in *(Mis)Understanding Interposition*, state level authority has often played an extraordinarily important role in our constitutional history, despite modern contentions to dismiss its legitimacy. Similarly, while the nullification attempts by Calhoun and South Carolina ultimately failed because of strong federal response and some regional rejection, the power structures of the United States government had at least been shaken, setting the stage for a more dichotomous approach to establishing constitutional principles in the Union, reflected most importantly by the decision in *Prigg*.

Responses like Calhoun’s in 1832 speak to the level which the political paradigm of the United States had shifted. South Carolina’s outright resistance to a federal tariff policy and attempt at usurpation of constitutional interpretative authority represents a major turning point in American politics. As Bradley Hays (2010, 1) notes, “Moments of state resistance to national constitutional orthodoxy can be understood as part of a wider constitutional dialogue that affects

the constitutional order in substantial ways” . To this end, the impact state resistance during the 1830s had on the constitutional order should not be belittled and its impact on the Court is of specific importance. Mark A. Graber’s (2009) article on judicial power and its sustainability during Jacksonian democracy makes a few important observations. The role of government, particularly “diffused political coalitions”, as is the correct categorization of government during the *Prigg* era, “facilitates the maintenance of judicial authority” (Graber 2009, 98). He continues, “The more power is diffused, the greater the challenges of putting together a partisan coalition that shares a coherent constitutional vision” (Graber 2009, 103). By extension, “by 1840, the Taney Court was more reliably Jacksonian than the Congress” and thus the constitutional principles enumerated in both the Jackson and *Prigg* eras reflect this institutional tension (Graber 2009, 103).

Post-nullification “the constitutional settlement formed the intellectual and political context for the federalism cases of the antebellum period, shaping both the nature of the legal controversies and the concerns expressed in the opinions” (Whittington 1996, 19). Roger B. Taney’s appointment to the Court provides an immediate switch in the leading judicial understandings of federalist principles on the Court and “downplayed Marshall’s strongly nationalist arguments in favor of a more centrist position consistent with the post-nullification settlement” (Whittington 1996, 19). Scholars have since linked decisions like *Dred Scott* with the dominant political principles of the time and considering the constitutional shift occurring during Jacksonian reconstructive politics and the continued fractionation of these principles into the 1840s, *Prigg*’s jurisprudence can be understood as a reflection of the shaken constitutional order. (Graber 2009, 104; Graber 2006; Maltz 2009).

The Jacksonian era clearly reflects an evolution of federalist principles in the late 1820s and 1830s. Jackson's standoffs with political opponents in Congress, the Supreme Court, and his own executive administration provided him with avenues to perpetuate a new political and constitutional vision for the United States. Jackson's manipulation and repudiation of constitutional foundations created by the Marshall Court reflect his desire to use federal power as avenue to enact a more state-oriented political structure. His views on nullification carefully draw a structural line where he was willing to stop, but Jackson undoubtedly shifts executive and state power within American government. Jackson's place in the evolutionary cycle of federalist principles provide an avenue for later regimes to acquiesce in more fractionated federalist practices in an effort to create governing political principles. The national-state dichotomy became increasingly blurred following Jackson's presidency and sets the stage for the increasingly fractionated political order of *Prigg*-era.

Chapter IV: Regime Politics in the Tyler Administration and the Dorr Rebellion

The Tyler Regime

John Tyler's presidency represents an important milestone in United States history. The election of 1840 featured William Henry Harrison and John Tyler on the presidential ticket, as president and vice president respectively, commonly remembered throughout the United States as Tippecanoe and Tyler Too! Following their election in 1840, William Henry Harrison was sworn in on March 4, 1841 as the ninth president of the United States (Crapol 2006). Precisely one month later, Harrison died from complications as a result of the common cold, effectively ending his presidency and leaving behind a succession crisis. Never before had a president passed in office and questions were raised throughout the nation, especially within political institutions as to who would become the President. John Tyler was well aware of Harrison's health issues and prepared himself to assume the presidency. Tyler's private letters indicate this was always his intent, despite some discussion in the Senate suggesting an alternative, possibly instituting Tyler with an "Acting President" title until a new election was held (Crapol 2006, 10). Tyler believed otherwise. April 6 arrived and Tyler took the presidential oath of office in his hotel room with cabinet members surrounding him. Tyler issued his inaugural address three days later on April 9th and established himself as the official president (both Houses would pass resolutions in early June acknowledging his official title and in 1967 this process was legally established within the United States Constitution under the addition of the 25th Amendment).

This controversy, aside from its obvious historical allure and significance, also marks an important political shift. Tyler, a Virginian, spent most of his life as a Democratic Republican in the Jacksonian vein. Conversely, he ran the election of 1840 on the Whig ticket and seemed to have shifted his political allegiances in recent years, in part because of what he viewed as

egregious errors in power assertion on the part of Andrew Jackson (Monroe 2003). This shift led most elected officials to believe, especially in light of Harrison's passing, that Tyler would articulate many of the Whig principles Harrison and major Whig counterparts like Henry Clay and Daniel Webster championed. Political history, however, tells a much different story.

As aforementioned, political regimes require inter-institutional cooperation in an effort to establish effective political change, John Tyler's presidency seems to fit clearly within this mold. Stephen Skowronek (1993) in his volume, *The Politics Presidents Make*, establishes three categories in which to place presidents, disjunction, articulation and reconstruction. The previous chapter notes Jackson as a president of reconstruction. Within this Jacksonian cycle, Skowronek labels James K. Polk as the articulator of Jacksonian reconstruction. His omission of John Tyler is one of particular interest because Tyler was indeed a member of the opposing party, but some of his actions demonstrate those similarly aligned with Andrew Jackson.

Skowronek (1993, 153) contends, "Jackson's vindication signaled a wholesale reconstruction of American politics—one that permanently redefined the position of the presidency in its relations with the Congress, the Court, the Cabinet, the states, the party, and the electorate". Skowronek does however make an important observation of the political scene of the time. He writes,

Though the Whigs trounced Martin Van Buren in his bid for reelection in 1840, they ended up with little to show for their first turn in the White House. William Henry Harrison's death shortly after his inauguration elevated John Tyler to the presidency and Whig leaders—for all their cleverness in having run a military hero they could call their own on a ticket with a disaffected Democrat (Van Buren)—then found themselves playing host to a 'mongrel.' Tyler asserted his independence with Jacksonian resolve and blocked implementation of the Whig program" (Skowronek 1993, 155).

Skowronek's brief look at the political unrest during the Tyler presidency adds an extraordinary facet to the implications of the decision in *Prigg*. The party of Jackson was phased out through elections in 1840 in what many believed would result in a switch in political policy, especially given the considerable amount of localist constitutional control advocated by Jackson.

Unfortunately for Whigs, after the passing of William Henry Harrison, John Tyler acquiesced in many Jacksonian policies. Notably, his theoretical approach to constitutionalism mimicked Jackson's in that "only strict adherence to the constitutional limits on national power would preserve 'the blessings of the Union' and prevent the generation of factions 'intent upon the gratification of their selfish ends'" (Whittington 2007, 175). Whittington expresses this constitutional vision of President John Tyler in respect the issues surrounding the national bank. Additionally, one of the more controversial aspects of Jacksonian democracy was his Second National Bank veto, as aforementioned in Chapter 3, and represents a repudiation of the earlier Marshall/Hamiltonian federalist vision.

The general literary narrative surrounding Tyler's presidency posits him as an alienating political force, again elected on the Whig ticket, but who identified with many Jacksonian Democratic tenets. Like Jackson, Tyler despised the creation of a Second National Bank. Constitutionally and politically Tyler opposed such a measure. Tyler's message to the House of Representatives on his veto echoes this point. He writes, "I will take this occasion to declare that the conclusion to which I have brought myself are those of a settled conviction, founding, in my opinion, upon a just view of the Constitutions; that in arriving at it I have been actuated by no other motive or desire than to uphold the constitution of the country as they have come down to use from the hands of our godlike ancestors..." (Tyler 1841b). Upon his ascension to the

presidency, both Whigs and Democrats alike pressed him on this issue in an effort to score political capital. Democrats hoped to split the Whig Party, and Whigs hoped to galvanize their new political base (Monroe 2003, 91). Throughout the special session of Congress called in 1841, Tyler constantly waffled on this position. The waffling drove a wedge between Tyler and his former ally Henry Clay. Clay wanted to move the bank through Congress as swiftly as possible, but Tyler clearly held back. Despite their past agreements on the actions of Jackson, Tyler's "republican vision" made him increasingly wary of what he viewed as a dangerous institution. Once Clay's bank bill made it through Congress, Tyler was forced to make a decision. Did his clearly evident republican political principles trump his allegiance to the new Whig platform? Tyler vetoed the bill despite unanimous opposition in his cabinet to this decision. Tyler addresses the constitutional argument over Congress' power to create such an institution and writes, "It will suffice to say that my own opinion has been uniformly proclaimed to be against the exercise of any such power by this government" (Tyler 1841a). Similar to his response in the Dorr Rebellion, Tyler reiterates his view on constitutional language stating "Before entering upon the duties of that office I took an oath that I would 'preserve, protect, and defend the Constitution of the United States.' Entertaining the opinions alluded to and having taken this oath...it would be to commit a crime which I would not willfully commit to gain any earthly reward, and which would justly subject me to the ridicule and scorn of all virtuous men" (Tyler 1841a). Tyler, like Jackson, rested policy objections on a state's ability to complete the same tasks the national bank would complete. In response to the local discount argument afforded by the national bank Tyler wrote, "So far as the mere discounting of paper is concerned, it is quite immaterial to this question whether the discount is obtained at a State bank or a United States bank" (Tyler 1841a). Most of his policy objections mimicked this line of logic. Tyler

conformed to the constitutional principles on which Jackson vetoed the Second Bank and felt it necessary to uphold his view of American constitutionalism. Monroe (2003, 110) writes, “Ironically, Tyler’s vetoes were in the Jacksonian tradition. Andrew Jackson had said that the president was the ultimate guarantor of liberty, an assertion that republicans like Tyler found an obnoxious aggrandizement of the executive. Yet it was precisely this rationale that Tyler professed when he argued that the veto was a great conservative power that protected the American people from the gaffes of a tyrannical majority”. Tyler’s departure from the Whig contingent on this important issue effectively alienated him from his political base.

This decision plays an extraordinarily important role when considering the overall political climate of the 1840s. John Tyler, a career Jeffersonian Republican, flipped his political allegiances in the mid to late 1830s in response to some of Andrew Jackson’s actions. As Monroe (2003, 49) writes, “Tyler and Jackson were bound to clash, given Tyler’s republican worldview with its deep, abiding distrust of executive power and Jackson’s tendency to strong leadership and willingness to discard the conventional rules in favor of those of his own making”. Despite this clash, Jackson and Tyler found common ground on two issues, the bank and internal improvements, and these agreements stemmed from a similarity (to some degree, on nullification they disagreed significantly which will be addressed later) in constitutional politics (Monroe 2003, 53). Prior to his assumption of the office of President and during his career as a legislator however, Tyler had actually “reluctantly supported Andrew Jackson in 1828, but privately fretted that neither Adams nor Jackson was the ideal Republican candidate” (Monroe 2003, 48). Tyler’s basic political principles, throughout his shift in the late 1830s and early 1840s, continued to lean Democratic. The ambivalence within the national executive in response to the national bank veto is indicative of an increasingly waffling political climate. The national

executive had now seen the different constitutional visions of a number of prominent executives and the issues which arose in the 1840s necessitated a use for multiple “fractionated” views (Purcell 2007). Members within political parties could not find common ground on issues. Jackson was an avowed states’ rightist, but when it came to executive power he had no issues enforcing it upon the states. Tyler held classic Virginia, Jeffersonian ideals his entire life and political career, yet switched parties upon a disagreement with Jackson and rivalry in the 1830s (Crapol 2006).

Prigg fits within this framework not only because the decision itself is ambivalent, but the federalist principles it entails mirror those of President Tyler. During the nullification crisis, Andrew Jackson and John Tyler offered two significantly different visions of state rights. Jackson supported devolving some political power to states, but drew the line at secession, as made clear with the Force Bill and his public responses to the nullification crisis. Jackson, Tyler, and Story in *Prigg* all address a specific political theory, social compact theory. Social compact theory in its most basic form describes the creation of the constitution not as an agreement among the people of the United States, but among the consenting states. Through this lens, Tyler and others who acquiesce in this theory (like Calhoun in the Nullification Crisis) believe states are afforded a constitutional avenue to dissent with federal law, or in the case of Calhoun, nullify federal law. Jackson rejected this notion out of hand in his Response to Nullification (see Chapter 3 of this dissertation). Tyler, however, sympathized with this theory due to his Virginia connections, a state with intense allegiance to Virginia itself. This theory clearly raises the question of dual sovereignty. Where does the allegiance of American citizens lie? To who ultimately is the Constitution accountable to, the states, the people or once it was created the

Union itself? Tyler's conflicted politics help us understand how a Court can similarly issue a conflicted ruling.

Much like Whittington's (2007, 166) notion, "The Court is likely to be sympathetic to the dominant regime, but at the same time it is a relatively autonomous institution. Its membership is less partisan and less involved the daily political struggles than most elected officials. Moreover, a major concern of the Court is articulation and enforcing the constitutional norms of the dominant regime" *Prigg* can be understood as a primary explanation for an "ambivalent embrace" of federalism during the Tyler era. The issues in *Prigg* existed as primary sources of political and constitutional controversy during this era and the Taney Court's response to the controversy reflects the dominant doctrine of Tyler politics, thus we can use *Prigg* to understand the real constitutional practice of the era.

Constitutional Upheaval in Rhode Island: The Dorr Rebellion

The Dorr Rebellion sheds light on the larger federalist principles articulated by the ruling federal government. President John Tyler attempts to balance the relationship between Hamiltonian federalism and the Jacksonian driven federalist shift. The Rhode Island controversy concerning the legitimacy of the state government involves a number of the same constitutional questions which permeated the minds of the national citizenry. Dorr and his followers called for the creation of a state constitution for Rhode Island and an official rejection of the Charter Government. Dorr believed in the extension of suffrage to all males, as opposed to the limit of suffrage to freeholders as the Charter Government provided. This state constitutional controversy is indicative of the national approach to dual sovereignty politics. State and nation were still attempting to establish their proper role in the American institutional governance scheme.

Likewise, competing political theories in Rhode Island ultimately boiled down to a question of loyalty and legitimacy and the citizens were asked to decide. The significance of the Dorr episode exists not only in this basic commonality, but also in the realm of the role of federal interference. Tyler's injection into the controversy raises the question, what role, if any, should the federal government play in state political, legal, and constitutional controversies? Dorr's Rebellion is interesting because the state ultimately did not afford the people a structural remedy for their dispute and thus the Dorrites pointed to the Guaranty clause for their remedy.

