THE CONSTITUTIONAL DEVELOPMENT OF POLITICAL PARTIES: A THEORY OF EMERGENT STRUCTURES AND REOCURRING PATTERNS OF POLITICAL OPPOSITION

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A Dissertation

Presented to

The Faculty of the Department

of Political Science

University of Houston

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In Partial Fulfillment

Of the Requirements for the Degree of

Doctor of Philosophy

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By

Robert E. Ross

May, 2014

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ABSTRACT

This study addresses a long-standing puzzle in American political party development as scholars have attempted to understand why political parties first emerged despite strong opposition to them. The result of this puzzle leaves us to understand a constitutional order that is deeply entrenched with political parties, despite the scholarly perception that the founders created a "Constitution-against-Parties." As such, I reassess how political actors developed early constitutional rules that facilitated the emergence of political parties and established their purpose in American politics. Utilizing qualitative evidence, I assess how an opposition party gained its constitutional foundations through constitutional constructions and creations involving the First Amendment, the Twelfth Amendment, and general ticket Electoral College vote allocation. Accordingly, once these constitutional rules allowing an opposition political access were in place, I reassess the electoral strategies of the Federalist Party and Democratic-Republican Party in national elections. As such, I argue that, contrary to current party scholarship, the Constitution actually worked for rather than against parties, and parties served as an early means of checking political power, particularly executive power, by majoritarian means. More broadly, I conclude policy and legal rules should seek to strengthen the two-party system thereby facilitating a legitimate opposition capable of checking executive power.

ACKNOWLEDGEMENTS

As my life as a graduate student comes to a close, I have become acutely aware of those who have been integral in my educational process and who have enriched both my academic and personal life. My success is really their success, and, unfortunately, no words are adequate to fully expressing my gratitude for their support.

Academically, I have benefited from numerous teachers who took the time to mentor my growth in and out of the classroom. My teachers at Brigham Young University, particularly Ralph Hancock, first introduced me to political theory and taught me to take it seriously. Michael Zuckert's timely visiting position at the University of Chicago helped me through the program and introduced me to American political development. Perhaps the greatest advice Michael ever gave me was to go and study with Jeremy Bailey at the University of Houston. Jeremy Bailey has willingly and exemplarily embraced the role of adviser and mentor. He has taught me how to be an academic and a professional, and I consistently recognize his influence on and in my own work. He constantly pushed me to aspire for more and his cautious optimism always kept me grounded. In many ways the type of teacher and scholar I aspire to be is the direct result of Jeremy's influence.

I have also benefited from the genuine friendship of those both inside and outside the University of Houston. I am grateful for Jeffrey Church and the Political Theory Reading Group who all endured reading multiple chapters of my dissertation and provided invaluable feedback. I will sincerely miss my Tuesday escape from the pressures of academic life with the TBT group: Andrea, Marcia, Roger, Sarah, and Markie. Grant Adamson and Mark Nolte provided much needed support as we all struggled and progressed through the Ph.D. process together. Thanks to Bruce Hunt and Matthew Lang for being supportive friends as we complained about school while watching sporting events. Andrea and Matthew, I count you two among my dearest friends. Finally, I am grateful for those in Maplewood II who were our family away from family: Matt and Brekke Sjoblom, Myles and Rishelle Scott, Nate and Aubrey Pettit, Matt and Rachel Theurer, Chris and Sarah Hawks, T.C. and Emily Ence, and Grant and Ruth Adamson. You all made my family feel welcome in Houston and made our stay here memorable.

Finally, I express my utmost gratitude to my family. My parents taught me to love reading and encouraged me to pursue my academic passions, no matter how obscure the subject matter. Harold and Teresa provided as much love and encouragement as in-laws could possibly give even though I was not going to be a "real" doctor. To my children, Nathaniel and Scarlett, thank you for patiently waiting for daddy to finish working before requesting his return to the good life. You two have taught me more about life and love than I could have possibly imagined. Finally, to my loving wife, I dedicate this work to you. You were my constant amid the persistent uncertainty endemic to academic life. You led when I needed guidance, you pushed when I was discouraged, you stayed by my side when I needed a friend, and you loved me through it all. For that gift, there are no words to express my gratitude.

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You loved me through it all.

Chapter 1: The Political Party Paradox in American Constitutional and Political Development

"If I could not go to heaven but with a party, I would not go there at all."
Thomas Jefferson

"As it is the business of the contemplative statesman to trace the history of parties in a free country, so it is the duty of the citizen at all times to understand the actual state of them."
James Madison

Much has been written regarding the importance of political parties in modern democracy. In fact, democratic success in the modern era is often attributed to political parties.[1] Moreover, parties have assumed an important role within the American constitutional context as there is "no America without democracy, no democracy without politics, and no politics without parties."[2] Political parties continue to be understood as

[1] E.E. Schattschneider, *Party Government in the United States* (New York: Rinehart, 1942), pp. 1. Schattschneider considered his work on parties to be his most important academic accomplishment. Towards the end of his life he said, "I suppose the most important thing I have done in my field is that I have talked longer and harder and more persistently and enthusiastically about political parties than anyone else alive (quoted in Leon D. Epstein, *Political Parties in the American Mold* (Madison, WI: The University of Wisconsin Press, 1986) pp. 32).

[2] Clinton Rossiter, *Parties and Politics in America* (Ithaca, NY: Cornell University Press, 1960), pp. 1.

the critical link between the government and the governed as "open, participant-oriented, viable, and representative system of parties operating within free and fair electoral procedures performs duties that make democratic government possible."[3] Furthermore, for Marc Landy and Sidney Milkis, a political party is an important source of power and legitimacy in American politics, particularly for the office of the president. Through a party, a president is empowered by a solid base of popular support to pursue ambitious national reforms; a party also constrains these presidential ambitions by holding presidents accountable to a popular party.[4] This is to say that, in the modern context, political parties have assumed a central role in scholarly explanations of the mechanisms by which democracy functions.

However, political parties have had an uneasy place in American history due to the difficulty in reconciling their modern praise with their undesired presence in early political development. The founders' apprehension towards parties is well documented. George Washington used his Farewell Address to warn against "the baneful effects of the Spirit of Party."[5] John Adams echoed these sentiments as he believed a "division of the republic into two great parties…is to be dreaded as the greatest political evil under the

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[3] Richard S. Katz and William Crotty, *Handbook of Party Politics* ed. Richard S. Katz and William Crotty (Thousand Oaks, CA: Sage Publications Ltd., 2006), pp. 1.

[4] See Marc Landy and Sidney M. Milkis, *Presidential Greatness* (Lawrence: The University of Kansas Press, 2000), pp. 8-11.

[5] James D. Richardson, ed., *A Compilation of the Messages and Papers of the Presidents* (New York: Bureau of National Literature, 1897), vol. 1, pp. 210-211.

Constitution."[6] Even Thomas Jefferson, the co-founder of the first political party, preferred the alternative to heaven if it meant avoiding alignment with a party.[7] Despite these clear admonishments against parties, political parties quickly developed and became a prevalent feature in American politics. As a result we are left to understand the emergence of political parties through the maxims of the salutary benefits of parties and the baneful effects of divisive partisanship. Put differently, even amid modern claims for the necessity of parties in a democracy, we still find remnants of early party apprehension. For example, Harvey Mansfield stressed the importance of remembering the founders' arguments against parties because partisan politics can "dangerously divide a free country…making compromise difficult by…fixing opinion into opposed categories equipped with slogans designed to raise heat rather than convince." Furthermore, according to Mansfield, parties undermine independence of mind requisite in a free country.[8] In this way, American political parties still rest on an uncertain foundation as the founders' anti-partisanship rhetoric and their seemingly anti-party constitutional design must be reconciled with the development of party politics.

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[6] John Adams to Jonathan Jackson, October 2, 1780, in *Works of John Adams* (1854), vol. 9, pp. 511.

[7] Thomas Jefferson to Francis Hopkins, March 14, 1789, in *The Portable Jefferson*, ed. Merrill D. Peterson (New York: Penguin, 1997).

[8] Harvey Mansfield, "Political Parties and American Constitutionalism", in *American Political Parties and Constitutional Politics*, ed. Peter W. Schramm and Bradford P. Wilson (Landham, MD: Roman Littlefield, 1993), pp. 6.

One example of this uncertain foundation is the Supreme Court's conflicting approach to political party jurisprudence. In 2000, the Court dealt with two separate cases involving political parties where the Justices provided conflicting conceptions of parties and their role in American politics. In *California Democratic Party v. Jones*, Justice John Paul Stevens disagreed with the position that "representative democracy is 'unimaginable' without political parties" by referring to the "prominent members of the founding generation" and their "anti-party thought." Additionally, according to Justice Stevens, the founding generation viewed parties as "an evil to be abolished or suppressed" and "parties ranked high on the list of evils that the Constitution was designed to check."[9] In *Nixon v. Shrink Missouri Government PAC,* Justice Clarence Thomas believed the "Framers preferred a political system that harnessed such faction for good, preserving liberty while also ensuring good government." Moreover, Justice Thomas disagreed with Stevens' previous assessment that parties were necessarily evil to be "abolished" or "suppressed" because measures designed to suppress political party activity were a "repressive 'cure' for faction" rather than an actually "remedy".[10] Even though they utilized the same historical sources, Justice Stevens and Justice Thomas developed opposite constitutional conclusions regarding the role of parties in American politics.

These unsettled constitutional conclusions can also be seen in in the Court's concept of representation in its First and Fourteenth Amendment jurisprudence. These two amendments have been used extensively in cases involving political parties ranging

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[9] See *California Democratic Party v. Jones*, 530 U.S. 567 (2000).