The judicial challenge ultimately resulted in a political stalemate with the ruling in *Luther v. Borden* that the political arms of the government need decide this controversy, not the Court. This ruling is interesting when you consider Dahl's dominant regime paradigm and Tyler's unwillingness to take action unless absolutely necessary. The controversy provides yet another example of the era's uncertain political culture and raises questions of allegiance similar to those in the nullification crisis. The Dorr Rebellion reflects the dominant idea of state flexibility in governing versus the national standard also present in *Prigg*.

The Colony of Rhode Island and Providence Plantations was founded in 1636 by Roger Williams. In 1663, because of the government upheaval in England, Rhode Island needed Charles II to grant a charter to its territory providing for an elected government and legislature to rule the colony. This charter was granted in 1663 and served as the basis for the Rhode Island until 2006. Following the American Revolution, Rhode Island chose not to write a new state constitution and continued to operate under the Royal Charter. This charter granted voting rights exclusively to landowners. The Dorr Rebellion arose in the 1840s for one dominant reason, the extension of voter suffrage in the state of Rhode Island. During the agricultural years, the voting

requirements did not inhibit democratic government participation, but industry created a much different dynamic within the state. An increasingly industrialized economy began to outpace the traditional land owning agriculturally based economy, leaving the political power in the hands of a minority (Mowry 1968).

Landowners made up less than 40% of the age eligible voting bloc by 1829. Thomas Dorr argued this power in the hands a few created an undemocratic system in Rhode Island and he advocated universal white male suffrage. Dorr and his supporters at first attempted to remedy the issue through the avenues the state government provided. Upon failure, Dorr drafted a People's Constitution and set up a competing government to Governor Samuel King's Charter based government and political chaos ensued. John Tyler would be asked to redress the Rhode Island concerns. Eventually Tyler managed to end the rebellion without bloodshed, a priority of his, and the Charter government agreed to accept and institute the Dorr grievances into Rhode Island politics. Tyler's interactions with competing government forces, as well as cabinet members and Supreme Court justices uncover the federalist commitments of the Tyler administration. Suffrage extension drove the political discourse in Rhode Island, but the Dorr episode's relationship federalism rests within the constitutional tensions it exhibited and its relationship to the governing federal regime of the 1840s (Mowry 1968) (Gettleman 1973).

There was however some differences in the Royal Charter of 1663 as compared to a traditional American state government. Mowry (1970) identifies three major differences between the Rhode Island government and most other state constitutive principles in his volume *The Dorr War: The Constitutional Struggle*. The first, voter suffrage, initially was a non-issue, but as the United States (and specifically Rhode Island) progressed into the 1840s it became the essential

factor. The Royal Charter established an incredibly selective property requirement for voting, one many could not meet during this era. The second was a severely misrepresented and misapportioned state legislature, for which no remedy was provided. Population levels used to establish the representative body reflected the numbers of the 1660s, not the most current levels. The third (and perhaps most interesting) was the branch structure. The power structure in Rhode Island did not reflect the common practice of the federal government and other states; it relegated the judiciary beneath both the executive and legislative bodies (who essentially worked on an equal playing field). These three factors contributed to the rise in reformative discourse during the early 1840s (Mowry 1968).²

Thomas Wilson Dorr, the namesake of the Revolution, advocated and pushed for a root movement to remedy the apparently dysfunctional and inadequate provisions of the current Rhode Island Royal Charter. His foray into politics is widely documented. As Marvin Gettleman explains in *The Dorr Rebellion: A Study in American Radicalism, 1833-1849*, Dorr was a fierce political advocate, and Dorr officially entered Rhode Island politics as an elected representative in the Rhode Island General Assembly before his thirtieth birthday (Gettleman 1973). Dorr would exist as the catalyst of the suffrage extension movement, consistently challenging the political status quo in an effort to achieve substantive political change.

Alongside Dorr, but with more of an eye toward suffrage extension was Samuel Atwell, a key member in the creation and subsequent activities of the Rhode Island Suffrage Association, an incredibly influential political body during the 1840s (Mowry 1968). This association held nine essential tenets, all of which are pertinent in the study of constitutionalism:

² This was not officially resolved until a 2006 vote in Rhode Island

- 1) All men are created free and equal;
- 2) Possession of property should not create political advantages;
- 3) That every body politic should have for its foundation a bill of rights and written constitution;
- 4) That Rhode Island had neither;
- 5) That the Charter lost its authority when the United States became independent;
- 6) That every state is entitled to a republican form of government
- 7) That any state is anti-republican which keeps a majority of the people from participating in its affairs
- 8) That by every right, human and divine, the majority should govern; and
- 9) That the time had gone by for submission to most unjust outrages upon social and political rights (Mowry 1968, 51).

The Rhode Island Suffrage Association clearly articulated both its moral, political and constitutional positions. These ideas are a marked shift in the political psyche of the people of Rhode Island and represent a larger shifting trend in American politics. An important difference, however, is the connection many Rhode Islanders make to equality. While this idea is important in the larger scheme of establishing democratic bounds for a republican government, and exhibits an obvious connection to the institution of slavery, it should be noted that the Dorr episode's connection to *Prigg* exists through the competing institutional practices of the Dorr movement and the Charter government. This dynamic, coupled with the articulated positions of the American federal government place the Dorr Rebellion in the same political realm as *Prigg v. Pennsylvania*.

Together, Dorr, Atwell, the Rhode Island Suffrage Association and affiliated others called for the legislature to revoke the charter and establish a constitutional convention. Their petition stated:

To the Honorable the General Assembly of the State of Rhode Island: The undersigned, inhabitants and citizens of the state of Rhode Island, would respectfully represent to your honorable body, that they conceive, that the dignity of the state would be advanced, and that the liberties of the citizens better secured, by the abrogation of the Charter granted unto this State by King Charles the Second of England, and by the establishment of a constitution which should more

efficiently define the authority of the Executive and Legislative branches, and more strongly recognize the rights of the citizens” (Mowry 1968, 56)

The Rhode Island General Assembly on February 6, 1841, obliged the concerns of the new movement and passed a resolution which called for the “Convention for the framing of a Constitution”, but under the rules and bounds of the Rhode Island General Assembly (Mowry 1968, 61). Suffragists, while viewing this as a step in the right direction, were not at ease with this idea stating “we do not suppose it will do anything for the advancement of freedom in our state. It will be seen that representation in the Convention will be nothing more than a representation of freemen, and taking this into view, it will be only the General Assembly elected over again, and therefore we have no more to hope from such a body than we have from the General Assembly” (Mowry 1968, 60). The objections clearly stem from a view of institutional malfunction with a basis of establishing a more equal society. The governance scheme under the Charter government possessed basic institutional fallacies which perpetuated an unjust and un-republican form of government, outside the larger American tradition and specifically the letter of the American Constitution.

Mowry demonstrates a necessary connection between the Dorr movement and the national political scene, one which speaks volumes to the state-national connection. Mowry astutely observes, “The Whig campaign of 1840 was still fresh in the minds of all. What better means for agitating the cause of “constitution and suffrage” than to adopt the essential features of that campaign. Processions and mass conventions were in some respect new features in political affairs, and they were destined to be used with good effect by the leaders of the new movement in Rhode Island” (Mowry 1968, 61). Prior to the call to the national government, the movement was already exhibiting dominant political principles of the era. Whig influence was not uniform however. Similar to the national regime which became fractionated under Tyler, “the

constitutionalist movement of the thirties attracted at least some men from all parties” (Dennison 1976, 14). The connection between constitutionalists, suffragists and the competing political parties remind one of the decision making process in *Prigg*. Political conceptions influence decision making, and traditional political principles reflective of the governing regime often determine action. Dennison differentiates between constitutionalists, suffragists and political ideology, a key observation. Constitutionalism was at the heart of the controversy, and the myriad political ideologies influenced the vision of this constitution. Dennison writes, “The issues, the ideology, and the patterns of development during the Constitutionalist crusade provided precedents and practical lessons for the Suffragists in the forties. Perhaps the most obvious connection between the two movements lies in the man who led both, Thomas Wilson Dorr” (Dennison 1976, 14). The in Dorrites Rhode Island embraced very democratic principles. The ideology embraced some Whig elements, but the Dorrites advocated suffrage expansion in the Jacksonian Democratic mold.

The relationship between constitutionalism and politics drove not only national political discourse, but political discourse within the state of Rhode Island. This connection has great implications throughout the Rhode Island controversy. Dorr himself almost exists as a microcosm of his competing national political system. Dennison describes Dorr as “Almost maudlin in his sympathies for the ‘People,’ Dorr nonetheless recognized the need for qualified leadership. As a firm Christian, he repudiated class politics, always insisting that the needs of the ‘greatest number’ came first. Thus he joined the disinterestedness of the Jeffersonian elitist tradition with the majoritarianism” (Dennison 1976, 16). His strain of Jacksonian politics was not however absent of Whig influence, he was a “reform Whig who believed implicitly in constant and continuous progress even if the occasional reverses held back the realization of

‘principle in its fullest extent’” (Dennison 1976, 16). Prior to his zest for anti-institutionalism Dorr felt the need to abide by legislative systems and seek redress through these avenues. His political career however led him to modify this position and “extend the central postulate of popular sovereignty and the Jeffersonian generational imperative to their logical extremes” (Dennison 1976, 16). Dennison’s work extensively documents the connections between Dorr and the national political climate. Dennison (1976) notes that during the election of 1836 pressure came down from other reformist Whigs for Dorr to “drop the constitutionalist question for the time being. Dorr refused, but most Constitutionalists returned to the party folds...and some Whigs articulated fears about the direction of the new movement under Dorr’s leadership” (Dennison 1976, 18). At first blush, Dorr’s movement seems to exist as a political anomaly, fusing Whig politics with Democratic enfranchisement (an idea many Whigs abhorred). Many Whigs were also incensed at Dorr’s appeal to independent Democrats as a source for continued support. Dorr began to separate himself from the Whig party as time progressed, but his new political movement continued to embrace an eclectic mix of Whigs, Democrats, and Anti-Masons all in support of the Constitutionalist movement (Dennison 1976, 20). The tenets of the Dorr constitutionalist movement were established as “reform, prosperity, and good government”. This appealing message facilitated the mesh of political ideas. Dorr’s complex political convictions and the composition of his movement at times seem to mirror those of an earlier discussed national leader, John Tyler and the ideological framework of the entire national government.

Federalism and the Dorr Rebellion

The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on

Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence. (U.S. Constitution Article IV, Section 4)

The connection of Dorr's uprising with the political climate of the 1840s federalist era and the decision in *Prigg* exists in two arenas. The first is the discussion surrounding the correct application and interpretation of the Guarantee Clause, Article IV Section 4 of the Constitution. The second arises through the study of Justice Joseph Story's interjection into the crisis. The first, the controversy surrounding the Guarantee Clause, addresses the primary federalist issue and concern inherent in the crisis. This move is necessary in an effort to connect the Dorr War, a mostly intrastate issue, within the larger federalist context of the 1840s. President Tyler's interpretation and application of Article IV, Section 4, while strict in nature, offers a look into the constitutional mind of the tenth President, a mind which clearly wavers on certain constitutional issues. The second, Story's interjection, connects with the federalist culture in two separate ways. First, Story clearly felt it necessary to levy his judicial construction of federalism in an effort to repudiate Dorr, which speaks to the level which the Dorr controversy concerned the larger political atmosphere. Second, Story's actions and positions on the Dorr issue reflect his Northern federalist tradition and "provide the historical and ideological backdrop against which his opinion in *Prigg v. Pennsylvania* must be projected" (Newmyer 1985, 358).

R. Kent Newmyer's judicial biography of Joseph Story addresses his role within what he calls "conservative constitutionalism" and specifically the Dorr Rebellion and *Prigg*. Newmyer correctly identifies the important influence the political and historical backdrop of the 1840s has on Story's judicial decision making, however, an important characteristic which separates my construction from Newmyer's is my focus on Story's federalist jurisprudential tradition, rather than moralistic complications Story may have had with some of the political issues present in the Dorr controversy. Newmyer's focus on these moralistic contentions falls into the similar trap

many other scholars have noted when analyzing Story's decision in *Prigg* (Eisgruber 1998; Fehrenbacher 1978; Finkelman 1993; Holden-Smith 1993). The issue of the Dorr Rebellion, essentially occurring simultaneously with the litigation battles in *Prigg*, engages with different federalist principles, but nonetheless provides a lens for viewing the political and judicial constructions of the era.

Before delving into the importance of Story's positions, John Tyler's influence on this controversy established a national position on the Rhode Island question. Careful analysis of the presidential papers of John Tyler illustrates an unwillingness to involve the federal military forces to "protect against invasion...and against domestic violence" on either side (*U.S. Constitution* Article IV, Section 4). This unwillingness to interfere stems from Tyler's interpretation of the Guarantee Clause. Tyler's correspondence with Charter Government Governor Samuel King and his brief correspondence with Daniel Webster concerning the Dorr issue highlight this unwillingness to interfere. This is not to say Tyler was not concerned with the issues in Rhode Island, in fact, the papers reveal quite the opposite. Tyler was very much interested in understanding the breadth of the controversy, going as far as to confer upon Daniel Webster the authority to send a trusted ally to determine the enormity of the "Rhode Island business" (Webster to Tyler 1842). Tyler's extensive correspondence with Governor Samuel King, which could at times be categorized as menial bickering, does unveil aspects of Tyler constitutionalism and political priorities.

The Dorr controversy allowed Tyler to illustrate his diplomatic strength. Ultimately, Tyler sought to avoid bloody conflict and makes this explicitly clear to King, insisting upon a "peaceable result" and arguing that a "spirit of conciliation will prevail over rash councils" (Tyler to King 1842c). Tyler stated, "I deprecate the use of force except in the last resort, and am

persuaded that measures of conciliation will at once operate to produce quiet” (Tyler to King 1842). However, Tyler’s personal preference for limited bloodshed and peaceful resolution is couched within a larger constitutional context, which he enumerates in separate letters. Tyler’s handling of the Dorr constitutional question unveils a certain level diplomatic prowess. Tyler’s invocation of the letter of the constitution not only justified his use of executive authority, but also served a political purpose. Couching his executive authority within the constitution provided Tyler a level of diplomatic leeway. His strict construction of Article IV facilitated Tyler’s ability to pull the diplomatic strings in his own way. Pursuit of a “peaceable result” could now be achieved through executive means. Tyler’s correspondence with Daniel Webster sheds light on Tyler’s pursuit for peace.

Tyler’s caution and strict construction is subject to three interpretations. First, Tyler simply applied a strict constructionist framework because this mirrors his true constitutional obligations. Tyler certainly respected the letter of the Constitution, as he makes clear during the Dorr Rebellion as well as his Bank Veto. The second possibility is that Tyler applied strict construction because it was necessary to do so in order to successfully mediate the negotiations. Essentially, Tyler wanted the state to remedy itself, but he wanted to remain a point of contact and influence behind the scenes without specifically advocating support for one side. The third interpretation suggests Tyler applied strict construction in an effort to cover himself from political backlash in case the situation spiraled out of control. Some overlap certainly exists among these three interpretations and as we know from Keith Whittington (2007), applying constitutional principles often involves political motivation. Tyler, regardless of his successes or failures in other political instances, managed to mesh constitutional application and political

preferences exceptionally in the case of the Dorr Rebellion. His federalist commitments are very clearly illustrated through his actions.

Despite Governor King's insistence on federal assistance in his intrastate issue (and despite his futile attempts to label the controversy an interstate issue due to other states, allegedly including Massachusetts and New York preparing to support Dorr) Tyler managed to adequately exercise diplomatic strength to avoid both bloodshed and a potentially damaging government overhaul in Rhode Island. Tyler continued to keep a close eye on Rhode Island. Tyler dispatched Winfield Scott, then General-in-Chief of the United States Army, to obtain daily reports of the rising political and potentially violent tensions. One of our few limited avenues to assess the level which Tyler was involved in striking a bargain between the two sides are the papers of the president and others, but it does appear that despite Tyler's strict construction of the United States Constitution he lent a behind the scenes hand in quelling the distress in Rhode Island.

His conferral on Daniel Webster to dispatch what essentially amounted to a spy to analyze the magnitude of the Dorr issue certainly gives credence to this theory. Tyler's words illustrate a level of frustration with the situation and he notes "I had hoped we were done with Rhode Island...I can not think otherwise of it, than as a continuance of the game of brag, which I had regarded as at an end" (Tyler to Webster 1842e). This frustration resulted in the request by Tyler to "take the matter in hand, & to appoint, a suitable person quietly and silently to go to the borders of Rhode Island, & ascertain all that the insurgents are about" (Tyler to Webster 1842e). By May 27, Tyler had enumerated his constitutional position to Governor King and Thomas Dorr, but Tyler remained keenly aware that this issue was far from settled. Thus, his continued clandestine meddling illustrates not only his frustration but his commitment to settling the dispute through political intervention.

Secretary of War John Canfield Spencer also reported to Tyler on developing issues and supported the idea to dispatch a “person on whose integrity and accuracy the fullest reliance can be placed” whose “communication is of the most private and confidential character, and is not to be made known to anyone” (J.C. Spencer to Colonel Bankhead 1842). Secretary Canfield’s Rhode Island contact was Colonel James Bankhead whose correspondence to Spencer is well documented in Tyler’s presidential records. Two different executive departments were involved in the monitoring of the Dorr issue. Daniel Webster, Secretary of State and secondary legal counsel to Tyler, and Secretary of War John C. Spencer were essentially providing Tyler with daily briefs on the Rhode Island situation. This political controversy loomed large on the mind of Tyler, and despite his frustration his diplomatic efforts never ceased. Quelling the subversive Dorr force was clearly a matter of national importance for the Tyler administration, and Tyler’s actions coupled with his constitutional invocations offer us a view into the decision making majority of the 1840s political pragmatism.

The Dorr question does offer us another conflicting view of constitutional interpretation regarding federalism during the 1840s, one consistent with Tyler’s fractioned political actions. Similar to other presidents i.e. Thomas Jefferson, Tyler exercised inconsistent constitutional visions. Jefferson famously bent the rules of his own constitutional vision in acquiring the Louisiana Territory in the early part of the nineteenth century, exhibiting a willingness to adhere to the federalist vision of earlier presidents despite his commitment to different principles. John Tyler similarly acquiesced in different constitutional visions ranging from citing constitutional authority to condemn the national bank, while supporting a strict construction of the Guarantee Clause of Article IV. This connects with the second implication of the Dorr crisis on the decision making process of *Prigg*, namely Justice Joseph Story’s involvement in the Dorr war.

Tyler's personal constitutionalism is one of many commitments. His ideas on a states' right to dissent and the formation of a national bank differ widely from his disagreement with the Jacksonian usurpation of federal power. His response to Dorr seems to fit in the mold of his traditional Jeffersonian Republican ideals or his "republican vision" (Monroe 2003). Tyler justifies his Dorr decision by explicitly adhering to the letter of the Constitution. Tyler writes, "I can only look to the Constitution and laws of the United States, which plainly declare the obligations of the executive department and leave it no alternative as to the course it shall pursue" (Tyler to King 1842c). Tyler then digresses into an extensive citation of the Article IV language. One of Tyler's initial concerns is the nature of the application for federal aid. The United States Constitution clearly specifies that the federal government shall "protect each of them against Invasion; *and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence*" (emphasis added) (*U.S. Constitution* Article IV). Tyler believed firmly, as did the framers due to their discussion surrounding the nature of this application during the ratification debates, this specific enumeration required the legislative branch to apply for such aid, because as Tyler notes following King's repeated attempts for the federal military to intervene, "Your excellency has unintentionally overlooked the fact that the legislature of Rhode Island is now in session. The act of Congress gives to the Executive of the United States no power to summon to the aid of the State the military force of the United States unless an application shall be made by the legislature, if in session; and that the State executive can not make such application except when the legislature cannot be convened" (Tyler to King 1842f).

Additionally, Tyler stresses the authority with which he as the national executive acts. Tyler notes, "By the third section of the same act it is provided 'that whenever it may be

necessary, *in the judgment of the President*, to use the military force hereby directed to be called forth, the President shall forthwith, by proclamation, command such insurgents to disperse and retire peaceably to their respective abodes within a reasonable time” (Tyler to King 1842c).

Tyler stresses this decision is wholly within his authority and that without an actual insurrection and an application from an active state legislature, he is powerless to act. Tyler writes, “By a careful consideration of the above-recited acts of Congress your excellency not fail to see that no power is vested in the Executive of the United States, to anticipate insurrectionary movements against the government of Rhode Island so as to sanction the interposition of the military authority, but that there must be an actual insurrection, manifested by lawless assemblages of the people or otherwise, to who a proclamation may be addressed and who may be required to betake themselves to their respective abodes (Tyler to King 1842c). Tyler stressed his constitutional requirement to abstain from supplying the Charter Government with government military forces. This constitutional issue is separate from Tyler’s own convictions surrounding the Dorr question. It appears Tyler ultimately supported the Charter government over Dorr’s forces, pledging in late June to lend a federal hand to the situation, but importantly, only after the state legislature applied for such assistance. Perhaps Dorr’s attempts to seize the Rhode Island state arsenal and his positioning at Chepachet influenced Tyler’s opinion, but throughout the controversy Tyler consistently held to this strict construction of the fourth article of the Constitution. Joseph Story’s involvement is of particular note in this regard because his letter to Tyler asks the president not to cite statutory authority for his actions, but direct constitutional authority. Story’s influence during the Dorr episode point to the degree to which executive expressions of the federal-state relationship reflect judicial conceptions articulate later in *Prigg*.

Justice Joseph Story, a noted Northern Federalist, had more than a few reasons to insert his political and judicial hand into the Rhode Island controversy. As R. Kent Newmyer (1985, 359) correctly recognizes, the Dorr issue spoke to a number of important political questions Story in which he would have exhibited interest notably, “the old charter, in addition to being shockingly unrepresentative, had produced legislative dominance, had weakened the judiciary, and had in the process produced an indolent, ineffective political establishment-all of which Story should have condemned by his own standards of good government.” According to Newmyer (1985, 359), who rests his categorization of Story’s Dorr involvement on political opposition, “Story saw no ambiguity in the Rhode Island situation, showed no signs of sympathy for the reformers, and made little effort to understand them, He agreed with Thomas Dorr on one thing only: that republican principles were at stake”.

The Dorr rebels existed in the mind of Story as individuals with a “perverted view of the American revolution” (Newmyer 1985, 360). Their “illegitimate attempt at constitution making” stemmed from this perversion and Story, like Tyler, agreed that “A violent confrontation of "the most serious consequences" was imminent, and "it is the duty of all good men to avert it."”(Newmyer 1985, 360). While many may have viewed the Dorr contingent’s actions as an “illegitimate” attempt at constitution making, opposition to the Dorr forces was not universal. Dorr was fighting his battle in the Jacksonian mold, and Jackson himself even offered support following Dorr’s treason conviction explaining, “Dorr was guilty of nothing more than wishing to supercede the royal charter by a constitution made by the people” (Jackson to Dorr Supporters 1844). Jackson’s private correspondence also exhibits sympathy for the cause. He wrote to Francis P. Blair,

The people of Rhode Island will triumph as they ought in Establishing their republican constitution and that state will hoist the republic banner and

democracy will triumph there. Surely it cannot be that the U. States will aid the aristocracy of Rhode Island to continued the charter of Charles the 2nd when bound to guarantee a Republican form of government to every state in the Union. If the President should be weak enough to order a regular force to sustain the charter against the peoples constitution a hundred thousand of the sovereign people would fly to the rescue to sustain the people's constitution, as it would be an act by the Executive, hostile to the principles upon which our republican government is based. The people are the sovereign power and agreeable to our system they have the right to alter and amend their system of Government when a majority wills it, as a majority has a right to rule (Jackson 1842).

Jackson, like politicians of the time and modern scholars, invokes the meaning of republican government, an issue directly addressed by James Madison in Federalist No. 43. William Wiecek (1978, 251), a legal historian who also describes the "conservative constitutionalism" R. Kent Newmyer discusses, notes the "astonishingly predictive" aspects of Madison's No. 43 in regards to Rhode Island,

in his discussion of the guarantee and domestic violence clauses of Article IV, section 4 and their relationship to the problem of majorities and minorities in a republic. He had there warned that a federal power to intervene in civil disorders in the states might be necessary because of the "ambition of enterprising leaders," "illicit combinations...formed...by a majority of a state, especially a small state," and a situation where "the minority of citizens may become a majority of persons, by the accession of alien residents, of a casual concourse of adventurers, or of those whom the constitution of the State has not admitted to the rights of suffrage,"...Taking their cue from Madison's troubled reservations about simple majoritarianism, conservatives worked out theories denying or restricting majority rule in a republic.

This is of particular note because while the "conservatives" championed this republican notion, Dorr and his allies were gaining a much higher level of support for their ideas. Dorr was in effect attempting to democratize Rhode Island in a Jacksonian vision. The political tensions within Rhode Island reflect similar concerns of the battling views within the federal government. Jackson's conception of republican government, to no surprise, rests on the idea of a ruling majority. Rhode Island's exclusive voting system clearly does not mesh with the Jacksonian democratic ideal, thus Dorr's constitutional vision more clearly links with Jackson. Tyler, however, may not necessarily have opposed Dorr entirely. He did invite Dorr for a face to face

meeting at the White House in May of 1842. Tyler clearly felt it necessary to hear Dorr's grievances and respond accordingly.

Justice Joseph Story held concerns similar to the conservatives and he wrote to the Honorable John Pittman on February 10, 1842 stating, "What is a Republican government worth if an unauthorized body may thus make, promulgate, and compel obedience to a Constitution at its own mere will and pleasure?" (Story to Pittman 1842). Story clearly fashions his view of republican government in the vein of the early Federalists, much like his *Prigg* decision. Federalist 10 clearly states that the American constitution makes "valuable improvements on the popular models" and that these models "cannot certainly be too much admired" (Madison *Federalist* 10). He writes, "The instability, injustice, and confusion, introduced into the public councils, have, in truth, been the mortal diseases under which popular governments have every where perished" (Madison *Federalist* 10). Despite Madison's contention that freeholder's requirements in Federalist 53 would remedy this majority-minority issue present in democratic systems of government, Rhode Island and federal conservatives like Story, used these justifications in an attempt to uphold the Charter system (Madison *Federalist* 53).

While Story sympathized with the Charter Government and its legitimacy, when it came to the constitutionality of John Tyler's decision not to initially intervene, Story in his typical constitutionally reverent fashion, supported Tyler's citation of authority. Before Story explains this he offered his opinion on what Rhode Island should have done in an effort to uphold the charter to Judge Pittman in April of 1842, which provides us with a clear view of Story's political preferences. Story writes, "Your legislature, a year ago, ought to have passed laws, making it a crime for any-self-created convention to frame a Constitution for the State; and thus to have stopped the affair in the bud. As it is, I think the friends of the old charter have acted

excessively unwisely, not to say excessively wrong, by not voting for the new Constitution,--not as the best in itself, but as the most practicably security und existing circumstances” (Story to Pittman 1842). Story ultimately supported the constitutionally enumerated power of the legislature to appeal to the federal government under Article IV. He continued in his letter to Pittman, “Everything, therefore, rests with your legislature. They must go resolutely, boldly, and bravely to work. If they hesitate, they are lost, and the charter is gone. The Legislature have the right to call upon the President to protect the government against “domestic violence” under the Constitution of the United States, and the President may then issue his proclamation. But, unless the Legislature as it, or the Executive when the Legislature is not in session, *I know of no authority in the President to do anything*” (emphasis added). Story goes on to suggest the legislature accept the Dorrites request for a place at the bargaining table but refuses to go further than that stating “I could say much more, but I do know whether the questions may not yet come before us in some shape judicially, and therefore forbear” (Story to Pittman 1842). Story saw the constitutional issues inherent in the controversy and in 1849 the Court would gain the opportunity to issue an opinion in *Luther v. Borden*, four years after Story’s death.

Like Tyler, Story also had his own Rhode Island contact, John Pittman, a federal district judge who corresponded with Story in an effort to relay the evolving movement. Newmyer also notes a close tie between Secretary of State Daniel Webster and Justice Joseph Story, who were in contact regarding the revolution in Rhode Island. Story’s letter to Webster unveils Story’s political feelings on the matter categorizing the suffragist movement as “without law and against law” (Story to Webster 1842). Interestingly, Story offers to Webster an avenue for Governor Samuel King to mobilize against the suffragists, but applying to other states to “be prepared” and even suggests, “I have no doubt Governor John Davis would at once, upon such an order issue

the proper orders to detail the militia and to have them ready for service” (Story to Webster 1842). Story continues by citing President Tyler’s constitutional power “‘protect the state from domestic violence’ upon the call of the governor or Legislature”. Story continues describing the power “to protect” as “necessarily means to guard *before* the domestic violence is committed and the President is to execute the laws of the United States; and the Constitution is the Supreme law. He may therefore and ought to take all steps, which are prudent and necessary to make the protection effectual, as preliminaries” (emphasis added by Story). It is difficult to determine if Story’s letter suggesting Tyler, “issue a preliminary proclamation ‘warning all persons not to attempt to carry any measures into effect by military power, or by insurrectionary movements.’ The president should also ‘hold the militia in readiness to be called forth at the first moment where an insurrectionary movement shall exist’” (Story to Webster 1842). Story’s influence is certainly of note. This federalist justice clearly exhibited strong feelings concerning the rising movement and wished to offer legal and political influence to quell such an uprising. Interestingly, Tyler does eventually dispatch troops in an effort to stabilize the region. Story’s legal analysis certainly may have lent a hand in President Tyler’s executive actions.