[10] See *Nixon v. Shrink Missouri Government PAC,* 528 U.S. 377 (2000).

from issues of campaign finance, redistricting and reapportionment, freedom of association, and election laws. As one legal scholar put it, parties "provide a set of structures that are integral to the attainment of effective representation."[11] Consequently, by adjudicating cases involving political parties, the Court has assumed a critical role in defining and shaping the operation of the central tenant of our democracy, representation. There is, however, substantial discord regarding the Supreme Court's jurisprudence on this matter due partly to the absence of a clear constitutional foundation for party politics. In terms of representation, one particularly difficult question is defining the legal status of political parties. For example, are they to be considered as state actors and therefore subject to the constitutional restrictions developed in the Bill of Rights and Fourteenth Amendment? Or, are they private associations, more like churches, in that they enjoy constitutional protections against overbearing state intervention?[12] Unfortunately, the Court's best answer to this question is "it depends," thereby providing no real consensus on how this matter should be settled.

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[11] David K. Ryden, *Representation in Crisis: The Constitution, Interest Groups, and Political Parties* (Albany, NY: State University of New York Press, 1996), pp. 2.

[12] See, for example, *William v. Rhodes*, 393 U.S. 23, 32 (1968); *Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997); *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666 (1998); *California Democratic Party v. Jones*, 530 U.S. 567 (2000). These cases dealt primarily with ballot access and the legal rules used during primary elections.

Adding to the unsettled legal status of parties, another largely overlooked question emerges once we begin to delineate the different aspects of political parties. Specifically, does the Constitution apply differently to the various components of a political party? Following V.O. Key's important work, we can understand parties to have three parts: the party-in-the-electorate, the party-in-office, and the party-organization.[13] According to Persily and Cain, many legal scholars working in this area "throw around the word 'party' as if it had a consistent meaning across a range of legal terrain" thereby missing these important distinctions.[14] As a consequence, these legal questions assume multiple

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[13] See V.O. Key, *Politics, Parties, and Pressure Groups* (New York: Thomas Y. Cromwell, 1964).

[14] Nathaniel Persily and Bruce E. Cain, "The Legal Status of Political Parties: A Reassessment of Competing Paradigms", 100 *Columbia Law Review* (2000), pp. 775-812. For example, the Columbia Law Review dedicated part of an issue to the relationship between political parties and law in *Symposium: Law and Political Parties*. As part of the *Symposium*, Nancy L. Rosenblum argued that political parties are vital to civic health because parties are primarily "membership groups", and "among associations of civil society, political parties are *primus inter partes*. More specifically, the defining characteristic of parties as *voluntary associations and membership groups* provide the armature of justification for valuing and strengthening them." (816) See Nancy L. Rosenblum, "Political Parties as Membership Groups," 100 *Columbia Law Review* (2000), pp. 813-844. In the same issue, Daniel R. Ortiz argued that political parties need be regulated and party entrenchment weakened because in a "democracy-as-consumption" theory, parties provide voters (consumers) with information (products)

dimensions that require a multifaceted understanding of the constitutionality of political parties. Unfortunately, the Court and the Constitution offer no clear guidance on this important constitutional issue as the "subject of political parties and their relation to the law continues to baffle judges, lawyers and scholars."[15]

The Court's unsettled conclusions regarding the role of political parties are derivative of the unclear relationship between parties and the Constitution. Moreover, the Court's difficulty with parties is part of a larger narrative concerning the constitutional

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from which to choose (purchase). In this regard, parties should offer voters, as consumers, a diverse range of policy choices. However, the two-party system gives too much control to the party thereby distorting and circumscribing political choice and enriching the party at the expense of the voter. See Daniel R. Ortiz, "Duopoly Versus Autonomy: How the Two-Party System Harms the Major Parties," 100 *Columbia Law Review* (2000), pp. 753-774. Rosenblum's argument is inherently centered on an understanding of the party-in-the-electorate and the associational advantages of strengthening this aspect of parties. Ortiz's bases his claims on an understanding of the party-organization and the importance of regulating the actions of major parties in the two-party system. In the end, both Rosenblum and Ortiz want to enhance and promote the role of voters within the party system. However, because they do not adequately distinguish between the separate parts of a political party (the party-organization and the party-in-the-electorate) Ortiz recommends regulating the very thing Rosenblum wants to strengthen.

[15] Persily, Nathaniel and Bruce E. Cain, "The Legal Status of Political Parties: A Reassessment of Competing Paradigms", pp. 775.

development of political parties. Although the Constitution is silent regarding party politics, there is a standard scholarly account of parties under the Constitution. That account, most famously given by Richard Hofstadter, relies on the founders' anti-partisan rhetoric to argue they created a "Constitution-against-Parties".[16] According to this account, the founders believed political parties posed a serious danger to a constitutional republic, especially if parties became the definitive means of structuring and organizing politics. For the framers of the Constitution, partisanship was illegitimate because it interfered with rational debate and caused political conflict.[17] This is to say that, political parties were viewed as unnecessary and potentially dangerous once a regime had been established on constitutional principles because "permanent party competition…would mean legitimizing a continual struggle between different views about the very foundation

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[16] Richard Hofstadter, *The Idea of a Party System: The Rise of Legitimate Opposition in the United States, 1790-1840* (Berkley: University of California Press, 1969), 40, 52-53.

[17] See Alexander Hamilton, James Madison, and John Jay, *The Federalist: A Commentary on the Constitution of the United States*, ed. Robert Scigliano (New York: Modern Library, 2000). From here on, *The Federalist*. Specifically, in *The Federalist* No. 50 James Madison stated: "When men exercise their reason coolly and freely on a variety of distinct questions, they inevitably fall into different opinions on some of them. When they are governed by a common passion, their opinions, if they are so to be called, will be the same," and, in *The Federalist* No. 55, "passion never fails to wrest the scepter from reason." (pp. 328; 356)

of the political order."[18] This thesis has been echoed throughout contemporary scholarship as it has been widely accepted as an authoritative narrative of early party development. Moreover, Hofstadter's "Constitution-against-Parties' thesis has also influenced how the Supreme Court has adjudicated cases involving political parties. Just to name one example, Justice Stevens explicitly relied on Hofstadter when downplaying the role of parties in his dissent in *California Democratic Party v. Jones*. The Court's difficulty with understanding political parties is indicative of the larger problem of reconciling these extra-constitutional political features with a Constitution originally understood to work against them.

The problem with the "Constitution-against-Parties" thesis is that it does not take seriously enough the silence of the Constitution. Because political parties are exogenous to the Constitution, the question of when parties and the party system were ultimately considered legitimate can be asked. Put differently, if parties are extra-constitutional, when, and how, did they become a legitimate feature of America's constitutionalism? The answer to this question, a question that has been considered settled since Hofstadter, is vital to understanding American party politics because establishing the characteristics of the legitimated party system reveals the nature and scope of parties and their role in the political arena. Moreover, focusing on the emergence of party legitimacy also provides a comparable system by which we can evaluate modern party practices. Ultimately, reconciling the history of party politics and the Constitution is a matter of determining how parties became legitimate features of the political process.

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[18] James W. Ceaser, *Presidential Selection* (Princeton: Princeton University Press 1979), pp. 91.

Some scholars have focused on articulating a political moment when a party system became a legitimate feature in American constitutional politics. For example, John Aldrich argues that parties became legitimate as early as 1791 during the Second United States Congress. According to his account, parties emerged as the arguments between Alexander Hamilton and James Madison regarding the government's republican character became the "great principle". This principle, together with "sectional and related interests, yielded disequilibrium, and an institutional form was required to reduce its baneful effects and provide at least a first approximation to solving the great principle."[20] Therefore, parties were the consequence of the great principle, majority instability in Congress, and the problem of social choice.[21] Aldrich's account, however, can only explain the emergence of America's first political parties as a means of overcoming the collective choice problem in Congress. Unfortunately, this narrative construes the presence of the first parties as temporary and unintentional and neglects to address parties' role in providing a necessary opposition. In this way, Aldrich legitimacy "moment" was merely temporary, and he misses the development of an essential feature of a democratically based party system, a perpetual legitimate opposition.

The Need to Reassess Opposition

For democracy to be effective and tenable there must be sustained competition for access to power and any winning party must face the serious threat of losing subsequent

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[20] John H. Aldrich, *Why Parties: The Origin and Transformation of Political Parties in America* (Chicago: University of Chicago Press, 1995) pp. 93

[21] *Ibid*., pp. 93.

elections. As such, legitimate opposition must be understood as the defining characteristic of a two-party system. And, because "a competitive party system is a necessary ingredient of democratic politics,"[22] we should be mindful of opposition as the bedrock of our party system, and, by extension, how well our party system fulfills the requirement for legitimate opposition. However, according to Courtney Jung and Ian Shapiro, "opposition is also the milestone that has been least studied by contemporary political scientists."[23] Unfortunately, in accordance with Jung and Shapiro's statement, previous accounts of opposition merely articulate the moment of legitimacy and assume its constancy amid substantial changes to the constitutional system itself. For example, Hofstadter argues that opposition did not become legitimate until parties took the form of their modern counterparts by becoming more democratic during the Andrew Jackson/James Monroe era.[24] Moreover, at this point Jefferson's initial strategy for political unanimity by conciliating dissent was abandoned for the idea of a permanent opposition as achieving the ideals of democracy.[25] More recently, Jeffery Selinger argued that party legitimacy during the Andrew Jackson era was still unsettled due to heightened domestic conflict over slavery and the prospect of civil war. Selinger thus pushes Hofstadter's argument backward, arguing that the party legitimacy process was

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[22] John H. Aldrich, *Why Parties*, pp. 26.

[23] Courtney Jung and Ian Shapiro, "South Africa's Negotiated Transition: Democracy, Opposition, and the New Constitutional Order," *Politics and Society* 23(3): 269-308.

[24] Richard Hofstadter, *The Idea of a Party System*.

[25] *Ibid.*, chapter 6.

not settled until after the Civil War when the national government was capable of ensuring compliance to federal law without state resistance devolving into war.[26]

These accounts, however, all rely on the same fundamental assumption that the concept of legitimate opposition is essentially static. In other words, they assume once the foundation for legitimate opposition is established we can then focus on the evolving nature of the party system's political structures. Subsequently, these studies can only account for the emergence of a legitimate opposition. However, one important question these accounts have yet to explore is the relationship between the evolving party structures and the foundations on which it is built. Put differently, if we accept the historical demarcation of the nation's party system into periods of unique party practices, does the nature of legitimacy change with each distinctive era? Or, are there recurrent patterns of party legitimacy that help us understand the rise and fall of parties within the full history of the political system? To begin to answer this question, we need to develop a dynamic theory of opposition that can transcend any particular party era and is based on the defining characteristics of legitimate opposition: responsibility and effectiveness. In this way, we can more clearly understand the incorporation of opposition into the United States' constitutionalism and, more importantly, how this concept changes within context of the U.S.'s party history.

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[26] Jeffrey S. Selinger, "Rethinking the Development of Legitimate Party Opposition in the United States, 1793-1828," *Political Science Quarterly* 127 (Summer 2012).

Constitutional Development and Legitimate Opposition

In his seminal work, Richard Hofstadter provided a useful articulation of legitimate opposition. Following his definition, I conceptualize this important term as "recognized opposition, organized and free enough in its activities to be able to displace an existing government by peaceful means."[27] In other words, a legitimate opposition must be constitutional, responsible, and effective. Hofstadter is correct in that the concept of legitimate opposition is a "sophisticated idea, and it was not an idea that the Fathers found fully developed and ready to hand when they began their enterprise in republican constitutionalism in 1788."[28] However, despite the absence of a mature notion of legitimate opposition, we can still ask the important question: Is there evidence that early parties were viewed as constitutional, responsible, and effective? To answer this question, special attention must be given to the process of developing a legitimate opposition rather than the political manifestation of a matured concept. Therefore, there are two processes that need to be disaggregated: (1) the process by which opposition gained constitutional status; (2) how the nature of opposition changes within the historical context of American political development. Accordingly, we must clarify the foundation on which our party structures have been erected and develop a dynamic, not a static, theory of reoccurring forms of opposition.

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[27] Richard Hofstadter, *The Idea of a Party System*, pp. 8.

[28] *Ibid*., pp. 8.

Opposition and the Constitution

The concept of a constitutional opposition is grounded in the rules governing political action within the political arena. Like other political actors, political parties are supplied with power and authority by the Constitution. In terms of power, the Constitution can provide opposition parties with certain formal and informal resources to challenge an existing party controlling governmental offices; the party in power can likewise utilize the same resources to maintain their political standing. A party's authority is contingent on their actions, either in challenging or securing government, being justified as appropriate for a given situation. As such, for an opposition to be considered constitutional, "both government and opposition are bound by the rules of some kind of constitutional consensus" thereby allowing an opposition to operate within the electoral process and throughout the public square.[29]

The nature and scope of these particular governmental operations and political actions are defined by the Constitution. The process by which the governing document accomplishes this, however, is not entirely clear.[30] The standard account of this defining process is through the exercise of judicial review as the Constitution is interpreted primarily as a legal document constraining the actions of political actors. Subsequently, "the Constitution is considered relevant to politics as a consequence of and only to the extent that the judiciary is willing to enforce its terms and block the actions of

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[29] Richard Hofstadter, *The Idea of a Party* System, pp. 4.

[30] See Chapter 1 in Keith Whittington, *Constitutional Construction: Divided Powers and Constitutional Meaning* (Cambridge, MA: Harvard University Press, 1999).

governmental officials."[31] Unfortunately, this manner of understanding the Constitution cannot enlarge our understanding of political party development and the acceptance of a legitimate opposition. The judiciary arrived relatively late to the party scene as party politics were well established before the Supreme Court began applying the Constitution to party practices. As a result, party jurisprudence merely defines or constrains the specifics of the party system's structure and not their foundation in American constitutionalism. This is to say that the Supreme Court assumes political parties have a role in American politics because cases seek to determine if certain actions taken by political parties are constitutional rather than asking if political parties themselves are constitutional. Hence, judicial interpretation cannot account for nor establish the constitutional foundation of legitimate opposition.[32]

An account of how nonjudicial actors create constitutional meaning is needed to explain the place of political parties and legitimate opposition in our constitutional tradition. Such account would need to supplement the "jurisprudential model" with a "more explicitly political one that describes a distinct effort to understand and rework the meaning of a received constitutional text." This political model is referred to as a

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[31] Keith Whittington, *Constitutional Construction,* pp. 1.

[32] See also Benjamin A. Kleinerman, *The Discretionary President: The Promise and Peril of Executive Power* (Lawrence: University of Kansas Press, 2009) in which Kleinerman argues that, in "the political contestations" over the limits of executive prerogative, the legislatures necessarily should have the "constitutional upper hand," not the judiciary. In this regard, the constitutional understanding of executive prerogative is largely determined by non-judicial political actors.

"constitutional construction."[33] Rather than relying on legal norms, a constitutional construction aims to "resolve textual indeterminacies" as political actors attempt to "elucidate the text in the interstices of discoverable, interpretive meaning, where the text is so broad or so underdetermined as to be incapable of faithful but exhaustive reduction to legal rules."[34] For example, in the early republic, political actors dealt with general indeterminacies in the freedom of speech, freedom of press, and freedom of association clauses. These clauses were used to elucidate important constitutional meanings to determine the nature and scope of the political tools available to the emerging opposition party. Consequently, a constitutional construction can account for the political process of incorporating an extra-constitutional party doctrine into our constitutionalism. Thus, our party system's foundation of legitimate opposition needs to be understood as a result of political actors creatively making a constitutional meaning more explicit while remaining faithful to the existing text.

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[33] Keith E. Whittington, *Constitutional Construction*, pp. 5. See also Stephen M. Griffen, *American Constitutionalism* (Princeton: Princeton University Press, 1996); Bruce Ackerman, *We the People*, vol. I (Cambridge, MA: Harvard University Press, 1991); Barry Friedman, "Dialogue and Judicial Review," *Michigan Law Review* 91 (1993), 577; Wayne D. Moore, *Constitutional Rights and Powers of the People* (Princeton: Princeton University Press, 1988).

[34] Keith Whittington, *Constitutional Construction*, pp. 5.

The Party System and its Emergent Structures

The United States has a rich history of party politics with some of the oldest political parties in the world. Given the durability and development of the party system and the Constitution, scholars have looked to how the party system developed in tandem with our constitutional government. As such, we know a lot about the structure of the party system and how party activities have varied across America's changing constitutional and political history. For example, scholars have conceptualized this structure by dividing party history into different party periods, or party eras.[35] Individually, these eras tell us how political parties operated in a particular stage of the nation's development with a new era beginning through the evolution of the parties themselves. Moreover, understood as a whole, they explain the development of the party system in relation to the nation's historical development more generally with political actors in each era engaging with distinct constitutional constructions of how parties would operate within the constitutional system.

Table 1: Emergent Structures of Party Organization

Era	*Type of Party Politics*
First Party Era (1790s-1820s)	Patrician
Second Party Era (1820s-1850s)	Confederated
Third Party Era (1850s-1890s)	Nationalized
Fourth Party Era (1890s-1930s)	Progressive
Fifth Party Era (1930s-1960s)	Administrative
Current Party Era	Service

[35] See for example Sidney M. Milkis, *Political Parties and Constitutional Government* (Baltimore, MD: The Johns Hopkins University Press, 1999). Milkis discusses the changing nature of the party system and its relation to the Constitution as the nation developed democratically.

Patrician Parties

The first party system is perhaps best described by the patrician politics dominant during that era.[36] In this period, party practices were organized by the Federalist Party and the Democratic-Republican Party as each competed for control of the national and local governments with the issue of federal and states' rights creating a primary political cleavage. Within this era, "patrician governance openly eschewed partisanship and organized political opposition"[37] because the Federalists and Democratic-Republicans did "not think of each other as alternating parties in a two-party system."[38] Compared to the modern, mass party, this party system produced only rudimentary political parties as most party activities are attributed to political elites, or those typically associated with the characterization of the "party-in-government" due to the general absence of what is understood as the "party in the electorate". After the election of 1800 and President Thomas Jefferson's strategy of party conciliation, the Federalist Party dwindled and eventually disappeared leaving the Democratic-Republican Party as the citadel of partisan politics.

For the purposes of this study, this first party era is vital for developing a cohesive account of party development because this is the only era in which most scholars have

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[36] For a summary of patrician politics see Stephen Skowronek's discussion of the emergent structures of political power in chapter 2 of Stephen Skowronek, *The Politics Presidents Make*: *Leadership from John Adams to Bill Clinton* (Cambridge: Harvard University Press,1997).

[37] Stephen Skowronek, *The Politics Presidents Make*, pp. 52.

[38] Richard Hofstadter, *The Idea of a Party* System, pp. 8

classified a political opposition as illegitimate, the centerpiece of the "Constitution-against-Parties" thesis. The emergence of political parties during this era is typically presented as a "puzzle" or "paradox" because the first parties emerged despite clear opposition to them.[39] Political parties in American politics were not vindicated until much later with the adoption of the formal two-party system. In other words, institutional accounts cannot place political parties in this first era because a political opposition was perceived as illegitimate. In general, then, scholars have yet to successfully solve this puzzle, and scholarship on party development in the United States is fragmented between the antiparty sentiments of the founding era and the recognition of parties as a positive good to democratic politics. As a new approach, this study emphasizes the development of political and constitutional norms during this party era that established the foundation on which the subsequent party system would be based. Consequently, the patrician politics of the first party era were actually part of a larger developmental stage of a constitutional regime based on political opposition and political parties.[40] And, contrary

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[39] For an example of the classification of political parties in the first party era as a puzzle or paradox see John H. Aldrich, *Why Parties*; Richard Hofstadter, *The Idea of a Party System.*

[40] See Mark Tushnet, *The New Constitutional Order* (Princeton: Princeton University Press, 2003). Tushnet defines a constitutional order or regime as "a reasonably stable set of institutions through which a nation's fundamental decisions are made over a sustained period, and the principles that guide those decisions." (1) For Tushnet, a constitutional regime comes into being over time through gradual transformations. For party development, I find Tushnet's developmental account of constitutional regimes more

to the "Constitution-against-Parties" thesis, the principles and norms that facilitated the emergence and acceptance of the two-party system were deliberately developed during the era typically classified as anti-party.