Certainly Story’s disdain for the movement influenced his political actions, but his understandings of early federalist tradition, the meaning of the Constitution and its relationship to revolution drive his decision making more than personal preference. Story was a clever legal mind who often found ways to establish his political vision through the arm of the Court, as evidenced in his *Prigg* decision. His beliefs regarding rebellion and the federal authority and necessity to intervene reflect his commitment to the Marshall tradition. Story was attempting to establish a federal supremacy within the judicial branch through the avenues he was afforded, namely the major political questions of the era. Story’s involvement in these political questions

was not met without opposition. His chief opponent on the Court during his tenure, Chief Justice Roger B. Taney, disagreed strongly with Story's meddling in state affairs, and would allude to his disdain in his decision in *Luther v. Borden* (Newmyer 1985).

Story, however, continued his support of the Charter Government through his judicial activities. Justice Story warned the Dorrites if they continued their activities charges of awaited them (Story was the designated senior circuit justice for Rhode Island under his Supreme Court responsibilities). Directly parallel with the previous jurisprudence of Story's mentor John Marshall, he believed "the "alarming crisis" prompted him to declare that treason could be committed against the state as well as the national government and under certain circumstances against both at once" (Newmyer 361, 1985). According to Story, Dorr's actions warranted federal response under his legal definition of "war". Story stated "'Levying war, included not only a direct and positive intention entirely to subvert or overthrow the government' but also any overt attempt by force to 'prevent the execution of any one or more general and public laws of the government, or to resist the exercise of any legitimate authority'" (Newmyer 1985, 361). Story's construction of treason law offers another interesting look into his jurisprudential tradition. The construction connects with his earlier stated belief surrounding revolution, namely, the creation of the United States Constitution "was designed to make further revolution unnecessary" (Newmyer 1985, 359). His definition of treason in this letter is a dangerous one, and considering Story's tradition of tightly founded legal writing, it could be assumed his anger has overtaken his judicial mindset in this private letter. Nonetheless, Story's sympathies are made clear and he sought to exert his influence in an effort to see the rebellion end favorably for Whig and conservative counterparts.

Story's respect for the Constitution and the avenues it provided for remedying national, state, local, and individual concerns provide a historical background for his jurisprudence in *Prigg*. Story's *Prigg* decision reflects a commitment to the letter of the law, upholding the fugitive slave clause on the language, but similarly not requiring states to aid federal enforcement. Newmyer (1985, 365) rejects the contention that Story's decision making is "strictly a matter of law and order," and categorizations his actions in the Dorr Rebellion as "law and order which became a form of higher morality rooted in the revolutionary experience" (Newmyer 1985, 365). Newmyer (1985, 365) concedes however that "How deeply he believed this and how much he was willing to pay for his beliefs was clear in *Prigg v. Pennsylvania* (1842), which pressed on him quite a different concept of morality". This offers an inconsistent view of what he calls "morality". He attempts to connect Story's ideological commitments to this elevated and ambiguous "morality" when Story's actions and relationship with both the Dorr question and *Prigg* can more adequately be explained through his demonstrated commitment to the Marshall federalist order. Newmyer writes (1985 366), "Never mind that the great nationalist resorted to arguments from state sovereignty; forget that he conceded unlimited discretion over martial law to state legislatures, though in every other respect he held them in contempt. The inconsistencies Story tolerated in his own jurisprudence speak only to the extent of his alarm," but this casual dismissal of Story's "inconsistencies" reflect not only Story's own jurisprudential commitments, but illustrate Story's wider understanding of the dominant political order, which can be categorized as a fractionated body with a commitment to compromise, a note Story resounds in *Prigg*.

Story's political constituency in Rhode Island was the Whigs. Story, a Massachusetts born and raised Northern federalist, sympathized with the Whig contingent which essentially

operated as a 1840s version of the Federalist Party. Whigs advocated federal intervention. The King government wanted Tyler to exercise his federal authority and enforce the Whig/Federalist vision. Story sympathized with this political vision and this drives his application of similar federalist principles.

Judicial and constitutional settlement of the Dorr episode and federal government powers under the Guarantee Clause would not occur until nearly seven years later, five years after the conviction of Thomas Wilson Dorr. Dorr was convicted of treason and sentenced to a life of hard labor by the Rhode Island Supreme Court in June of 1844. As Rhode Island attempted to rework its government and quell the political tensions, an episode which occurred as a result of the uprising was weaving its way through the federal courts. Martin Luther of Rhode Island was arrested in 1842 by a state official Luther M. Borden following a search of Martin Luther's residence. Martin Luther brought suit contesting his arrest by stating Rhode Island did not have "a form of republican government" as described under the fourth article of the Constitution and therefore Borden acted without proper authority because all of Rhode Island's laws should have no effect under this interpretation.

This case arises essentially in an effort to force the Supreme Court to rule on the government's actions during the crisis, an effective challenge to the John Tyler and Congress' interpretations of Article IV Section 4 and an avenue to establish the legitimacy of the popular government in 1842. The Supreme Court, however, did not take this bait. Chief Justice Roger B. Taney issued the opinion and offered this analysis, "Much of the argument on the part of the plaintiff turned upon political rights and political questions, upon which the court has been urged to express an opinion. We decline in doing so... This tribunal, therefore, should be the last to overstep the boundaries which limit its own jurisdiction" (*Luther v. Borden* 1849). When one

considers the author of this opinion, Chief Justice Taney, it is difficult to grasp why he would decline such a clearly political opportunity. History well documents Taney's connection to the Jacksonian regime, and Jackson was not quiet about his feelings concerning the Dorr government. Taney is noted throughout constitutional lore for his "activist" opinions, i.e. *Dred Scott*, but in *Luther*, Taney leaves the political question to the "political" institutions. Much of the opinion focuses on jurisdiction analysis, but in his conclusion Taney does allude to his political preference, which, to no surprise, mirrors President Jackson's. Taney writes, "No one, we believe, has ever doubted the proposition, that, according to the institutions of this country, the sovereignty in every State resides in the people of the State, and that they may alter and change their form of government at their own pleasure. But whether they have changed it or not by abolishing an old government, and establishing a new one in its place, is a question to be settled by the political power. And when that power has decided, the courts are bound to take notice of its decision, and to follow it" (*Luther v. Borden* 1849).

Interestingly, Taney's decision politically aligns with the actions taken by the Tyler administration, but his language attempts to dispel this by focusing on the jurisdiction argument, rather than political affinity for a particular vision. Effectively, the Tyler administration's actions and constitutional interpretation are vindicated by Chief Justice Taney, an idea one can imagine he was not very comfortable with. This decision also has implications for Justice Joseph Story, who, despite his death in 1845, four years prior to the ruling, had made his respect for Tyler's constitutional vision very clear during the Dorr Rebellion. Story, while in disagreement with the inaction of the federal government, respected Tyler's adherence to the letter of the United States Constitution. Story and Taney, clear political and judicial counterparts, acquiesced in similar juridical practices when it concerned the decision making majority.

Luther v. Borden's significance not only to the Dorr episode, but to the larger question of earlier federalist principles being perpetuated in 1840s Supreme Court jurisprudence results from its respect of the letter of the Constitution and deference to political institutions the Guarantee Clause directly addresses. More clearly, the Guarantee Clause allots the "United States" with the power to "guarantee to every state in this Union a Republican form of Government" and Chief Justice Taney interpreted this, as President John Tyler did as well, as a right of the political branches to fulfill this obligation. Judicial interference in this regard was not only unnecessary, but unwarranted. The constitutional debates locate this right similarly as a right of the political branches to guarantee a form of republican government in the states because, in its entirety, this is a political question. Taney along with his fellow justices in the majority—and even Justice Woodbury who dissented not on the issue of jurisdiction, but on the question of martial law—deferred to the political bodies and the original construction and proposed application of the article in question.

Despite a lack of a previous ruling on the issue of the Guarantee Clause, its conformity with the initial visions (and practical application) of the clause further bolster the notion of a Supreme Court acting within the political framework of the era. John Tyler's practice of constitutional interpretation in an effort to accommodate a peaceful, non-violent compromise within the state of Rhode Island were justified by a Supreme Court which presented in *Prigg* its own visions of peaceful, non-violent compromise, this time in response to the slavery question. We see throughout the 1840s, the federal government's desire to delineate federalism in a much more centrist manner, reflective how preceding government institutions transformed conceptions of the federal-state power relationship.

Chapter V: Rediscovering *Prigg v. Pennsylvania*

Introduction

Prigg v. Pennsylvania, a slavery case arising out of Pennsylvania decided by the Taney Court in 1842, sparked intense controversy across what one could consider a fragile nation. Contemporary scholars tend to categorize this case on its perceived proslavery principles resulting from judicial personal bias and a necessity to perpetuate the American system of human bondage (Eisgruber 1998; Fehrenbacher 1978; Finkelman 1993; Holden-Smith 1993). Earl Maltz (2000; 2009) has begun analysis of *Prigg* in an effort to connect the decision to its political context, as well as uncover the federalist principles present in the opinion. However, his analysis may fall short when he considers the decision a result of an alignment of justices and their policy preferences, as opposed to justices possibly endearing the general political conceptions of the Union in the early 1840s. Nonetheless, this decision marks an extraordinarily important moment in Supreme Court jurisprudence and its relationship with the institution of slavery; therefore *Prigg's* parallels to its contemporary political system allow the case to be used as a conduit through which political scholars can analyze the political and social constructions of the time. Aspects of federalism emanate from every opinion in this case and a more exhaustive analysis of *Prigg* and its political applicability can serve as an important developmental piece to the puzzle of antebellum America.

While I profess to “rediscover” *Prigg v. Pennsylvania*, its prior “discovery” or study places the case in its current scholarly position. Most current scholarship posits *Prigg* in one of two arenas: 1) a case decided on proslavery principles to perpetuate the American slavery system or 2) a case decided as neither pro-slavery nor sufficiently anti-slavery. Clearly, this guide does

not sufficiently identify the political importance of what is generally considered “the last of the great slavery cases of the 1840s” and a precursor to *Dred Scott* (Maltz 2009, 93). Why then, does the scholarly world view the case in such narrow terms? When you consider the holding in its simplest form, at face value it offers little more than a perpetuation of American slavery aligned (by contemporary historical standards) with the views of slavery of the time. But, as modern scholars of American political development illuminate, no case, especially one of powerful historical significance, should remain settled without wholesale consideration of the determining political factors of the age (Graber 2006). Close readings of not only the majority decision, but other opinions as well, offer an extraordinary amount of political commentary, sometimes in dialogue with one another.

The Original Discovery of *Prigg*

These notions of why *Prigg v. Pennsylvania* needs closer scholarly evaluation require alignment with contemporary scholarly materials. As aforementioned, proslavery policy principles have received an enormous amount of attention by political scholars. Christopher Eisgruber locates justification for Justice Story’s majority opinion in *Prigg* in his foundational principles of natural law. Eisgruber dissects Justice Story’s personal, political, and judicial backgrounds in an effort to gain greater understanding of his motives in *Prigg*. While this seemingly comprehensive evaluation of Justice Story’s intellectual background offers essential information about the possible roots of his decision-making, it still rests on that familiar position of *Prigg* as an undeniable affirmation of the American slavery system. Barbara Holden-Smith (1993, 1126) offers similar categorizations of Story condemning the author of the majority opinion as “one which effectively stripped the states of all constitutional authority to regulate the

reclamation of fugitives and left little room for legislation to protect free blacks”. Her contentions that Story’s antislavery reputation “rests on a thin foundation” once again reverts back to the old classification of *Prigg* as simply proslavery jurisprudence (Holden-Smith 1993, 1148). Both of these pieces on *Prigg* label the case in parallel forms. Both attempt to shed new light and add a different perspective to the case itself and to some degree they succeed, but the ultimate brand of the case remains the safe, familiar notion of proslavery perpetuation. Here we must ask, after understanding the constitutional issues involved, i.e. the Fugitive Slave Clause of 1793 positioned against the Pennsylvania statute as well as the Pennsylvania conviction of Edward Prigg, can we be naïve enough to simply aver that *Prigg* unabashedly promoted African-American bondage and perpetuated the caste system? Without comprehensive evaluation of the case and only a basic understanding of the constitutional questions at stake, one can understand the larger theoretical issues involved.

A third scholarly article written by Earl M. Maltz (2000, 347), an author whose work will receive greater attention later on, offers deep analysis of the separate opinions (6 in total) while subsequently “reflecting on the relationship between the opinions in *Prigg* and the more general political climate of the area”. His attempt at this political connection as aforementioned can be extended further by establishing a relationship between the opinion(s) in *Prigg* to the doctrine of federalism and its relationship to this time period. *Prigg* is more than a “reflection”. It is an explanation. Maltz (2000; 2009) considers the dominant political culture of the 1840s one of compromise insistent on perpetuating slavery, and while this certainly comprises an important element of the political system, *Prigg*, can be extended further and understood not as merely influenced by the climate, but as general explanation for the social principles of the era.

Prigg v. Pennsylvania, as Earl M. Maltz (2009, xvii) astutely recognizes has yet to receive a book-length treatment, but a number of historical, legal, and political scholars have recognized its influence. Donald Fehrenbacher (1978), a renowned historian of American history, plots the *Dred Scott* decision in its historical context, as well as includes a brief analysis of *Prigg* and extensive coverage of pre-*Dred* America. The historical perspective of *Prigg* by scholars aids my analysis in its effective ability to uncover the implications the case had on the institution of slavery. My analysis of *Prigg* in no way attempts to undermine the notion that the Court missed a chance to speak out in a unified egalitarian voice against slavery. Certainly this was an option. What this analysis attempts to uncover is precisely how the common categorizations are simply not exhaustive. The common conceptions of federalism, legal theory, as well as proslavery biases by justices would simply not allow for an egalitarian dismissal of the institution. Scholars have blamed justices for all of the above, but what scholars have failed to do is take the multi-faceted legal and political operation of *Prigg* and attempt to discern not only why the case was decided as such, but more importantly, how can we understand *Prigg* as an important example of the political climate. The federalist principles are present, why then must we continue to condemn the case as immoral, irrational and a missed opportunity?

Contextualizing the “Rediscovery”

Before delving further into the political climate, thorough analysis of two important scholarly works, Mark Graber’s *Dred Scott and the Problem of Constitutional Evil* and Earl M. Maltz’s *Slavery and the Supreme Court*, must be introduced to position my argument. Aspects of Maltz’ newly released volume speak directly to the case at hand, but fails to extend the case to its proper political positioning. Maltz does an effective job of identifying existing federalist

principles in *Prigg*, but further interpretive work can be done in terms of explaining 1840s political culture. As aforementioned, *Prigg* should not and does not exist in the constitutional canon as merely a proslavery perpetuation. *Prigg*'s importance cuts much deeper. This case has not received the scholarly attention it needs because of the constant connection made to institution of slavery. As Mark Graber (2006, 1) eloquently explains "No decent person living at the dawn of the twenty-first century supports the proslavery and racist policies that [Stephen] Douglas and Chief Justice Taney championed. Nevertheless, important normative, historical and constitutional reasons exist for rehabilitating the *Dred Scott* decision." Similarly, *Prigg v. Pennsylvania* exists more prominently in the discussion of antebellum America and its political climate than attention it has been given. *Prigg* emits applicable, explanatory political principles consistent with not only political elite views of federalism and the order of the era, but a more abstract general understanding of the American system. Maltz dissects the case and federalist principles inherent in the decision-making but fails to discern the true political importance of *Prigg*. His contentions rest on that familiar backdrop of proslavery perpetuation. This paper does not simply study *Prigg* for *Prigg*, this paper aims to rediscover 1840s political climate; and no better conduit exists to rediscover than *Prigg v. Pennsylvania*.