Confederated Parties

Thomas Jefferson's strategy of conciliation, however, did not last as John Quincy Adams' controversial presidential election in 1824 resulted in a break of the Democratic-Republican Party thereby ushering in the second party era. The newly organized Democratic Party competed with the failing Republican Party and the emerging Whig Party as a cleavage between the northern and southern states developed. In this period, political parties obtained an organized political foundation with the emergence of

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convincing than Bruce Ackerman's argument for constitutional moments. Ackerman's constitutional history is one of constitutional moments followed by a time of "normal politics". See Ackerman, *We the People: Foundations* (Cambridge, MA: Harvard University Press, 1991) and *We the People: Transformations* (Cambridge, MA: Harvard University Press, 1998). The accepted scholarly accounts of party development are primarily framed according to Ackerman's conception of constitutional history. In other words, the acceptance of a competitive two-party system was the constitutional moment that defined subsequent "normal" party politics, and this constitutional moment would persist until a new moment would alter the nature of party politics. Following Tushnet, I argue the "constitutional moment" of accepting a two-party system was part of the larger development of a regime seeking to constitutionally incorporate political opposition and political parties.

national coalitions of localized party machines following the collapse of the so-called "Era of Good Feelings". In addition, two-party politics extended to the South and the West replacing one-party domination, and elections were competitive at both the national and state level.[41] Moreover, the previous system's utilization of elite-driven party structures and practices were replaced as "all sorts of Americans… [wielded] the tools of the new political democrats—a mass press, popular conventions, petition campaigns, and other means—to rouse supports for demands."[42] In sum, "with the full establishment of the second party system, campaigns were characterized by appeals to the common man, mass meetings, parades, celebrations, and intense enthusiasm, while elections generated high voter participation. In structure and ideology, American politics had been democratized."[43] This party system was designed much like a confederation with powerful local unit organizations operating under a decentralized national party apparatus.

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[41] See Richard P. McCormick, *The Second American Party System: Party Formation in the Jackson Era* (New York: W.W. Norton, 1966) and "Political Development and the Party System", in W.N. Chambers and W.D. Burnham, eds. *The American Party Systems* (1967).

[42] Sean Wilentz, *The Rise of American Democracy: Jefferson to Lincoln* (New York: W.W. Norton & Company, 2006), pp. 311

[43] William E. Gienapp, Thomas B. Alexander, Michael F. Holt, Stephen E. Maizlish, and Joel H. Silbey, *Essays on American Antebellum Politics, 1840-1860* (College Station, TX: Texas A&M University Press, 1982), pp. 15.

Nationalized Parties

The third party era began when the Whig Party ended. This period was a tumultuous time as slavery divisively divided the nation and the Whig Party. Unable to survive mounting intraparty factions, the Whig Party collapse and a new Republican Party emerged. Despite this party evolution, the essential characteristics of the "confederate party system" remained intact until the late nineteenth century. Following the Civil War, parties still relied heavily on local efforts to promote campaigns in national elections. However, towards the end of the nineteenth century, national party leaders "consolidated control over national campaigns in the national party committees, bolstering their capacities to operate independently of the local party franchises."[44] Consequently, parties utilized a new nationalized campaign strategy by distributing national campaign literature directly to voters rather than relying on local units thereby proffering presidents and presidential candidates a role in managing campaigns and elections. Moreover, rather than subnational organizations, national party committees were given responsibility and control over the election process as they were empowered with a "centralized national committee apparatus and an independent fundraising apparatus." Finally, national networks of "party clubs" forged associational bonds between the national party organization and the party-in-the- electorate. In sum, these developments led to the nationalization of American political parties.[45]

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[44] Daniel Klinghard, *The Nationalization of American Political Parties, 1880-1896* (Cambridge: Cambridge University Press, 2010), p. 98.

[45] See Daniel Klinghard, *The Nationalization of American Political Parties*. In particular, these developments are given a more detailed explanation in chapters 4-6.

Progressive Parties

The fourth party era was characterized by Republican Party dominance rather than the emergence of a new party supplanting a collapsed one in the two-party system. Moreover, significant changes came to the system when the newly established nationalized party apparatus became subject to progressive reforms. These reforms aimed at weakening the parties' strength as intermediary associations between the government and citizens, and self-government was favored over party government. Reformers, therefore, focused their efforts on subjecting party politics to methods of "pure democracy" as women suffrage, primaries, the direct election of senators, initiatives, recalls, and referendums all became tools to reduce the influence of party organizations in government and politics.[46] Consequently, this party system has been caste as a "revival of the Constitution-against-Parties" thesis because parties during this time were viewed as "the linchpin of corruption and injustice".[47] Thus, progressivism began to replace party loyalty with loyalty to a national administration, and the growing federal power aimed to link individuals directly to the nation's government rather than a party and locale.

Administrative Parties

Like the fourth system, the fifth party system is characterized by the dominance of one party over another without a new party necessarily emerging. This era emerged in

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[46] Sidney M. Milkis, *Political Parties and Constitutional Government*, pp. 43.

[47] *Ibid.*, pp. 42

the wake of the Great Depression and the formation of "New Deal coalitions" supporting Franklin D. Roosevelt. According to Milkis, Roosevelt's leadership of the Democratic Party and the New Deal "marked a critical historical moment in the development of the American party system, namely the culmination of efforts…to loosen the grip of partisan politics on the councils of power, with a view to shoring up national administrative power and extending the programmatic commitments of the federal government."[48] Like the Progressives, FDR viewed the parties as an obstacle rather than an asset, and he aimed to transcend the system rather than transform it. For Roosevelt, party politics became less about partisan attachment and more about ideological commitments as he tried to "purge" the Democratic Party of dissident democrats. When this strategy was unsuccessful, "Roosevelt and his successors increasingly disregarded the apparently outmoded parties and utilized the Executive Office of the Presidency to govern directly from the White House" utilizing new forms of mass media to perform traditional party activities like rallying popular support.[49]

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[48] Sidney M. Milkis, *Political Parties and Constitutional Government*, pp. 75.

[49] Nicol C. Rae, "Exceptionalism in the United States", in Richard S. Katz and William Crotty, *Handbook of Party Politics* ed. Richard S. Katz and William Crotty (Thousand Oaks, CA: Sage Publications Ltd, 2006). See also Sydney M. Milkis *The President and the Parties: The Transformation of the American Party System Since the New Deal* (New York: Oxford University Press, 2003); Samuel Kernell, *Going Public: New Strategies of Presidential Leadership* (Thousand Oaks, CA: CQ Press, 2006); Jeffrey E. Cohen, *Going Local: Presidential Leadership in the Post-Broadcast Age* (New York: Cambridge University Press, 2009).

Service Parties

After the New Deal coalitions began to disband, the status of American political parties came into question. Accordingly, prominent scholars argued that political parties and their memberships were in decline. For example, Wattenberg's view of *The Decline of American Political Parties*, Broder's declaration that *The Party's Over*, Kirkpatrick's assessment of party "dismantling" and "decomposition", and Price's call for *Bringing Back the Parties* are all based on the assumption of the parties' diminishing role or perceived absence in American politics.[50] These studies, however, were followed with other claims that *The Party's Just Begun*, and *The Party Goes On*.[51] Therefore, more recent studies on political parties present us with a puzzle as the parties seem to be weakened and strengthened simultaneously.

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[50] See Martin P. Wattenburg, *The Decline of American Political Parties: 1952*-1988 (Cambridge, MA: Harvard University Press, 1990); David S. Broder, *The Party's Over: The Failure of Politics in America* (New York: Harper and Row, 1972); Jeane J. Kirkpatrick, *Dismantling the Parties: Reflections on Party Reforms and Party Decomposition* (Washington, D.C.: American Enterprise Institute of Public Policy Research, 1978); David E. Price, *Bringing Back the Parties* (Washington, D.C., 1984).

[51] See John H. Aldrich *Why Parties* for a similar formulation of the various scholarship on the apparent decline and resurgence of political parties; Larry J. Sabato, *The Party's Just Begun: Shaping Political Parties for America's Future* (Glenview, IL: Scott Foresman, 1988); Xandra Kayden and Eddie Mayhe Jr., *The Party Goes On: The Persistence of the Two-Party System in the United States* (New York: Basic Books, 1985).

V.O. Key's important delineation between the party-in-the-electorate, the party-organization, and the party-in-government can help explain this current party puzzle. As such, the literature on party decline has explained the "public's declining views of, and identification with, the two major parties" while the "revitalization of parties-as-organizations points to the…strengthening of the organizations as they become both more 'nationalized institutions'…and more professionalized, better financed, and effectively stronger overall in performing their central task."[52] Accordingly, party politics have adapted to this decline by strengthening the resources available to individuals seeking office in a very "candidate-centered" party era. As a result, parties have become, as Aldrich describes, organizations that serve rather than control ambitious politicians.[53]

Emergent Structures of Political Parties

Based on these eras, certain party developments are easily discernible across the United States' general history. For example, parties have become paramount for election structure and electoral success, more so than any other political organization; despite

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[52] John H. Aldrich, *Why Parties*, pp. 259; Aldrich also makes reference to Paul S. Herrnson, *Party Campaigning in the 1980's* (Cambridge, MA: Harvard University Press 1988). This simultaneous decline and increase is further seen in understanding polarization as the party-in-the-electorate is not as strongly divided on important political issues as are the members of the party-in-government and the party-organization. See Morris P. Fiorina, Samuel J. Abrams, and Jeremy C. Pope, *Culture War? The Myth of a Polarized America* (New York: Pearson Longman, 2005).

[53] John H. Aldrich, *Why Parties*, pp. 285.

significant changes to the system, parties have become an unusually stable and durable feature of American politics with their sole purpose being political activity; parties have moved from localized organizations to a nationalized system capable of mobilizing an enormous range of supporters to win national elections as the electorate has expanded both geographically and demographically. It is also clear that operational changes in the political system have significantly redefined provisional party authority. As such, taken individually, each era tells us how party politics operated at a particular stage of political development; taken collectively, they reveal how changes to the party system have been inextricably tied to the development of constitutional politics in general. Overall, the historical periodization of the party system into eras captures the ebb and flow of authority and party practices in the government and in electorate.

Much of our understanding of the party system is based on this general history of changes to party politics. Moreover, this history is full of divergent assessments regarding the desirability of political parties and their function in our constitutional government. It is this history that creates the uncertainty regarding the role of political parties as they have grown more entrenched in our system despite concerted efforts to minimize their impact and influence. As a result we have seen the country delve into many of the founders' greatest fears of a country divided by entrenched partisanship. This history, however, does not explain the full scope of a party system and its primary function of providing political opposition. Therefore, focusing on the emergence and development of opposition allows us to view the periodization of party politics with a more discerning eye. Specifically, we need to consider in more detail how an opposition works by reassessing two important characteristics of an opposition, responsibility and

effectiveness. Using these two important concepts, a pattern of reoccurring structures of opposition will be developed and used to understand how the nature of opposition changes within the emergent structures of party practices.

Responsible Opposition

The notion of a responsible opposition is closely related to the theory of responsible party government and party accountability. In 1885 Woodrow Wilson argued that political parties needed to be "managed and made amendable from day to day public opinion."[54] Building on Wilson's assessment, E.E. Schattschneider and the Committee for a more Responsible Two-Party System developed a model, or ideal type, of what a responsible party would entail. According to this report, a responsible opposition was crucial for a properly functioning two-party system as "[t]he fundamental requirement of accountability is a two-party system in which the opposition party acts as the critic of the party in power, developing, defining, and presenting the policy alternatives which are necessary for a true choice in reaching public decisions."[55] Much of this model is summarized by Ranney's four principles of responsible parties. These parties: (1) would be tied to the electoral through policy commitments; (2) are able and willing to execute policy commitments when in office; (3) develop alternative policies when not in office;

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[54] Woodrow Wilson, *Congressional Government: A Study in American Politics*, (Boston, Houghton Mifflin, 1885), pp. 97.

[55] Committee on Political Parties, *Toward a more Responsible Two-Party System* (New York: Rinehart, 1950), pp.1.

(4) differentiate themselves from other parties to "provide the electorate with a proper range of choice between alternative actions."[56] As Richard Hofstadter put it,

> When we speak of an opposition as being *responsible*, we mean that it contains within itself the potential of an actual alternative government—that is, its critique of existing policies is not simply a wild attempt to outbid the existing regime in promises, but a sober attempt to formulate alternative policies which it believes to be capable of execution within the existing historical and economic framework, and to offer as its executors a competent alternative personnel that can actually govern.[57]

Subsequently, this normative party standard places great emphasis on holding parties and elected officials accountable and providing legitimate policy alternatives.

Effective Opposition

The concept of effective opposition is derivative of competitive elections in a two-party system. Responsibility, while important, is not sufficient to achieve a properly functioning party system because a party must also be capable of winning an election. Otherwise what was once a two-party system collapses into one of a dominate party, and, as Walter Dean Burnham wrote, without two parties there can be no "countervailing collective power on behalf of the many individuals powerless against the relatively few who are individually—or organizationally—powerful."[58] In other words, competition

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[56] See Austin Ranney, *Curing the Mischiefs of Faction: Party Reform in America* (Berkeley and Los Angeles: University of California Press, 1978).

[57] Richard Hofstadter, *The Idea of a Party* System, pp. 4.

[58] Walter Dean Burnham, *Critical Elections and the Mainsprings of American Politics* (New York: Norton, 1970), p. 133.

between two parties fulfills the Madisonian principle of ambition checking ambition,[59] and, as Aldrich argued, "Democracy fails when there is but one party. Instead it is necessary to have a party system, an ongoing competition between two or more durable parties."[60] As such, effective opposition means that an opposition's "capability of winning office is…real, that it has the institutional structure and the public force which makes it possible for us to expect that sooner or later it will in fact take office and bring to power an alternative personnel."[61] Political competition is vital in a representative democracy, and representative government is essentially party government.[62]

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[59] See *The Federalist* No. 51, pp. 330-335.

[60] John H. Aldrich, *Why Parties*, pp. 15-16.

[61] Richard Hofstadter, *The Idea of a Party* System, pp. 5.

[62] See also Maurice Duverger, *Political Parties: Their Organization and Activity in the Modern State* (Methuen, 1954) as he argues "the simplest and most realistic definition of democracy is the following: a regime in which those who govern are chosen by those who are governed, by means of free and open elections… The existence of an organized opposition is an essential feature of 'Western' democracy, its absence a feature of 'Eastern' democracy." (353, 413-415); Herman Finer, *Theory and Practice of Modern Government* (H. Holt, 1949), pp. 237; Robert MacIver, *the Web of Government* (New York: Macmillan, 1947) in which he argues, "the principle of representation had to be vitalized by the conflict of parties. When parties flourish we have in effect passed from a pre-democratic mode or representative government to a genuinely democratic one." (210); E.E. Schattschneider, *Party Government* (1942) which contains his famous statement that "political parties created modern democracy…and modern democracy is

An opposition's legitimacy, therefore, is a function of its ability to formulate alternative policies and win competitive elections; a party's legitimacy varies depending on its effectiveness and responsibleness. At its most basic level, an opposition is either effective or not and responsible or not. Therefore, we can understand opposition legitimacy by these generic categories because an opposition can have an identifiable alternative policy platform, or they present one similar to the governing power; an opposition can have a real chance of electoral success against an incumbent, or they are not competitive in a one-party dominant election. Thus, effectiveness and responsibility leads to qualitatively distinguishable differences at work in the political dynamics of a two-party system and the vitality of political opposition.

Creating a cross-tabulation of effectiveness and responsibility creates a typology of four structures of opposition.

Table 2: Recurrent Structures of Opposition

	Responsible	*Not Responsible*
Effective	Legitimate Opposition	Catch-All Opposition
Ineffective	Diminished Opposition	Illegitimate Opposition

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unthinkable save in terms of the parties. The most important distinction in modern political philosophy, the distinction between democracy and dictatorship, can be made best in term of party politics." (1)

Legitimate Opposition

In the first typology the opposition is both effective and responsible. Theoretically, this type of opposition produces the most effective form of democracy as voters are provided with alternative policies by electoral candidates who have a real possibility of winning office. Without a legitimate opposition, democracy suffers as the majority needs not fear ever becoming the minority thereby losing their incentive to recognize minority rights. Moreover, the minority loses incentives to adhere to the decisions of the majority if they are never provided the opportunity to become the majority. Accordingly, "unstable and irresponsible government rather than democracy will result" without the prospect of periodically awarding "effective authority to one group, a party or stable coalition."[63] Furthermore, like one-party states, the absence of legitimate opposition maximizes authority of governmental officials while minimizing popular influence. A great opportunity for democratic politics can be harnessed through elections as parties compete for the standards of legitimate governance and the conditions of constitutional government.

An opposition also serves an important constitutional function by checking the actions of the governing party. Put differently, the conditions of constitutional government become particularly important when one considers how political actors utilize the Constitution in order to accomplish desired political outcomes. For example, our understanding of presidential power and authority demonstrates the tension between

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[63] Seymour Martin Lipset, "Some Social Requisites of Democracy: Economic Development and Political Legitimacy," *The American Political Science Review*, vol. 53, No. 1 (Mar., 1959), pp. 71.

the president and the constitutional order. According to Alexander Hamilton, the president was expected to take office with the intent to "undertake extensive and arduous enterprises" which require considerable time and often produce significant political change.[64] Moreover, Hamilton described political change as inherently induced by the election of a new chief magistrate:

> To reverse and undo what has been done by a predecessor is very often considered by a successor as the very best proof he can give of his own capacity and desert; and in addition to this propensity, where the alteration has been as the result of public choice, the person substituted is warranted in supposing that the dismission of his predecessor has proceeded from a dislike to his measures, and that the less he resembles him the more he will recommend himself to the favor of his constituents.[65]

Regarding the ability to "reverse and undo what has been done by predecessors", Stephen Skowronek described presidential authority as hinging "on the warrants that can be drawn from the moment at hand to justify action and secure the legitimacy of the changes effected."[66] Presidential actions, especially those that substantially alter the political environment, must, therefore, be legitimized, especially if the actions require him to act "without the prescription of the law, [or]…against it."[67] Regarding these actions, reelection becomes an important means by which presidents can gain legitimacy for their novel endeavors by connecting public opinion with presidential performance. For example, Jeremy D. Bailey demonstrated how President Thomas Jefferson used his

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[64] *The Federalist* No. 72, pp. 464.

[65] *Ibid*., pp. 462-463.

[66] Stephen Skowronek, *The Politics Presidents Make* pp. 18.

[67] John Locke, *Second Treatise of Government*, (Indianapolis: IN: Hackett Publishing Company, Inc., 1980), pp. 84.

reelection as justification for the Louisiana Purchase.[68] There was no constitutional provision allowing for the national government to incorporate a new territory into the Union. Therefore, under Jefferson's own strict construction, the purchase was unconstitutional and, to legitimize his actions, the Constitution would need to be amended. Jefferson, however, acted without amending the Constitution and would utilize his reelection as the means of justifying the acquisition. Jefferson, then, gave political space for an opposition to oppose his presidential actions and Jefferson could have been reprimanded for his inappropriate exercise of presidential prerogative. In this regard, while the president takes an oath to preserve, protect, and defend the Constitution, a legitimate opposition, if needs be, serves to preserve, protect, and defend the document from the executive. A legitimate opposition is essential for preserving and defining a constitutional government.