Mark A. Graber's *Dred Scott and the Problem of Constitutional Evil* provides an essential analytical tool for my research. Graber's revolutionary look into the typical discussion of the *Dred Scott* decision carves a space for my research. *Dred Scott v. Sanford* generally exists in our constitutional canon as another failed opportunity to condemn the institution of slavery, and further, spurring the nation into Civil War. Graber takes this construction, uncovers its flaws and merits and extends *Dred Scott*'s place in constitutional history. The renewal of this case's constitutional merits place it in a new light, challenging the dominant scholarly narrative

surrounding *Dred Scott* and supplying a new generation of scholars with the tools to forge proper constitutional analysis of similar cases. To this end, *Prigg* while considered a hallmark of the proslavery canon, functions as a jurisprudential statement about its surrounding political climate. Additionally, Stephen Skowronek (1993), through his various studies on the American executive, teaches us the importance of the idea of political time. This template for political time is useful because *Prigg* is decided during an era of political compromise and an apparent unwillingness to confront the extremely volatile institution of slavery and its position in the American political system.

Doctrines and Operation of Federalism in Early America

In order to understand where Maltz falls short in his categorization of *Prigg* we must establish a few basic principles about the constitutional order and accepted social and political principles of the time. The previous chapters identify operative federalist principles in the Founding era, the Jacksonian era, and the Tyler era. On a more macro federalist scale, Edward Purcell (2007) accurately depicts the doctrine of federalism as “doubly blurred” and “fractionated”, noting the immense difficulty with establishing a singular notion of the term. This categorization is specifically useful because similar to Purcell’s (2007) findings, the Court in *Prigg* seems to embrace a “fractionated” view of federalism, a view perpetuated by the Tyler administration. Given Purcell’s abstraction of federalism, one could use this version as a template and basis for understanding of Justice Story’s opinion. The opinion in *Prigg v. Pennsylvania* does not simply deem the Fugitive Slave Clause of 1793 supreme, although it does uphold its constitutionality in the strict sense. Story’s opinion opens the door for future state consideration of fugitive slave legislation and creates an area for state legislative

maneuverability. He does not hold that that any state statute concerning prohibition of returning fugitive slaves violates Article IV Section 2. The opinion is not strictly proslavery as scholars and many Northern dissenters articulated and this resulted from inherent principles of federalism implicit in Story's language, consistent with the understanding of the doctrine of social principles during the 1830s and into the 1840s as a result of their evolution.

Following the Federalists defeat in the election of 1800, Federalist Party political figureheads, most notably John Marshall among others, retreated into the federal judiciary. This set the stage for a string of landmark Supreme Court decisions which effectively transformed the constitutional order by establishing formal national government supremacy through jurisprudential precedent. Due to the clear federalist questions present in a constitutional controversy surrounding the Fugitive Slave Clause and the supremacy clause of Article VI, the Court would have to effectively locate its opinion in a jurisprudential history favorable to its vision of federalism, i.e. the Marshall/Hamilton vision. What makes *Prigg* interesting in this sense is not so much its alignment with Marshall Court federalism, but the subtle twist of Marshall Court federalism the Court uses to purport a constitutional vision consistent with its own political time. A student of American political development can effectively understand *Prigg* as a microcosm of the political controversy of antebellum America. The level of ambiguity in *Prigg*'s decision should not be considered a fault as it so often has by past scholarship. At first blush, *Prigg* exists as a missed opportunity by the Court to repudiate the institution of slavery and usher in a new era of social egalitarianism.

Before establishing the more centrist versions of federalism accepted in the era of *Prigg*, the Marshall Court's effect on the doctrine itself must be analyzed, especially given the shift in

Court jurisprudence after the introduction of Roger B. Taney in 1836. Often scholars look to major assertions of state interpretative constitutional authority after the election of Andrew Jackson, but prior to this movement, the federal government, notably the judiciary, faced resistance from states. More important than the state resistance was the moment in which they occurred. Bruce Ackerman (1993) contends that certain Supreme Court jurisprudence should and often does reflect important constitutional moments. The essential moment for the Marshall Court was the framing of the Constitution itself; following Ackerman's paradigm we can understand why John Marshall may have upheld that constitutional vision. As Chapter 1 indicates, the opinions of the era often reflect this interpretation. For example, no discussion of early federalism is complete without the inclusion of *McCulloch v. Maryland* or *Gibbons v. Ogden*. Both cases laid a foundation for future constitutional authority, and were generally considered legitimate assertions of federal power, providing Congress with sweeping authority. Still, *Gibbons* and *McCulloch* did not "address the question of whether states retained concurrent authority to act in a manner that was not inconsistent with federal statutes on matters that Congress could (in theory) have regulated", but the Court did address the question in both *Houston v. Moore* and *Sturges v. Crowninshield*, an interesting component when considering *Prigg* (Maltz 2009, 16). Story's opinion in fact cites the authority in *Houston* while not strictly applying it, in fact providing no legal principle for his vision for application of the Fugitive Slave Act of 1793 it as we will see later (Maltz 2009, 16).

Why are these seemingly unrelated cases and earlier political moments related to a slavery case with none of the same issues? Here lies the importance of *Prigg v. Pennsylvania*. *Gibbons v. Ogden*, again a case generally considered a hallmark of Marshall Court jurisprudence, enjoys a vital connection to *Prigg* in its authorization for state police power authority on certain

issues. Justice Story's majority opinion in *Prigg* as we will see cites the same authority while not specifically invoking the *Gibbons* decision.

Maltz's overall picture seems to fall on that familiar notion of the Court's failure to address the institutional problem of slavery, while simultaneously providing legal citation for this failure. The real political application of *Prigg* occurs through a comprehensive understanding of the political climate coupled with an imperative understanding of "the problem of constitutional evil". Mark A. Graber (2006, 11) notes, "If every present constitutional ambiguity can be resolved justly and no constitutional provision clearly entrenches practices remotely analogous to slavery, then few pressing political questions exist for questioning constitutional authority". *Prigg v. Pennsylvania* exists in similar ilk.

Chapter 2 notes the influence of *Worcester v. Georgia*, the Second National Bank Debate, and the Tariff Crisis and subsequent nullification crisis as actors which facilitated a shift in the doctrine of American federalism. Local authorities for the first time since the Virginia and Kentucky Resolutions (analyzed in Chapter 1) were attempting to pave a road for dual authority in the Jacksonian era, and it can be argued that the majority opinion in *Prigg* paves a similar road in its actual applicability. As Bradley Hays (2010) documents in *(Mis)Understanding Interposition*, state level authority has often played an extraordinarily important role in our constitutional history, despite modern contentions to dismiss its legitimacy. Similarly, while the nullification attempts by Calhoun and South Carolina ultimately failed because of strong federal response, the power structures of the United States government had at least been shaken, setting the stage for a more dichotomous approach to establishing constitutional principles in the Union, reflected most importantly by the decision in *Prigg*.

Chapter 3 identifies the Tyler administration's influence on evolving federalist principles through the handling of the Dorr Rebellions and Joseph Story's political affinities. The Tyler presidency's significance to the rehabilitation of *Prigg* is twofold. The first is the Court's willingness/necessity to align itself with the dominant political regime. When *Prigg* is viewed through the lens of Whig politics the decision is politically favorable because the supremacy of national law is upheld. However, when viewed through the Southern Democratic lens, the decision is unfavorable because is not decidedly proslavery enough for the Southern slaveholding contingent. The necessary question is why does the Court articulate such ambiguous legal principles in *Prigg*? As aforementioned, the Court historically sides with the decision-making majority in an effort to secure its institutional legitimacy and this may provide the answer (Dahl 1957; Whittington 2007).

The second important aspect of the national regime of the 1840s necessary to understanding *Prigg*'s importance is the sectional divides which increasingly grow during the period. Political compromise exists as the status quo in American government throughout the antebellum period. Tyler's views on slavery, the veto (a view which counters Jackson's yet is employed similarly in one famous instant), and his own party all shape the era. President Tyler and the national regimes' politics are necessary tools to fashion the new construction of *Prigg*. As time moved forward, visions of federalism began to facilitate compromise and more localist control of government, even in the realm of slavery, as evidenced by the decision in *Prigg*. Much like Whittington's (2007, 166) notion, "The Court is likely to be sympathetic to the dominant regime, but at the same time it is a relatively autonomous institution. Its membership is less partisan and less involved the daily political struggles than most elected officials. Moreover, a major concern of the Court is articulation and enforcing the constitutional norms of the dominant

regime” *Prigg* can be understood as a primary explanation for an “ambivalent embrace” of federalism during the 1840s. The issues in *Prigg* existed as primary sources of political and constitutional controversy during this era and the Taney Court’s response to the controversy reflects the dominant doctrine of political practice, thus we can use *Prigg* to understand the real constitutional practice of the era.

However, the institution of slavery and its implications for the operation of this social principle must be analyzed. The institution of slavery regularly attempted to maintain its legitimacy through state level authority, specifically in an effort to define state obligations under the constitutional provision at issue in *Prigg*, Article IV Sec. 2 and the Fugitive Slave Act of 1793 (Hays 2010). Personal liberty laws, like the bill in Pennsylvania suggested to exist as repugnant to the aforementioned constitutional provision, “challenged the consensus of political elites in all three national departments of government by creating procedural safeguards that protected free blacks from being abducted into bondage and, according to antislavery factions, make fugitive retrieval as onerous to slave-owners as possible” (Hays 21, 2010). Hays (2010, 23) continues, “In light of Story’s dicta, several states passed noncooperation laws that made it a criminal offense for officers of the state to aid in the capture or detainment of runaway slaves, despite other contentions that the majority opinion “effectively stripped the states of all constitutional authority to regulate the reclamation of fugitives and left little room for legislation to protect free blacks” (Holden-Smith 1993, 1126). Certain states had different responses to the decision in *Prigg*. Northern states contended that the decision in *Prigg* was inherently proslavery, infringing on the authority of states to control the institution within its jurisdiction. Southern states contended the decision undermined their authority through the provision that other states could enact laws of similar nature despite the rejection of the Pennsylvania law

(Hays, 2010). Regardless, clearly the understanding of which political institutions held authority in certain political spheres was beginning to be questioned. The political order supposedly established by the Marshall Court was beginning to fade in the late 1820s through the early 1840s, and although *Prigg* invokes the jurisprudence of the Marshall Court, the decision's ambivalence clearly mirrors the changing political doctrines of the time.

***Prigg* and the Attitudinal and Postpositivist Model**

Judicial decision making in today's academic world is often viewed through two other models in an attempt to discern judicial motivation. The first, the attitudinal model, posits judges rule on cases based solely on ideological preferences where institutional influence and existing case law play little to no role. Harold Spaeth and Jeffrey Segal (2002, 433) explain in *The Supreme Court and the Attitudinal Model Revisited* that "The attitudinal position on motivated reasoning is one of agnosticism. What matters is that justices' ideology directly influences their decisions...The fact remains that the justices' ideology drives their decisions". They focus their finds on empirically based models which belittle motivating political influence on Supreme Court decision making.

Prigg very clearly dispels the legitimacy of this theory's application. Justice Joseph Story was a noted Northern Federalist. Regardless of the role the institution of slavery played in the mind of Joseph Story, he makes clear in his response to the Dorr Rebellion and earlier Court jurisprudence his preference for upholding federal constitutional supremacy, regardless of his political preference on the issue. Story was very much a nationalist, yet in *Prigg*, he manages to cut away a piece of federal exclusivity in an effort to afford state's legislative maneuverability. Paul Finkelman documents Story's vast anti-slavery political history in *Joseph Story and the*

Problem of Slavery: A New Englander's Nationalist Dilemma and alleges he discarded these views in *Prigg* so as to promote a national legal order and extend the institution. Story's political activism and commitment to deeply rooted constitutional principles could not have caused this shift. The political awareness of Justice Story and the constitutional tools at his disposal, i.e. the shift in federalist principles into the 1840s allowed Story to diminish federal enforceability of the institution without sending the nation into political turmoil. Ideological concerns for Story could often be fashioned through his clever manipulation of political principles and *Prigg* offers the vision not of an immoral justice, but of a judicial actor who understood contemporary constitutional visions and could apply these visions in ways consistent with the political climate.

A second judicial vision often used to determine the reasons for judicial decision making is post positivism wherein justices decide cases based on their best concept of the meaning of the rule of law and their role in the governmental system. *Prigg* does not adhere to this judicial model either. *Prigg* exists as a complex calculus of legal theory, political influence, and judicial strategy all reflected in the 1840s era. Story's ruling is effectively non-partisan considering its practiced application, but his ruling reflects an understanding of the political order. Rather than using his position on the Court as one of a judicial independent, concerned only with explaining the law for the law's sake, Story possessed a political understanding of a divided era.

Story used his Marshall/Hamilton legal federalist background, his understanding and convictions of the institution of slavery, the positions of the federal government on the issue, and his role as an associate justice of the Supreme Court to issue an opinion which remedied the political processes governing slavery in neither federal or state terms. Rather, he fashioned a compromised which adequately quelled major political unrest surrounding the issue, a product of

the evolution of federalist principles over the previous fifty years. Analysis of the opinion itself adequately reflects these conventions.

Fact and Fiction: The Case Itself

To conceptualize the exact functions of *Prigg* and its relationship to the social principles of its era, we must analyze of the facts and opinions of the case. Edward Prigg, a slave catcher, was convicted under Pennsylvania's personal liberty, anti-kidnapping statute of forcibly removing a former slave, Martha Morgan, from her home in Pennsylvania and returning her to a slave master in nearby Maryland. Martha had been born to slaves of John Ashmore, a resident of Maryland, who allowed Martha's parents to retire from slavery, but continue to live on his estate. While Mr. Ashmore allegedly (according to numerous accounts) freed both parents and the child, he never took the formal steps to emancipate the family and upon his death, his estate listed only two members of his estate, Martha's parents, as bound slaves and no mention of Martha. Due to this procedural mistake on the part of Ashmore, Martha, despite her self-perceived freedom and her later marriage to a free black man, technically remained a slave. Jerry and Martha Morgan moved to York County, Pennsylvania in 1832 to start a family, but in 1837 a party of slave catchers led by Edward Prigg and Nathaniel E. Bemis (a son-in-law to Margaret Ashmore) obtained a warrant from a justice of the peace in Pennsylvania authorizing the York County constable to bring Martha and her children before the court. The constable then brought the entire Morgan family before the court and the judge determined he lacked jurisdiction to adjudicate the matter under Pennsylvania law (Maltz 2009).