Catch-All Opposition

The second typology produces an opposition that is effective but not responsible. Under these circumstances two competing parties both have real chances of winning an

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[68] See Jeremy D. Bailey, *Thomas Jefferson and Executive Power* (New York: Cambridge University Press, 2007). Bailey argues that rather than a constitutional amendment granting executive power to acquire new territories, Jefferson utilized the 12th amendment to claim approval for his actions. As a result, Bailey uses this evidence for the existence of presidential mandates in early American politics thereby challenging Robert Dahl's assertion that the presidential mandate was essentially a dangerous modern creation.

election; however, the parties lack sober, alternative polices and viable programs. Under this condition political parties are "gradually transformed into ideologically bland catch-all parties" with this process culminating "in a waning of principled opposition and a reduction of politics to the mere management of the state."[69] Therefore, elections can be competitive with peaceful transitions of power from one party to another. However, parties are not organized around competing principles thereby yielding "a partisanship joined to a form of administrative politics that relegates electoral conflict to the intractable demands of policy advocates."[70] Accordingly, policy and principles rarely fluctuate because one of "the major force shaping a party's policies is competition with other parties for votes", and this competition also influences the "stability [of their policies] and…their relation to the party's public statements." Therefore, according to Downs, "competition determines whether parties will be responsible and honest."[71] Thus, under this particular arrangement, parties focus on sustaining rather than transforming the American political landscape due to lack of competition between parties.

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[69] Andre Krowel, "Party Models" in *Handbook of Party Politics* ed. Richard S. Katz and William Crotty, (Thousand Oaks, CA: SAGE Publications, Inc., 2006), pp. 256. This characterization is part of Krowel's summary of Kirchheimer's theory of party transformation. See also A. Krouwel, "Otto Kirchheimer and the Catch-all Party", *West European Politics*, 26 (2): 23-40.

[70] Sidney M. Milkis, *The President and the Parties*, pp. 307.

[71] Anthony Downs, *An Economic Theory of Democracy* (Boston, MA: Addison-Wesley Publishing, Inc., 1957), pp. 102.

In addition to the policy implications, these irresponsible parties also undermine the ability to evaluate and develop general principles of government. As America's first political parties developed, James Madison identified this important party function and the distinction between the Federalists and the Democratic-Republicans was animated by a division emerging from the current administration over beliefs "in the doctrine that mankind are capable of governing themselves." Moreover, Madison would accuse the Federalists of promoting a government that was "not strictly conformable to the principles, and conducive to the preservation of republican government."[72] It was necessary for Republicans to espouse distinct principles of government so as to evaluate and challenge those of the Federalists. Furthermore, Alexis de Tocqueville would describe the dangers of replacing legitimate opposition with a catch-all opposition. For Tocqueville, great parties based on principle would make more substantive political contributions than small parties based on interest; great parties dedicated themselves "more to principles than to their consequences; to generalities and not particulars; to ideas and not to men" these great parties "generally have nobler features, more generous passions, more genuine convictions, and a franker, bolder manner than others. Private interest, which always plays the greatest role in political passions, is here more skillfully hidden beneath the veil of public interest."[73] In contrast, small parties "do not feel ennobled and sustained by any great purpose, their character bears the stamp of self-

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[72] James Madison, *Selected Writings of James Madison*, ed. Ralph Ketchum (Hackett Publishing, 2006), pp. 226

[73] Alexis de Tocqueville, *Democracy in America* trans. by Arthur Goldhammer (New York: Literary Classics of the United States, Inc., 2004), pp. 199.

interest, which clearly manifests itself in every action they undertake. They always become hotly passionate for coldly calculated reason; their language is violent, but their course is timid and uncertain."[74] In this way, a responsible opposition becomes beneficial to the public and politics by providing the electorate with alternative principles rather than merely shadowing those of the majority.

Diminished Opposition

In the third typology the opposition is not effective but still responsible. Accordingly, political parties offer viable, competing programs and governmental principles, but the opposition lacks the ability to take office and bring power and authority to alternative personnel. Under this condition, opposition serves nothing more than an "agitational function" whose grievances are consistently defeated by regular vote. As a result, there is no peaceful transfer of power between parties, just one dominate party. And, similar to the political context of *Catch-all Parties*, politics remain centered on maintaining the status quo with little or no incentive to necessarily deviate. With no viable competition, the dominant party has little incentive to be responsive to public preferences once these external forces are no longer aligned with the party's policy and principles.

This particular type of political arrangements can have dangerous effects on the national character and the principle of liberty. As Tocqueville warned, the omnipotence of the majority can lead to despotism when minority parties have no prospect of ever replacing a majority party. To avoid such despotism and possible violent actions by the

[74] Alexis de Tocqueville, *Democracy in America*, pp. 199.

minority there must be a mutual obligation between the majority and minority party to effectively compete for political office. If the prospect of being displaced from office is real, the majority party must pursue political rules that do not hinder the minority party from taking office. Otherwise they will be disadvantaged once there is a transfer of power. Minority parties must effectively strive towards this peaceful transfer of power otherwise minority voices may find other avenues, such as physical force, to accomplish their designs. Regarding this issue, James Madison recognized the importance of protecting both the majority and minority party in order to achieve social justice:

> In a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign as in the state of nature, where the weaker individual is not secured against the violence of the stronger; and as, in the latter state, even the stronger individuals are prompted, by the uncertainty of their condition, to submit to a government which may protect the weak as well as themselves; so, in the former state, will the more powerful factions or parties be gradually induced, by a like motive, to wish for a government which will protect all parties, the weaker as well as the more powerful.[75]

Accordingly, social justice is achieved when the majority and minority mutually recognize the rights and liberties of the other. In other words, the majority must be allowed to govern and the minority must be allowed to effectively challenge the majority, both recognizing the uncertainty of their position in government.

Illegitimate Opposition

Finally, there are opposition parties that are neither responsible nor effective. As such, this type of opposition provides neither credible alternatives nor credible challengers in contesting the existing political order. The democratic problem that comes

[75] *The Federalist* No. 51, pp.334-335

to the fore in this arrangement is a default "tyranny of the majority". While most "tyranny of the majority" concerns involve the party in power suppressing, harassing, or hampering opposition, we must also consider the theoretical possibility of a constitutionally free minority simply failing to meet the ideal and standards of a legitimate opposition. Illegitimate opposition can lead to what Diamond, Linz, and Lipset referred to as *pseudodemocracy* in which the perception of an electoral democracy merely masks the reality of arbitrary domination in that the ruling party cannot be turned out of power.[76] At a minimum, Catch-All Opposition provides a turnover in personnel while Diminished Opposition affords the expression of alternative principles. In both of these, principles of democracy are dwindling; illegitimate opposition culminates in a defunct democracy.

Plan of the Work

The purpose of these particular classifications is to allow for comparison of opposition efforts within the two-party system. This is to acknowledge that an opposition will not always be considered "Legitimate" or "Diminished". The typology's distinct characterizations are representative of the reoccurring features of the party system and the success or failure of an opposition party to challenge, redefine, and replace an existing constitutional order. At any given time in American political history, a particular constitutional order persists. The aim of this categorization of opposition is to help

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[76] See Larry Diamond, Juan Linz, and Seymour Martin Lipset, "Introduction: What Makes for Democracy?" in *Politics in Developing Countries* eds. Larry Diamond, Juan Linz, and Seymour Martin Lipset (Lynne Rienner, 1990), pp. 8.

understand why this change does or does not occur and how particular constitutional arrangements either help or hinder the work of a legitimate opposition. More broadly, this study presents a new way to understand political parties in American political development.

In the following chapters I provide evidence for the emergent structures and reoccurring patterns of legitimate opposition during the early republic. Specifically, I assess the manner in which political opposition gained its constitutional foundation through "constitutional constructions" involving the First Amendment, Twelfth Amendment, and winner-take-all allocation of Electoral College votes. Once opposition gained constitutional status, I reassess the electoral strategies of the Federalist Party and Democratic-Republican Party in national elections to find evidence of the various typologies for reoccurring patterns of legitimate opposition. To establish the constitutional rules allowing for the emergence of a legitimate opposition, Chapter 2 will address the nature of the First Amendment's freedom of speech, freedom of press, and freedom of association clauses in relation to the Alien and Sedition Act of 1798. The Act was a direct challenge to the constitutionality of an opposition party as the Federalists aimed at suppressing party and oppositional forces rather than simply prosecuting seditious libel. The debates surrounding this controversial partisan act reveal indeterminacy in the meaning of the First Amendment, and this indeterminacy was overcome by a constructed constitutional meaning of the freedom of speech, press, and association grounded in an argument for the need of organized opposition.

Chapter 3 argues that, right at the time parties were supposed to wither away, the Twelfth Amendment constitutionalized party politics by creating a party unified

executive office. Very little prior work has been done in connecting the Twelfth Amendment with the emergence of a legitimate opposition. Presidential selection during the election of 1796 and 1800 proved to be deeply flawed. In 1796 the Federalist won the presidency while the Democratic-Republicans captured the vice-presidency thereby dividing the executive offices between rival parties. In the 1800 presidential election, Thomas Jefferson was chosen somewhat problematically over Aaron Burr by the House of Representatives because the Electoral College votes ended in a tie. Understanding that the current method of presidential selection would challenge Jefferson's party cohesion, Democratic-Republicans proposed the Twelfth Amendment to ensure a party, supported by the popular will, would win both the presidency and vice-presidency. Contrary to current scholarship, the framers of the amendment recognized they were changing the electoral system to accommodate parties and, because the Democratic-Republicans recognized that they would not always be in the majority, this new form of party politics would be durable. Moreover, the framers acknowledged the existence of a political opposition and created an electoral system that would allow for contested elections to continue. In this way, the Twelfth Amendment was vital to the development of legitimate opposition because it allowed for a party unified executive without disadvantaging the opposition party in the electoral process thereby facilitating durable, competitive party elections that reflected the popular will.

Chapter 4 compares the Democratic-Republicans' opposition efforts with those of the Federalists. Using the typology developed in chapter 1, I argue that the Democratic-Republicans were successful because they can be understood as "Legitimate Opposition"; once out of office, the Federalists failed because they were an example of a "Diminishing

Opposition" that eventually became an "Illegitimate Opposition". Put differently, as an opposition, the Federalist Party recognized and competed for office by the same constitutional rules as the Democratic-Republicans yet was unsuccessful at actually winning major elections. As an opposition, the Democratic-Republicans developed an effective electoral strategy that helped capture the presidency and majorities in Congress. Now as the opposition party, Alexander Hamilton began to develop a similar strategy for the Federalists to be more competitive in future elections. However, his plans were disregarded, and the Federalists pursued other illegitimate political actions like secession and extra-constitutional state conventions. As a result, the Federalists failed to be an effective opposition. The Federalists did, however, maintain responsibleness in their opposition to the War of 1812, at least until the Democratic-Republicans successfully negotiated a peace treaty. Once the War had concluded, the Federalists lost their responsibleness and diminished from the political scene. Accordingly, the "Era of Good Feeling" was not, as many scholars assume, the result of anti-party sentiments and a "Constitution-against-Parties"; rather, The Federalist Party lost both effectiveness and responsibileness thereby eliminating any future prospects of electoral success.

Chapter 5 provides a narrative for the acceptance of the "unit rule" in the allocation of Electoral College votes further incorporating the practice of party politics. Once the Federalist Party was no longer competitive in national elections, accepted scholarly accounts emphasize this time as a return to the "Constitution-against-Parties" politics because political parties would no longer be necessary. During this time, however, there were changes made to the rules and methods of selecting presidential electors that would directly impact the nature of a political opposition. Specifically, the

separate states began adopting a method of winner-take-all by single member districts, or "unit rule," to determine the selection of presidential electors thereby encouraging the emergence of a two-party system. The debates over presidential selection began during the constitutional convention, and by 1832, all but one state determined their electoral votes by the unit rule. The evidence from these debates strongly suggests these specific electoral rules were adopted as a means of unifying votes in support of a specific political party, and ensuring that the winning party was supported by the majority will. The centerpiece of the debates was the nature of constructing majorities, particularly in presidential elections, and at stake was the president's ability to claim popular support within the federal system. This development would have significant impact on the further development of a legitimate opposition because an opposition party's legitimate claim to power can only be achieved by a mode of presidential selection that best ensures the Electoral College results reflect and represent popular will. And, with the Constitution granting states plenary power to determine electors, the majorities constructed would have to best reflect the majorities within the separate states thereby preserving the federal system. And, just like the Twelfth Amendment, these electoral rules were developed without necessarily putting the opposition party at a disadvantage thereby allowing for their legitimate contestation and competition in elections.

Chapter 6 will conclude by discussing the importance of these reoccurring patters of opposition for further research on the vitality of two-party systems. Specifically, I will discuss how these patterns can be further applied to understand party politics across American political development and suggest further research on the relationship between a legitimate opposition and the political resources available during each distinctive party

era. As such, based on the reoccurring patterns of opposition, I will offer suggestions on how this study directly applies to contemporary party practices and how party politics can be enhanced by strengthening opposition politics. Moreover, another significant application of this study extends to the Supreme Court's role in establishing the legal rules that define political party practices. In recent cases, the Supreme Court has been accused of (or praised for) supporting the two-party system. Based on the purpose of a legitimate opposition, this study provides a way to reassess the Court's rulings on political parties and party practices as legal rules should seek to strengthen the two-party system to empower a legitimate opposition capable of, as Justice Thomas argued, "preserving liberty while ensuring good government."[77]

[77] See *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000).

Chapter 2: Ensuring Majoritarianism: A Constitutional Construction of the First Amendment to Protect an Opposition Party

"When the bonds among men cease to be solid and permanent, it is impossible to get large numbers of them to act in common without persuading each person whose cooperation is required that self-interest obliges him to join his efforts voluntarily to those of all the other. The only way to do this regularly and conveniently is through a newspaper. Only a newspaper can deposit the same thought in a thousand minds at once."

"There is a necessary relation between associations and newspapers: newspapers make associations, and associations make newspaper."

Alexis de Tocqueville

"The liberty of the press is indeed essential to the nature of a free state: but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published."
"But to punish (as the law does at present) any dangerous or offensive writings, which, when published, shall on a fair and impartial trial be adjudged of a pernicious tendency, is necessary for the preservation of peace and good order, of government and religion, the only solid foundations of civil liberty."

William Blackstone

The First Amendment requires that "Congress shall make no law…abridging the freedom of speech, or of the press." Despite this seemingly simple guarantee, the meaning of this freedom is unclear and, sometimes, unsettled. For example, as Justice Holmes argued, we would not think twice of prohibiting citizens from yelling "fire" falsely in a crowded theater. In other words, the types of speech that approximate falsely yelling fire "has plagued First Amendment theory", and the various ways in which speech can be expressed contributes to the difficult task of formulating "principles that separate

the protected [speech] from the unprotected."[78] Put differently, when dealing with difficult First Amendment issues, the Supreme Court has answered freedom of speech and press questions by developing principles on a case-by-case basis rather than developing a general theory of free speech. This in turn has led to Court to only superficially rely on the language of the amendment and the history of its meaning.[79] In this way, the Court has produced a "complex and conflicting body of constitutional precedent", and our legal understanding of the First Amendment is constrained to this development of principles derivative from a history of cases in which the amendment was invoked to protect what was deemed as illegal action.[80] The applicability of the First Amendment, however, extends beyond this jurisprudential genealogy.

Much of our First Amendment understanding is based on the judicial branch's effort to establish an accepted legal norm of a given concept by interpreting meaning

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[78] William B. Lockhart, et. al., *Constitutional Law: Cases, Comments, Questions*, eighth ed., (St. Paul, MN: West Publishing Co.) 1996, pp. 614.

[79] For more on the difficulty of developing a general theory of free speech, see Larry Alexander and Paul Horton, *The Impossibility of a Free Speech Principle*, 78 Nw.U. Law Review 1319 (1983); Daniel Farber and Phillip Frickey, *Practical Reason and the First Amendment*, 34 UCLA Law Review 1615 (1987); Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General theory of the First Amendment*, 78 Nw.U. Law Review 1212 (1983); Lawrence Tribe, *Toward a Metatheory of Free Speech*, Sw.U. Law Review 237 (1978).

[80] See, for example, *Schenck v. United States* (1919) in which Justice Holmes develops the case-by-case principle of "clear and present danger".

from the inherited constitutional text by way of analysis and elaboration. This jurisprudential model, then, relies on an authoritative judiciary to interpret the constitution and ultimately "declare what law is". In terms of freedom of expression, many constitutional law case books start First Amendment examinations with the Espionage Act of 1917 and the landmark case of *Schenck v. United States*. In addition, the First Amendment was not applied to the states until 1925 when the Supreme Court incorporated it through the due process clause of the Fourteenth Amendment. As such, due to limited number of times the Court dealt with freedom of expression there is relatively little emphasis on Supreme Court cases prior to *Schenck*.[81] This emphasis on the legal history since 1917 has structured the way the First Amendment is understood and the extent to which it is applied to our understanding of modern politics. As a result, the First Amendment is traditionally understood as a protection for minorities from an

[81] See Michael Gibson, *The Supreme Court and Freedom of Expression from 1791 to 1917*, 55 Fordham Law Review 263 (1986). According to Gibson, prior to 1917, "the Court issued opinions in over sixty cases that today we would consider as concerning the First Amendment (255). Moreover, due to the limited number of cases, the Court was "unable to address many important areas, it also never developed a First Amendment specialist…who would ponder the intricacies of the amendment and the long-range effects of the Court's decisions" (270). Overall, the case law on freedom of expression does not pay much attention to cases prior to 1917 because the "Court's early decisions present no threat to the modern interpretation of the First Amendment. Instead, the early decisions are examples of how the Constitution's guarantees of free speech and a free press should not be interpreted. They deservedly have been left dormant" (267).

overbearing majority. Or, as Akhil Amar has argued, "many scholars tend to view these rights as fundamentally minority rights—rights of paradigmatically unpopular individuals or groups to speak out against a hostile and repressive majority."[82] In other words, within the modern legal context, the core purpose of the First Amendment was protection from a tyrannical majority. This meaning, however, is largely the result of a jurisprudential model relying solely on the interpretive authority of the judicial branch.

Beyond the jurisprudential model is a more political model in which other political actors besides the judiciary participate in the process of understanding and elucidating constitutional meaning.[83] In this political model, other governing actors and institutions participate in the process of addressing "a substantive constitutional issue" with the intention of "resolving a particular question of textual meaning" through political activity within the political process.[84] Somewhat differently, the political model allows for a larger breadth of constitutional meaning by incorporating the efforts of non-judicial actors in how we understand the mechanisms by which constitutional questions are conceptualized and addressed, and how these political responses redefine the types of influential actions available to political participants in their efforts to alter the political environment. In this way, framing our constitutional understanding within the more

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[82] Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (New Haven, CT: Yale University Press 1998), pp. 21.

[83] See, specifically, chapter one in Keith Whittington, *Constitutional Construction: Divided Powers and Constitutional Meaning*, (Cambridge, MA: Harvard University Press, 1999).

[84] *Ibid*., pp. 13.

general context of American political development can broaden and supplement the jurisprudential model thereby enhancing our grasp of the waxing and waning of particular constitutional orders and the related political resources available to actors seeking political change. In other words, the jurisprudential model can provide one of many ways in which political actors can understand and use the First Amendment and the protections it guarantees.

Specifically, one of the earliest controversies involving the First Amendment was not a matter of judicial interpretation. The Alien and Sedition Acts of 1798 proved that the First Amendment's meaning was unsettled, and the path to settling the meaning would be paved by political actors other than the judiciary. In this way, the jurisprudential model misses this early episode that established an interpretation of the First Amendment that defined its function and purpose in American politics. The politics of the Alien and Sedition Acts helped establish the nature and scope of the freedom of speech and press as a guarantee against oppression from a congressional minority attempting to legislatively circumscribe the political participation of a rising national majority. The responses to the controversial legislation were also critical in expanding the protections guaranteed by the amendment beyond prior restraint to also include subsequent punishment. Put differently, the Federalists and Democratic-Republicans had competing interpretations of the First Amendment. For the Federalists, the First Amendment, basing their understanding on the English common law tradition, only protected against prior restraint. The Democratic-Republicans, however, had a much broader interpretation that protected individuals from both prior restraint and subsequent punishment. The controversy between the competing parties, however, extended well

beyond the nature of rights guaranteed by the First Amendment as the status of a political opposition would also be settled.