Due to Jerry Morgan's freedom, he was subsequently released by Prigg's slave catching party with the promise of delivering his family to him in the morning. That night however, Prigg

and his party brought the rest of the Morgan family to Maryland where they were sold to a slave trader. Martha then sued in May of 1837 for her freedom in a Maryland county court and a jury concluded that due to the procedural misstep by John Ashmore, Martha and her children were slaves now owned through the will of John Ashmore's estate by Margaret Ashmore. They were subsequently sold to a slave owner (Maltz 2009).

Jerry Morgan received considerable public and political support for his attempts at recovering his kidnapped family. The Governor of Pennsylvania demanded that Maryland extradite the Prigg slave catching party to Pennsylvania to stand trial for violating Pennsylvania's personal liberty and anti-kidnapping statute. The Maryland state legislature then organized a compromise with Pennsylvania aimed to "make arrangements as may be necessary to refer the questions involved to the Supreme Court of the United States without compromising the liberty of the accused" (Maltz 2009). In 1839, Pennsylvania passed a statute authorizing a pro forma trial of Edward Prigg where "he essentially would be found guilty through a process ensuring that the issues raised by the case could ultimately be resolved by the Supreme Court" (Maltz 2009, 95).

Once this incredibly complex controversy had reached the Supreme Court, the multi-ideologically represented Court was forced to rule on the constitutionality of Pennsylvania's 1826 enacted personal liberty law in conflict with Article IV, Sec.2 of the U.S. Constitution, and the Fugitive Slave Clause of 1793. Earl M. Maltz throughout his volume *Slavery and the Supreme Court* when considering *Prigg* often returns to the familiar idea that *Prigg* "clearly reflected the influence of related conventions of legal analysis". His analysis of *Prigg* involves a location of the Marshall Court federalism ascribed earlier, but the legal foundations of Story's

argumentation are of continual focus in Maltz's analysis. This is not to say these foundational principles are not important for understanding the implications of Justice Story's language, but in his attempt to differentiate from other scholarly treatments, Maltz trends with the common legal construction.

Story's opinion begins with a citation of *Somerset v. Stewart* a pre-Revolution British case which effectively outlawed the institution of slavery in England. However, Story uses this case as a matter of differentiating between the English system and the American constitutional system. Justice Story cites the enumeration of a clause (Article IV Sec. 2) which specifically speaks to slavery in the Constitution as "of the last importance to the safety and security of the southern states; and could not have been surrendered by them without endangering their whole property in slaves" (*Prigg v. Pennsylvania* 1842). He explains in the absence of such an enumeration "every non-slaveholding state in the Union would have been at liberty to have declared free all runaway slaves coming within its limits, and to have given them entire immunity and protection against the claims of their masters" (*Prigg v. Pennsylvania* 1842). Story continues through this analysis to endorse what Maltz considers "the proslavery position on recapture" and while Story certainly does seem to dismiss notions of local jurisdiction of recapture, it may foreshadow Story's contentions later in the opinion of state power of nonenforcement and state assertions of police powers, similar to the jurisprudential effects of *Gibbons v. Ogden*. The *Somerset* invocation, can in many ways connect with this assertion especially given the similarity in language, notably "The state of slavery is deemed to be a mere municipal regulation founded upon and limited to the range of the territorial laws" (Story's interpretation of *Somerset*) and "That police power extends over all subjects within the territorial limits of the states...that the states, in virtue of their general police power, possess full jurisdiction to arrest and restrain

runaway slaves...to secure themselves against the depredations and evil example...The rights of owners of fugitive slaves are not are in no just sense interfered with, or regulated by such a course; and in many cases, the operations of this police power, although designed essentially for other purposes, for the protection, safety, and peace of the state, may essentially promote and aid the interests of the owners” (*Prigg v. Pennsylvania* 1842).

While Story clearly attempts to connect the police power with enforcement, the practical application of this opinion supports either side. States in the name of police powers can adequately regulate the institution within their borders as they see fit so long as the law is not repugnant to the ruling in *Prigg*. While this connection may seem far-fetched if you consider the institutional effects of Story’s opinion as well as the political time in which it was issued, it is clear Story’s decision sought to fashion an area for state maneuverability. A number of northern states established newly framed personal liberty laws and nonenforcement statutes to prohibit aid of fugitive slave catchers, as aforementioned, and “certain states even interpreted *Prigg* as an absolute proscription on any state involvement in the fugitive slave retrieval process and they released blacks being presently held in their jails” (Hays 2010, 23). Certainly the legislative applicability of *Prigg* differs from what scholars consider an opinion concerned with “the protection of property rights and the expansion of federal power more than the injustices done to black people by the fugitive slave law” or one which demonstrably perpetuated the institution (Holden-Smith 1993, 1091; Fehrenbacher 1978; Finkelman 1993). This important connection to *Somerset* offers an important differentiation from Maltz’s contentions because Maltz basically considers the invocation little more than an example to strike down, whereas it clearly applies to Story’s later contentions and connects with the overall changing political scene of the time.

Again, the extent to which states began asserting national authority was beginning to shift at this time and Story an astute student of politics and constitutionalism may have had a greater understanding of the political climate. Story's oft-examined *Commentaries on the Constitution of the United States* may reflect this. Maltz uses Story's comments on slavery from *Comments* to derive answers for his contentions in *Prigg*. I uncovered answers in *Commentaries* for judicial understanding of the political climate in Story's section on social compact theory, a rehabilitated theory during this time thanks to John C. Calhoun. Interestingly, in Story's *Commentaries* to a certain degree he acknowledges the legitimacy of social compact theory in the ratification of the United States Constitution. He writes,

“The cardinal conclusion, for which this doctrine of a compact has been... that in construing the constitution, there is no common umpire; but that each state, nay each department of the government of each state, is the supreme judge for itself, of the powers, and rights, and duties, arising under that instrument. Thus, it has been solemnly asserted on more than one occasion, by some of the state legislatures, that there is no common arbiter, or tribunal, authorized to decide in the last resort, upon the powers and the interpretation of the constitution. And the doctrine has been recently revived with extraordinary zeal, and vindicated with uncommon vigour... But if it were admitted, that the constitution is a compact, the conclusion, that there is no common arbiter, would neither be a necessary, nor natural conclusion from that fact standing alone...It would be perfectly competent even for confederated states to agree upon, and delegate authority to construe the compact to a common arbiter. The people of the United States had an unquestionable right to confide this power to the government of the United States, or to any department thereof, if they chose so to do. The question is, whether they have done it. If they have, it becomes obligatory and binding upon all the states (Story 1833, 342-343).

The connection of American constitutionalism to social compact theory made by Story inherently recognizes influences of political culture on judicial decision-making, but this point is clearly articulated by Earl M. Maltz. James Madison, Thomas Jefferson, John C. Calhoun, and John Tyler also accepted social compact theory as the basis for the constitutional agreement.

Madison and Jefferson both explain this view in their responses to the Alien and Sedition Acts. Calhoun articulates his belief in his South Carolina Nullification Ordinance. Tyler once stated during the nullification crisis, “The Government was created by the States, is amenable by the States, is preserved by the States, and may be destroyed by the states” (Tyler on Senate Floor 22nd Congress, Second Session). Ironically, James Madison nominated Joseph Story to the Court in 1811. It is unclear whether this connection plays any significant role in the question at hand, but for purposes of understanding the legitimacy of social compact theory, it is notable.

Another area where I believe the ability for *Prigg* exists to ascend in our political discussions of the 1840s is in the *lack* of jurisprudential connection in Story’s explanation for the nonenforcement provision. The theme of silence emanates throughout Justice Story’s opinion in *Prigg*. Early on he distinguishes silence in British constitutionalism versus explication in American constitutionalism as reason for action. Later in the opinion he analyzes the silence of the Constitution on Fugitive Slave Act enforcement not as legitimacy for the Pennsylvania statute, but as legitimacy for federal supremacy over the statute. In this vein, we must consider Story’s silence on why exactly states are not obliged to enforce fugitive slave procedures in either support or disdain for the clause in question. This doctrine of nonenforcement seems to clearly lean toward a more localist understanding of control over such issues. Where does a doctrine like this emanate? Only from common political understandings of the time period. Justice Story clearly through his *Commentaries* had an extraordinary sense of constitutional history as well as the contemporary political expressions of his time. Therefore when Earl M. Maltz notes, “Story cited *no* legal authority to support the conclusion that state officials could not be required to aid in the enforcement of the federal statute” a plausible explanation for this lack

of legal citation exists in the understanding of federalist principles during the decision-making process. Scholars of American political development have often linked larger political ideologies to Court jurisprudence. *Prigg* which for most of its constitutional history has received an unfair categorization along the lines of *Dred Scott* and *Ableman v. Booth* clearly exhibits extraordinary elements of 1830s-1840s political culture, inclusive of tenets of compromise, federalism and re-emerging doctrines of state control (*Dred Scott v. Sandford* 1857; *Ableman v. Booth* 1859).

The lack of jurisprudential citation in assuming constitutional authority is not an uncommon interpretative move. Marshall's assertion of judicial review in *Marbury v. Madison* cites no legal authority, yet judicial review is still prominently accepted as a legitimate doctrine in our understandings of American constitutionalism. When Marshall writes, "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each" he essentially accepts Publius' interpretation in Federalist 78 concerning the true function of the Court (he also cites a belief in a substantive right emanating from Article IV) (*Marbury v. Madison* 1803). The connection Marshall's move enjoys with Story's approach in *Prigg* is one of citation outside the legal principles normally justified to render court decisions. Both Marshall and Story make legitimate claims for their different assertions of judicial power, (although Story's "assertion" of judicial power is actually one of nonaction). The legitimacy of their claims is fundamental for the precedential effects of their respective decisions.

Blind statements about judicial power and authority hold no weight in the legal or political realm, thus statements like Marshall's in *Marbury* and Story's lack of legal citation in

Prigg must originate from somewhere and this somewhere for *Prigg* exists in general understandings of federalism and the overall political climate of the 1830s and 1840s, just as *Marbury*'s legitimacy stems from Hamilton's categorization of judicial power and the accepted doctrine of judicial authority during the foundational years of America. As Professor Hays recognizes, "State legislatures are pivotal in legitimating state action as they array the full legislative authority of the state against the authority of the national government". This observation of the effects of legitimate state power on the constitutional orthodoxy may have been fully understood by Justice Story. Simple observation of the changing political principles of the time demonstrated by the responses to the Tariff Crisis, as well as Mark Graber's claims of "political fragmentation and federalism" as purposive for the failure of the repeal of judicial review in 1831 reflect this larger point. This is where Maltz's narrative on *Prigg* fails. Maltz, a legal academic, focuses mostly on legal elements and constructions of *Prigg* and while a necessary aspect of this project is to connect federalism with *Prigg* mere citations of legal authority do not justifiably elevate *Prigg*'s real relevance the political discussion of this era. One of his final categorizations of Story's opinion he writes, "Story's conclusions on the right of recaption and the constitutionality of the state personal liberty laws were dictated by a distinctively legal analysis of the language of the Fugitive Slave Clause and the background principles of common law" (Maltz 2009, 110). Maltz links aspects of the political climate to the institution of slavery later on, but his analysis of *Prigg* specifically, demonstrates little connection.

This can be effectively realized through analysis of the leading dissenter on the Court, Chief Justice Roger B. Taney, an appointee of Andrew Jackson, infamous for his later *Dred Scott*

opinion as well as his commitment to states' rights during this era. As Maltz (2000) describes, "Taney's analysis in *Prigg* is particularly striking when considered against the backdrop of the other themes that marked his jurisprudence. In general, Taney had a typically Jacksonian respect for states' rights. For example, although ultimately agreeing to accept the compromise formulation of *Cooley v. Board of Wardens*, he came to that position only after failing to rally the Court behind a stronger vision of concurrent state power over commerce in *The License Cases* and *The Passenger Cases* (*Cooley v. Board of Wardens* 1852; *The License Cases* 1847; *The Passenger Cases* 1849). Taney's opinion in *Groves v. Slaughter* is even more protective of states' rights, contending that states possessed exclusive authority to regulate the trading of slaves (*Groves v. Slaughter* 1841).

Conversely, Chief Justice Taney explicitly disagrees with Story's contention that states cannot pass any law restricting or aiding the return of fugitive slaves. Taney interprets "according to the opinion just delivered, the state authorities are prohibited from interfering for the purpose of protecting the right of the master and aiding him in the recovery of his property. I think the states are not prohibited; and that; on the contrary, it is enjoined upon them as a duty to protect and support the owner when he is endeavouring to obtain possession of his property found within their respective territories" (*Prigg v. Pennsylvania* 1842). Not surprisingly, given the (typical) historical reputation of Taney resulting from *Dred Scott*, he argues for an extension of the Fugitive Slave Act of 1793, forcing states to aid in the return of fugitive slaves. He takes issue with Story's essential centrist position on the enforcement question present in the case, but as Maltz (2000, 397) notes, "In striking contrast to his views on the dormant Commerce Clause, Taney's opinion in *Prigg* was not only strongly pro-slavery, but in many ways more nationalistic

than those of Story and Justice Wayne. Admittedly, Taney contemplated a state role in the process; this factor, however, is counterbalanced by two other points.” This tension is one which yields important analytical answers. The installation of Chief Justice Taney is notable for two reasons: 1) this was an expected nomination given Jackson’s wish to reconstruct the constitutional order to reflect his vision and Taney was certainly a man who shared this vision. 2) His nomination represents an important rebuke of the Marshall Court at a time when, “all three branches of the national government were controlled by Jacksonians committed to abandoning the central constitutional themes of the Marshall Court, Joseph Story was the only Justice left standing who articulated that jurisprudential vision” (Graber 2009, 154). The political implications of Taney’s presence on the Court speak directly to my thesis. The struggle between Chief Justice Taney and Justice Story exist as a microcosm of the political culture. The collision of ideology resulted in a centrist effective application of Justice Story’s jurisprudential reasoning in *Prigg*. Ideas and principles representative of two different spheres of judicial and political philosophy clash and yield an effective compromise. Certainly Taney articulates and maintains a view very different from Justice Story, but at a time when the institution of slavery was ill-prepared to be totally rebuked by every level of governmental authority, a *majority* decision of six votes prevailed, inclusive of a vision of ambiguous federalism, and a necessity to preserve a constitutional order envisaged by framers and accepted by the polity of 1842.

In addition to the polarization of ideas by both Justice Story and Chief Justice Taney, other opinions play pivotal roles in understanding the different conceptions of federalism and political principles of the time period. While these opinions do not hold jurisprudential weight, their analysis is pivotal when considering the political context of the time. For example, Justices

Wayne and McLean both offer different versions of the political system in their arguments. Justice Wayne writes a separate concurring argument, while Justice McLean offers another informed dissent presenting informed, nuanced opinions on different sides of the constitutional controversy. Again, an essential tenet of the political climate of the 1830s and 40s was the clashing ideologies of the former federalist era. To this end, it is not surprising that two other justices brought equally as compelling constitutional claims to the table. While some may dismiss the importance of such opinions, many forget that often words spoken in concurrences and dissents resonate loudly in future cases and the world of academia. The most prominent example stems from Justice Harlan's dissent in *Plessy v. Ferguson*. His description of a "colorblind constitution" in his dissent has remained a focus of constitutional law ever since. Ironically, its application in actual Court opinions only recently arrived (see *Parents Involved in Community Schools v. Seattle School District No. 1* 2007), this statement has enjoyed immense attention in constitutional lore due to its emanating egalitarian principles coupled with Justice Harlan's clear eye for the future. Therefore, we must also consider the opinions of both Justice McLean and Justice Wayne in an effort to gain further perspective on the changing political scene of 1842.

Justice McLean's dissenting opinion, as Maltz (2009, 107) explains, "reflected the influence of both his opposition to slavery and his commitment to judicial nationalism", and "took a strong stance in favor of state authority, to vindicate one of the major tenets of antislavery constitutionalism". This is a categorization of which I am very sympathetic, but once again, while Maltz adequately analyzes the content and emanations of the opinion, why does the analysis stop here? As I have illustrated, the ideas surrounding common American political

principles, i.e. federalism, were becoming muddied and the paradigm was shifting. Does McLean's opinion not reflect this idea, especially when you consider the multitude of political principles presented by the justices in *Prigg*? McLean's opinion, like the case as a whole, speaks to the larger theoretical aspect of *Prigg*. These principles Maltz identifies coincide with the shifting political and constitutional dialogues of the time and thus allow modern scholars to extend the study of *Prigg* from simply a case in the constitutional canon of slavery to an explanatory device for the political climate of the 1840s.

Justice Wayne's concurring opinion offers a different perspective of constitutional legitimacy. Justice Wayne's opinion "was devoted entirely to a defense of the view that the power to enforce the guarantees of the Fugitive Slave Clause rested exclusively with the federal government" (Maltz 2009, 103). Wayne exhibited very nationalistic and federalist concerns consistent with earlier views of the federalist doctrine. One can clearly see the dichotomy and tension present between the Wayne opinion and the McLean dissent. Justice Wayne's sympathies lie with the familiar notion of the federal authority retaining exclusivity in regard to recapture, which Maltz (2009, 103) contends rests on Wayne's "claim that federal exclusivity was necessary to minimize the sectional friction created by the issue of fugitive slaves". Interestingly, this too connects with common 1840s political sentiment. Sectional tensions commonly entered political discussions (especially in regards to slavery) and resulted in government action reflecting the controversy (see Missouri Compromise of 1820). Similarly, Wayne views his position on the bench as an opportunity to present a remedy for quelling sectional tensions, namely the retention of federal exclusivity in regard to fugitive slaves.

The constitutional conversations among the justices reflect the constitutional conversations occurring during the same time period, as evidenced specifically by the dialogues of the nullification crisis during the 1830s and slavery discussions in general. Justice Wayne and Justice McLean's opposing views of federal rights, like Taney and Story, demonstrate the political dynamism of the late 1830s and 1840s. Clashes between Justices often reflect clashes between political actors and while some view the Court as a strictly legal actor, its political influence often plays an important role. Here we can see again how the *Prigg* opinions not only were influenced by common political practice as Maltz (2009) explains, but in fact took a step further and offered informed options for both the federal government and the states. The connection between the political climate and the legal aspects can clearly be expounded to demonstrate what I believe is the proper constitutional role of *Prigg*, namely a conduit through which we can understand the political principles of its time.

Where my opinion and Maltz's differ is not necessarily in the principles present in the opinions (although sometimes this is the case), but more in what scholars can do with these elements. When he writes, "Story's opinion embodied the views of those who sought to dampen social tensions through a process of accommodation and compromise" this idea does more than just uncover an important connection but it provides a scholar with an essential analytical element (Maltz 2009, 109). Not only does *Prigg* contain common notions of political practice, but more importantly the principles and dialogues *Prigg* exhibits can be extended and placed in a larger context and hopefully scholars can understand that answers to political controversy can exist in areas other than strictly political actors. The political role of the Court is an important

one and *Prigg* speaks to the level which Court jurisprudence can yield effective answers for understanding a dynamic political system.

Conclusion and Extension

Through the discussion and subsequent connection of popular politics and the jurisprudence of the Supreme Court in *Prigg v. Pennsylvania*, specific tools fashioned by *Prigg* and a summation of its relevance the constitutional discussion of the political era are necessary. We must come full circle and extend Maltz's construction of *Prigg*. This is possible through establishing the federalist principles established by the case and identifying the theoretical frameworks *Prigg* provides. First and foremost, the most important political connection to arise from *Prigg* which reflects the era is the majority opinion itself. The fact that the six vote majority upheld the constitutionality of the Fugitive Slave Clause, while allowing states to head back to the legislative drawing board in efforts to effectuate new laws disallowing compliance with fugitive slave catchers, speaks directly to the changing constitutional values of the time period.

The earlier analyzed case studies work in tandem with the analytical paradigm produced by *Prigg*. Principles of federalism in the United States were clearly being explored in action as well as speech in early American history. The founding era established the federalist government structure in the American constitutional order. Early executives and their administrations provided insight into how they viewed constitutional obligations and the federal government's role over the states. Legislative debates and dissenting responses unveil the constant banter that occurred over the proper role of the federal government and its relationship to the states. These early political issues created a foundation for how the following generation should understand the constitutional and political order. The dynamic institutional relationships during the founding era provided a framework for the political conversations which would follow and culminate in *Prigg*.

The institutions set forth in the Constitution by the founders and the limits pushed by early executives, legislatures and judges laid the foundation for the federalist evolution. Justice Story's jurisprudential framework in *Prigg* echoes many founding federalist principles. He uses the Marshall perpetuation of the Hamiltonian federalist to access the original conceptions of the federal-state relationship. He invokes the *Federalist Papers*, Marshall Court federalism, and early conceptions of government which reflect not only his knowledge of constitutionalism, but his commitment to federalist constitutional principles. Yet, the opinion offers something much more than simple adherence to these early principles. The political exploration of these principles which occurred in the years following the founding era allow *Prigg* to exist as the culmination and ultimate manifestation of federalist principles in the American system. Without these earlier iterative conversations, the extension to *Prigg* is impossible.

Similarly, The Marshall Court did its best to re-establish the Hamiltonian federalist principles within the rule of law, and against this backdrop future courts could acquiesce in this tradition. *Prigg* takes specific note of the Marshall federalist tradition. Story's judicial connection to Chief Justice Marshall is extraordinarily evident not only in his jurisprudence, but in his political conversations during the Dorr episode. Story was very much a conservative constitutionalist, yet acutely aware of the intricacies of the institutional relationships of American government. Stare decisis for Story plays a role equally important to political time. The Marshall Court's jurisprudential foundation was an effective tool for locating principles of federalism for *Prigg*, but understanding the political moment facilitated Story's ability to mold these principles to a controversial topic. This application of federalist principles allows us to understand how a Supreme Court decision surrounding slavery can effectively operate within our

political discussions of the 1840s as another example of federalist principles, and more extensively as the dominant paradigm of the period.

The political players of the Jacksonian era did their best to restructure aspects of the American political system. Jackson's antagonism with John Marshall and John C. Calhoun created a new, more centrist version of federalism and exists as the second step in early federalist evolution. His documented constitutional principles in his response to *Worcester v. Georgia* and the Second National Bank Veto provide us with an avenue to understand how he attempted to repudiate the Hamiltonian/Marshall federalist order; yet his response to nullification illustrates his constitutional limits and his unwillingness to completely depart from the early foundational principles. This dynamic cements Jackson's status as a catalyst for change in the federalist relationship.

Jackson's political influence created an entirely new constitutional and political paradigm. Jackson demonstrated how an aggrandized federal government could operate while recognizing a degree of state maneuverability. His greatest public opposition, the South Carolina nullifiers, was eventually suppressed and Jackson avoided a full scale federal versus state constitutional competition. However, the substantive effect of the nullifiers should not be understated. Calhoun's actions re-introduced paradigms of federalism reminiscent of the founding era during the Alien and Sedition Acts backlash. State interpretative authority once again reared its head and proved states do have constitutional influence, although under the federal system the extent and power of this influence is often limited, especially when the overall structure of the federal union are at stake as they were in 1832 (and arguably in 1842). The federal government's relationship with the states often drives political discourse and when states

voice their opposition, as they would during the Tyler and *Prigg* era, federal institutions must respond. The Court responded in *Prigg* offering an application of political principles which afforded states' legislative maneuverability in a limited capacity, just as Jackson accepted a state's right to dissent in a limited capacity.

The political regime of John Tyler was tasked with applying fractionated federalist principles passed down from earlier political actors to highly divisive constitutional and political controversies. John Tyler is often overlooked as an influential political actor, but his dedication to certain constitutional paradigms and influence on the constitutional order are clearly evidenced by his political actions in the 1840s. Tyler's departure from major Whig principles and response to the Dorr Rebellion demonstrate his willingness to acquiesce in a certain constitutional vision, and as federal executive he did not struggle with applying these principles in order to quell both inter- and intra-state conflict. The constitutional values imbued by the Tyler federal regime as a result of the federalist evolution since the founding created a jurisprudential and political safety net for the Supreme Court and provided the Court with the tools to issue politically salient decisions on divisive issues.

Tyler's regime and the Dorr Rebellion are probably the most integral in understanding the *Prigg* operative paradigm, yet provide the least explicit evidence. John Tyler's existence as a Whig by name and Republican by practice (in the 1840s mold) provides the clearest evidence for the fractionated political order. Tyler struggled with party politics and clearly favored his own political and constitutional paradigms over those of his political base. Yet, during a number of political episodes, the Dorr Rebellion being the most notable, Tyler successfully applied his constitutional paradigms to moderate success. The 1840s required political compromise. Tyler's

political time was an extremely controversial one and a multitude of political issues permeated the national government, from slavery to the national bank to territorial annexation. Tyler's remedies, while not entirely successful, did have an aggregate effect of the institutional relationships of the period. His one-term presidency and the issues he faced required he make decisions which impacted the overall political order. The degree to which these issues influenced the federal institutions is manifested in Story's decision on an issue which had plagued the union from the founding, slavery. However, since slavery had not yet become the politicized issue it was poised to become in the thirty years to follow, the Court was offered an opportunity to issue an opinion reflective of its relative political importance and perpetuate the status quo of compromise which consumed federal politics.

Prigg v. Pennsylvania exists as the primary example of how federalist principles can cross institutional boundaries and influence the entire political order. *Prigg* invokes federalist principles from each of the prior political moments. Justice Story uses the litany of Marshall Court federalist decisions as the foundation for his argument. He entertains contested principles of the Jacksonian era to promote his reasoning. And Justice Story demonstrates his awareness of the political climate and relationship with the Tyler regime by issuing a non-threatening opinion. *Prigg's* federalist principles are reflective of how the federal-state relationship had changed over approximately a sixty year period and its existence as the prominent example of operative federalist principles in the antebellum era stem from this connection.

No major move to condemn or unanimously uphold the institution of slavery could have been conceived, and no move wholly supporting federal supremacy could have prevailed due to the shift created during the Jacksonian era, and the Tyler federalist structure (Graber 2006). We

can use this opinion and further explicate its theoretical application by using Story's framework as a tool for analyzing "the relative authority of the competing institutions of the American political system" in an effort to "give meaning to the Constitution" (Whittington 2007, 283). The major competing institutions in the 1840s were the constitutional authorities of the federal government posited against interpretative authority of the states. Therefore, Justice Story's decision making process and application can clearly be viewed as a method to balance such interpretative claims. My argument does not hinge on the success or failure of such a framework. Clearly, American history illustrates how the institution of slavery played a hand in driving our nation apart and spurring the Civil War. What my argument attempts to establish is how *Prigg*, a case commonly lumped as a failure to uphold moral justice and dispel racist practices, explains the general approach and implementation of political decision making during its era, inclusive of principles of federalism and their relationship to political compromise.

A second important connection between *Prigg* and its political culture is the way which it quelled the issue of slavery through compromise. The regional tensions between North and South on the issue of slavery were growing in the early 1840s and, as aforementioned, a repudiation of a constitutionally rooted institution was political suicide. Both the Missouri Compromise of 1820 and the later Compromise of 1850 clearly speak to the legislative paths taken in an effort to settle this particular constitutional question during the first half of the nineteenth century.

A third tool taken from *Prigg* is the degree to which, in the realm of slavery and federalism, a number of different perspectives were percolating through the political system. The five other offered opinions speak to the high level of controversy surrounding the case and

the doctrines involved, but notably, Justice Story's more moderate approach to the issues prevailed. Keith Whittington (2007, 295) writes,

The judiciary's most useful role may be in framing constitutional disputes for the extrajudicial resolution and in enforcing the principled decisions reached elsewhere rather than in autonomously and authoritatively defining constitutional meaning. By using the power of judicial review to quash challenges to reasonable but contested constructions of the Constitution, even those favored and supported by political leaders, the Court may well give greater authority to those constitutional understandings than they are entitled and shrink the legitimate sphere of political debate and decision.

If we take Whittington's construction of the "political foundations of judicial power" and apply it to *Prigg*, one can clearly discern that despite the Court's larger moralist failure, or Story's natural law failure, or the Court's biased need to perpetuate the institution of slavery, the political principles present in *Prigg* are not only rooted in historical context, but further explain the dominant theories of political decision making of the era. *Prigg* exists as a larger theoretical framework for the antebellum period, more than just "the last of the trilogy of important slavery cases of the 1840s" with political implications (Maltz 2009, 93).

Federalism permeates every political institution in American government. Understanding the national-state relationship has major implications for discerning the larger role of the federal government and how it effectively operates throughout its institutions. Institutional relationships often produce effects on governing political principles. The evolution of federalism from the Founding Era until *Prigg* serves as a prominent example of these effects. Political controversies and transformative moments often result in political progress. The progression of the applicability of federalism had implications across American political institutions and drove Supreme Court jurisprudence on sectional divisive issues as a result.

This argument is not without flaws. Other scholarly treatments acquiesce in convictions very different from my own and might take issue with my lack attention to their larger points, but when considering the field of American political development greater attention should be paid to questions of why decisions are made, how they are made and what this means for the larger political sphere. Certain cases and political theories are constantly taken for granted when through close analysis of political climate; different answers to the same questions posed by those theorists often appear. The external factors of the political climate often provide more adequate answers to important political questions. The development of political institutions, social and political doctrines of the time, as well as a myriad of other important factors can serve as resources for understanding political controversy, all of which need consideration when formulating a new argument. *Prigg's* position within the evolution of federalism reflects the degree to which a Supreme Court decision's implications stretch much further than simply dicta. Court decisions often reflect larger institutional relationships and commitments. *Prigg's* connection to the most essential governing relationship in American politics, the federal-state relationship, should elevate its role not only in constitutional lore, but throughout American political literature.

The overall political developments of the nation often supply interesting frameworks for understanding the governance scheme. My own study does not sufficiently answer a number of questions. Importantly, is this theoretical approach workable? Differently, can we apply this idea to cases outside the realm of slavery? What role did the power shift in the executive play on the decision making on the Court? Was this viewed as an opportunity to speak out by the Court, hence the different opinions? The list goes on and on. The most influential aspect of this study stems from the normative shift of typical slavery case to potential theoretical answer. The role of

the Court has shifted throughout this history of our nation, but its importance to essential political questions will never wane.

The principles at stake in *Prigg* were the principles every political institution on every level considered of the utmost significance during the 1840s. By 1860, the political unrest surrounding these issues forced institutional actors to commit themselves to one of the two accepted paradigms. The difference of 1842 is the degree to which institutional actors were not prepared to take such drastic measures. Compromise, a willingness to hold the Union together, shifting interpretational paradigms coupled with some institutional respect for these interpretative paradigms, and an overall shift from early Federalist ideology to the rise of localist legitimacy during the Jacksonian era, all effectively demonstrate why the constitutional and political conversations surrounding *Prigg v. Pennsylvania* should not stop at the unveiling of the myriad legal and political principles present in the opinions, but consequently should be extended so *Prigg* can assume its proper place in our “constitutional canon”, namely, an essential political mechanism which provides answers an insight into the political development of the United States during the early 1840s.

How was *Prigg* able to perpetuate these federalist principles? The Court is clearly not the only institution aware of the political tools at its disposal. Much of this dissertation focuses on other governing political institutions which influence judicial decision making, thus allowing *Prigg* to exist on a similar political and analytical playing field. The other institutions were aware of the complex political processes which led them to articulate their visions of federalism. Interestingly, the incredibly volatile issue in *Prigg*, namely slavery had yet to consume the national political scene. Within five years following the *Prigg* decision, slavery launched to the

political forefront with the annexation of Texas and the Mexican War under James K. Polk. This begins to alter the operation of federalism in American politics and the principles become highly politicized and concerned with slavery. The *Dred Scott* decision had major ramifications for exacerbating the slave problem. Abraham Lincoln's election in 1860 exacerbated sectional tensions. The pre-Polk 1840s and specifically the *Prigg* decision exist as the last reasonable effort to manage the role of slavery in a traditionally political manner. The post-*Prigg* political system approached the issue much differently.

An intriguing question remains. Does the lesson from *Prigg* have relevance for today's political system? Certainly it is important for those wishing to gain a better understanding of federalism's role in antebellum America, but some aspects may be applicable to today's political order. As Bradley Hays (2010) illustrates, state actors continue to assert what they perceive as legitimate constitutional interpretative power. States' political positions on federal government actions are continually issued and the states' role in federal government practices is being increasingly re-evaluated. *Prigg*'s avenue for state maneuverability may provide a paradigm for contemporary political compromise. Looming political and legal challenges in a variety of different policy areas may require the federal government to carve states legitimate legislative opportunities for dissent. A lesson could be learned from *Prigg*. Slavery was too volatile an issue to be suppressed in antebellum America, but other issues may benefit from affording states increased rights to object to federal government practices. *Prigg* provides for a federal-state discourse and attempts to delimit proper federalist practices. Increased political conversations can produce positive results and perhaps if the *Prigg* precedent were re-energized, rather than

condemned, contemporary political institutions could see the value of the proper application of federalist principles and legitimate, responsible political discourse.

References

Ableman v. Booth 62 U.S. 506 1859.

Ackerman, Bruce. 1993. *We the People: Foundations*. Cambridge: The Belknap Press of Harvard University Press.

Bancroft, Frederic. 1928 *Calhoun and the South Carolina Nullification Movement*. Baltimore: The Johns Hopkins Press.

Brown v. Maryland 1827. 25 U. S. 419

Calhoun, John. 24, November 1832. "South Carolina Ordinance of Nullification". *The Avalon Project: Documents in Law, History and Diplomacy*. Accessed: 10 January 2011 http://avalon.law.yale.edu/19th_century/ordnull.asp.

Clay, Henry. "On Jackson's Veto of the Bank Bill" 10, July 1832. Accessed: 11 February 2011 <http://eweb.furman.edu/~benson/docs/clay.htm>

Cooley v. Board of Wardens 53 U.S. 299 1852.

Crapol, Edward. 2006. *John Tyler: The Accidental President*. Chapel Hill, NC: The University of North Carolina Press

Dahl, Robert A. 1957. "Decision-making in a Democracy: The Supreme Court as a National Policy-Maker." *Journal of Public Law* 6 (Fall): 279-295. Reprinted in *Emory University Journal of Law* (50) Spring ,2001: 563-583. (*Emory* page numbers are used).

Dred Scott v. Sandford 1857 60 U.S. 393

Eisgruber, Christopher. 1988. "Justice Story, Slavery and the Natural Law Foundations of American Constitutionalism." *University of Chicago Law Review* Winter, 1988 55: 273-327.

Ericson, David F. 1993. *The Shaping of American Liberalism: The Debates over Ratification, Nullification and Slavery*. Chicago, IL: University of Chicago Press.

Epstein, Lee and Thomas G. Walker 2004. *Constitutional Law for a Changing America: Institutional Powers and Constraints*. Washington, D.C.: CQ Press.

Fehrenbacher, Donald. 1978. *Dred Scott Case*. New York: Oxford University Press.

Finkelman, Paul. 1981 *An Imperfect Union: Slavery, Federalism, and Comity*. Chapel Hill: The University of North Carolina Press.

- Finkelman 1993 "Sorting Out *Prigg v. Pennsylvania*." *Rutgers Law Journal* 24: 605-665.
- Gerring, John. 2001. *Social Science Methodology: A Criterial Framework*. New York: Cambridge University Press.
- Gettleman, Marvin E. 1973. *The Dorr Rebellion: A Study in American Radicalism 1833-1849*. New York: Random House
- Gibbons v. Ogden* 1824. 22 U.S. 1
- Gillman, Howard. 1993. *The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence* Durham, NC: Duke University Press.
- Gillman, Howard "The Struggle over Marshall and the Politics of Constitutional History" *Political Research Quarterly* 47: 877-886
- Graber, Mark A. 2006. *Dred Scott and the Problem of Constitutional Evil*. New York: Cambridge University Press.
- Graber, Mark A. 2009. "James Buchanan as Savior? Judicial Power, Political Fragmentation, and the Failed 1831 Repeal of Section 25." *Oregon Law Review* 88: 95- 156.
- Greenstein, Fred I. 2009. *Inventing the Job of President: Leadership Style from George Washington to Andrew Jackson*. Princeton: Princeton University Press.
- Groves v. Slaughter* 40 U.S. 499 1841.
- Hamilton, Alexander, James Madison and John Jay. "The Federalist Papers." *The Avalon Project: Documents in Law, History and Diplomacy*. Accessed: 2 June 2011. http://avalon.law.yale.edu/subject_menus/fed.asp.
- Hamilton, Alexander. 1791. "Opinion on the Constitutionality of the Bank" University of Chicago Press: *The Founder's Constitution*. Accessed: 9 February 2011 http://press-pubs.uchicago.edu/founders/documents/a1_8_18s11.html
- Hays, Bradley. (Mis)Understanding Interposition: *Constitutional Politics in State and Nation* Manuscript on file with author.
- Holden-Smith, Barbara. 1993. "Lords of Lash, Loom and Law: Justice Story, Slavery and *Prigg v. Pennsylvania*." *Cornell Law Review*. 78: 1086-1152.
- Houston v. Moore* 1820. 18 U. S. 1
- Jackson, Andrew. 10, July 1832a. "President Jackson's Bank Veto Regarding the Bank of the United States" *The Avalon Project: Documents in Law, History and Diplomacy*. Accessed 9 January 2011. http://avalon.law.yale.edu/19th_century/ajveto01.asp
- Jackson, Andrew. 10 December 1832b. "Proclamation Regarding Nullification." *The Avalon Project: Documents in Law, History and Diplomacy*. Accessed 10 January 2011. http://avalon.law.yale.edu/19th_century/jack01.asp.

- Jackson, Andrew. 4, March 1833. "Second Inaugural Address of Andrew Jackson" *The Avalon Project: Documents in Law, History and Diplomacy*. Accessed 9 January 2011. http://avalon.law.yale.edu/19th_century/jack01.asp.
- Jackson, Andrew. Letter to Francis P. Blair. 23, May 1842. In *Correspondence of Andrew Jackson Vol. VI*, edited by John Spencer Bassett, 153. Washington, D.C.: Carnegie Institute of Washington, 1933.
- Jackson, Andrew. Letter to Committee of Dorr Supporters. 22, August 1844. In *Correspondence of Andrew Jackson Vol. VI*, edited by John Spencer Bassett, xx. Washington, D.C.: Carnegie Institute of Washington, 1933. Also found in Niles Register LXVII, 23.
- Jefferson, Thomas. 1791. "Opinion on the Constitutionality of the Bill for Establishing a National Bank." University of Chicago Press: *The Founder's Constitution*. Accessed: 9 February 2011 http://press-pubs.uchicago.edu/founders/documents/a1_8_18s10.html
- Levinson, Sanford. 1997. "Slavery in the Canon of Constitutional Law" In *Slavery and the Law*, ed. Paul Finkelman Madison, WI: Madison House.
- The License Cases* 46 U.S. 504 1847.
- Luther v. Borden* 1849. 48 U.S. 1
- Magliocca, Gerard N. 2007. *Andrew Jackson and the Constituion: The Rise and Fall of Generational Regimes*. Lawrence, KS: University Press of Kansas.
- Maltz, Earl M. 2000. "Majority, Concurrence, and Dissent: Prigg v. Pennsylvania and the Structure of Supreme Court Decisionmaking" *Rutgers Law Journal* 31: 345- 399.
- Maltz, Earl M. 2009. *Slavery and the Supreme Court, 1825-1861*. Lawrence, Kansas: University of Kansas Press.
- Marbury v. Madison*. 1803. 5 U.S. 137.
- Martin v. Hunter's Lessee* 1816. 14 U.S. 304
- McCloskey, Robert G and Sanford Levinson. 2010. *The American Supreme Court*. 5th ed. Chicago, IL: The University of Chicago Press.
- McCulloch v. Maryland* 1819. 17 U.S. 316
- Monroe, Dan. 2003. *The Republican Vision of John Tyler*. College Station, TX: Texas A&M University Press.
- Mowry, Robert. 1968 *The Dorr War: The Constitutional Struggle in Rhode Island* Providence, RI: Preston and Rounds Co.
- Newmyer, R. Kent. 2006. *The Supreme Court under Marshall and Taney* 2nd ed. Wheeling, IL: Harlan Davidson Incorporated.
- Newmyer, R. Kent. 2001. *John Marshall and the Heroic Age of the Supreme Court*. Baton Rouge: Louisiana State University Press.

- Newmyer, R. Kent. 1985. *Supreme Court Justice Joseph Story: Statesman of the Old Republic*. Chapel Hill, NC: University of North Carolina Press
- O'Brien, David M. 2008. *Constitutional Law and Politics: Struggles for Power and Governmental Accountability*. 7th ed. Vol. 1. New York: W.W. and Norton Company.
- The Passenger Cases* 48 U.S. 283
- Parents Involved in Community Schools v. Seattle School District No. 1* 551 U.S. 701 2007.
- Powe, Lucas A. 2009. *The Supreme Court and the American Elite: 1789-2008*. Cambridge, MA: Harvard University Press.
- Purcell, Edward A. 2007. *Originalism, Federalism, and the American Constitutional Enterprise: A Historical Inquiry*. New Haven & London: Yale University Press.
- Prigg v. Pennsylvania*. 1842. 41 U.S. 539.
- Rosenberg, Gerald. 1991. *The Hollow Hope: Can Courts Bring About Social Change?* Chicago: University of Chicago Press.
- Schlesinger, Arthur 1945. *The Age of Jackson*. New York: Little Brown and Co.
- Skowronek, Stephen. 1993. *The Presidents Politics Make: Leadership from John Adams to George Bush*. Cambridge, MA: The Belknap Press of Harvard University Press.
- Spencer, John Canfield. Letter to Colonel Bankhead, 28, May 1842. In *Messages and Letters of the President*, 2152. New York: Bureau of National Literature, 1897.
- Story, Joseph *Commentaries on the Constitution of the United States*.
- Story, Joseph. Letter to Judge Pittman, 10, February 1842. In *Life and Letters of Joseph Story*, 450-452. New York: C.C. Little and J. Brown, 1851 (digitized eBook).
- Story, Joseph. Letter to Daniel Webster, 16, April 1842. In *Life and Letters of Joseph Story*, 450-452. New York: C.C. Little and J. Brown, 1851 (digitized eBook).
- Sturges v. Crowninshield* 1819. 17 U. S. 122
- Tyler, John. Veto Message on National Bank, 16, August 1841a. In *Messages and Letters of the President*, 450-452. New York: Bureau of National Literature, 1897.
- Tyler, John. First Inaugural Address, 9, September 1841b. In *Messages and Letters of the President*, 1890-1891. New York: Bureau of National Literature, 1897.
- Tyler, John. Letter to Samuel King, 11, April 1842c. In *Messages and Letters of the President*, 2143-2145. New York: Bureau of National Literature, 1897..
- Tyler, John. Letter to Samuel King, 9, May 1842d. In *Messages and Letters of the President*, 2147. New York: Bureau of National Literature, 1897.
- Tyler, John. Letter to Daniel Webster, 27, May 1842e. In *Messages and Letters of the President*, 2160. New York: Bureau of National Literature, 1897.

- Tyler, John. Letter to Samuel King, 25, June 1842f. In *Messages and Letters of the President*, 2156. New York: Bureau of National Literature, 1897.
- Webster, Daniel. Letter to John Tyler, 3, June 1842. In *Message and Letters of the President*, 2153. New York: Bureau of National Literature, 1897.
- Webster, Daniel. "National Bank Veto Reply" 11 July, 1832. *Register of Debates in Congress*, 22nd Cong., 1st sess., 1221-1240.
- Wiecek, William M. 1978. "'A Peculiar Conservatism' and the Dorr Rebellion: Constitutional Clash in Jacksonian America" *The American Journal of Legal History* 22: 237-253.
- Wood, Gordon. 2009. *Empire of Liberty: A History of the Early Republic, 1789-1815*. New York, NY: Oxford University Press.
- Whittington, Keith. 1996. "The Political Constitution of Federalism in Antebellum America: The Nullification Debate as an Illustration of Informal Mechanisms of Constitutional Change" *Publius* 26 1-24.
- Whittington, Keith. 2007. *Political Foundations of Judicial Supremacy: The Presidency, The Supreme Court, and Constitutional Leadership in U.S. History*. Princeton: Princeton University Press.
- Worcester v. Georgia* 1832. 31 U. S. 515
- Willson v. Blackbird Creek Marsh* 1829. 27 U.S. 245