More broadly, this constitutional debate would have a lasting impact on the development of political parties. The constructed First Amendment meaning would free the use of the press as a mobilizing mechanism for political parties, particularly opposition parties. In other words, the controversy between the Federalists and Democratic-Republicans over the meaning of the First Amendment would redefine the resources available to an opposition party by legitimizing the use of the press as a means of building a majority coalition around political principles different from those accepted by the prevailing administration. This is to say that the early debate over the meaning of the First Amendment established a much stronger commitment to majoritarian politics than previously understood by the jurisprudential model.[85]

The commitment to majoritarian politics that emerged in response to the Alien and Sedition Acts is necessary for understanding how political parties became a central

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[85] On this point, see Akhil Amar, *The Bill of Rights: Creation and Reconstruction*. In particular, Amar argues that "although the First Amendment's text is broad enough to protect the rights of unpopular minorities (like Jehovah's Witnesses and Communists), the Amendment's historical and structural core was to safeguard the rights of popular majorities (like the Republicans of the late 1790s) against a possibly unrepresentative and self-interested Congress." Furthermore, "our First Amendment's focus on Congress suggests that its primary target was attenuated representation, not overweening majoritarianism. Congress was singled out precisely because it was *less* likely to reflect majority will." (21-22)

component of American democracy. Indeed, the printed press became the primary tool used by early political parties to organize electoral efforts and disseminate political information. As such, the Democratic-Republicans' understanding and use of the newspapers made political parties at that time appear more similar to their modern counterparts than once thought. More to the point, previous scholarship has understated the relevance of this freedom of press development. For example, according to John Aldrich, the first parties (Federalists and Democratic-Republicans) "fell far short of the true modern political party" because "these national parties were not much in the way of electoral parties…seeking to mobilize the public, provide voice for the new democracy, and aggregate the public interest."[86] Aldrich is right in that, compared to a modern, mass political party, early American parties were still in developmental stages as they lacked many institutional structures such as national committees, party nominating conventions, and campaign committees. However, despite their lack of formal institutional structures, early parties approximated some of the key functions of modern political parties such as organizing and mobilizing voters in elections. And, newspapers, protected by the Democratic-Republicans' understanding of the First Amendment, would be the preliminary and primary means by which an opposition party, committed to majoritarian politics, would organize an electoral challenge to those in government.

This early controversy over the meaning of the First Amendment would determine the extent to which political parties, and an opposition party, would be allowed to participate in the democratic process. And, newspapers, particularly a partisan press,

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[86] John H. Aldrich, *Why Parties: The Origin and Transformation of Political Parties in America*, (Chicago: University of Chicago Press, 1995), pp. 94.

would be a crucial ingredient in the subsequent development of the two-party system in the United States. As one scholar described, "[t]he many gaps left by the party system's underdevelopment were filled by networks of partisan newspapers, which provided a fabric that held the parties together between elections and conventions, connected voters and activists to the larger party, and lined the different political levels and geographic regions of the country."[87] In addition, these partisan newspapers gave party members "a sense of identify and a sense of belonging to a common cause," and, in this way, subscriptions to newspapers served as a proxy for party registration and the press was capable of connecting individuals ideologically.[88] As such, Tocqueville was correct in placing so much emphasis on the freedom of the press as newspapers could "not only suggest the same plan to large numbers of people but also enable people jointly to carry

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[87] Jeffrey L. Pasley, "The Two National" Gazettes": Newspapers and the Embodiment of American Political Parties." *Early American Literature* (2000), pp. 52.

[88] Gordon Wood, *Empire of Liberty: A History of the Early Republic, 1789-1815* (New York: Oxford University Press, 2009), pp. 252. See also Jeffrey L. Pasley, *"The Tyranny of the Printers": Newspaper Politics in the Early American Republic* (Charlottesville: University of Virginia Press, 2001); Donald H. Stewart, *The Opposition Press of the Federalist Period* (Albany: State University of New York Press, 1969); Richard D. Brown, *Knowledge is Power*: *The Diffusion of Information in Early America, 1700-1865* (New York: Oxford University Press, 1989); Richard Buel Jr., *Securing the Revolution: Ideology in American Politics, 1789-1815* (Ithaca, NY: Iuniverse Inc, 1972); Marcus Daniel, *Scandal and Civility: Journalism and the Birth of American Democracy* (New York: Oxford University Press, 2009).

out plans they may have conceived on their own."[89] It should be no surprise that the development of an opposition party and the rise of the printed press occurred in tandem. Newspapers can easily be understood as a means by which the Democratic-Republican Party could effectively disseminate their alternative political principles in an effort to win office. However, the constitutionality of these practices was not settled because there was no clear constitutional consensus on the rules governing the use of the press. Accordingly, early debates over the meaning and application of the First Amendment's free press opened the path for arguments that presupposed a constitutional creation of a legitimate opposition party.

While there is substantial literature linking the emergence of political parties to the partisan press, most accounts of this link inadequately address the extent to which political parties would benefit from settling the First Amendment's contested meaning, especially in regards to an opposition party electorally challenging the party-in-government through majoritarian means. Scholarship on the partisan press has rightly demonstrated that there was more to the press controversy than the issue of seditious libel as parties began to use the press to shape public opinion. For example, contrary to standard accounts of the Federalist Party, Todd Estes, using debates over the Jay Treaty, finds the Federalists were much more attuned to public opinion and the press as both the Federalists and the Democratic-Republicans "attempted to influence public sentiment, such as it was, with pamphlets, newspapers, and essays and then in turn 'collected' that opinion in petitions and resolutions that were then printed for further distribution and

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[89] Alexis de Tocqueville, *Democracy in America*, trans. Gerald Bevan (New York, Penguin Books, 2003), pp. 600.

held up as examples of partisan attitudes."[90] Estes's account, however, does not adequately address the controversy over the meaning of the First Amendment and its relation to the election process. Put differently, Estes claims the debate over the Jay

[90] Todd Estes, "Shaping the Politics of Public Opinion: Federalists and the Jay Treaty Debate," *Journal of the Early Republic*, Vol. 20, No. 3 (Autumn, 2000), 393-422, pp. 403. See also Todd Estes, *The Jay Treaty Debate, Public Opinion, and the Evolution of Early American Political Culture* (Amherst, MA, University of Massachusetts Press, 2008). Estes argues that the Federalists have long been mischaracterized as being opposed to courting public opinion and using the press to mobilize public support. See, for example David Hackett Fischer, *The Revolution of American Conservatism: The Federalist Party in the Era of Jeffersonian Democracy* (New York: Harper and Row, 1965); Linda K. Kerber, *Federalists in Dissent: Imagery and Ideology in Jeffersonian America* (Ithaca: Cornell University Press, 1970); James M. Banner, *To the Hartford Convention: The Federalists and the Origins of Party Politics in Massachusetts, 1789-1815* (New York: Knopf, 1970); Shaw Livermore, *The Twilight of Federalism: The Disintegration of the Federalist Party, 1815-1830* (Princeton, NJ: Gordian Press, 1962); and James H. Broussard, *The Southern Federalists, 1800-1816* (Baton Rouge: Louisiana State University Press, 1978). As a result, Estes argues that, during the debate over the Jay Treaty, the Federalists actually establish the foundation for popular politics. See also, Stanley Elkins and Eric McKitrick, *The Age of Federalism: The Early American Republic* (New York: Oxford University Press, 1994); Lisle A. Rose *Prologue to Democracy: The Federalists in the South, 1789-1800* (Lexington, 1968); Alfred F. Young, *The Democratic Republicans of New York: The Origins, 1763-1797* (Chapel Hill, 1967).

Treaty "represents the development of not just political parties but of the conduct and content of political culture," a political culture that utilized the press as a means of incorporating the public into politics.[91] Estes, however, does not necessarily provide the evidence to truly substantiate his claim as he focuses solely on the content of the debate and not on the actual strategies in which the press would be utilized as part of the new post-Jay Treaty "political culture". Moreover, as the party-in-government, the Federalists' use of the press during the Jay Treaty was ultimately supportive of the government's actions, and their acceptance of the relationship between the press and public opinion only extended to these positive pronouncements and not to opposition politics thereby paving the way for the Alien and Sedition Acts. So, while Estes correctly explains the manner in which the Federalists used the press to enhance their position in the debate, he misses the specifics as to how and why the press would be used (or not used by the Federalists) as a means of successfully coordinating subsequent electoral efforts, particularly the efforts of an opposition party.[92] Somewhat differently, while

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[91] Todd Estes, *The Jay Treaty Debate, Public Opinion, and the Evolution of Early American Political Culture*, pp. 9.

[92] See Gordon Wood, *Empire of Liberty: A History of the Early Republic, 1789-1815* (New York: Oxford University Press, 2009) pp. 252. Wood described that, during this time, "newspaper subscriptions and readership often came to define partisanship; newspaper offices even printed party tickets." However, despite this assertion, Wood's argument never fully captures this significant feature as he, like Estes, does not detail how the press, particularly the importance of printing and distributing party tickets, would be used by the Democratic-Republicans in elections. Wood, like most scholarship

Estes's Federalists may have successfully used the press during the Jay Treaty, they never capitalized on the emerging popular politics for electoral purposes even after the controversy over the First Amendment and a partisan, opposition press was settled. Settling the extent to which the partisan press would be used in politics, then, allowed for newspapers to play a more predominant role in the election process, such as printing party tickets and distributing information regarding those who would be on the party ticket. In this way, the First Amendment protected the means by which an opposition party could successfully, and legitimately, challenge the party-in-government through majoritarian elections.

Focusing on this early construction of the First Amendment and the development of political parties will help clarify the function of an opposition party in American politics and the two-party system's democratic and majoritarian features. The Federalists' controversial Alien and Sedition Acts have been used as evidence to substantiate claims that parties were deemed illegitimate during the early republic.[93] The standard argument being that parties were considered illegitimate because the

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on parties and the press, emphasizes the Democratic-Republicans' understanding and use of the press to coordinate state legislative action in opposition to the Alien and Sedition Acts thereby missing the comprehensive electoral strategy employed by the Democratic-Republicans of using the press to print party tickets. These efforts will be further detailed in Chapter 4.

[93] Specifically see Richard Hofstadter, *The Idea of a Party System*. See also Leonard Levy, *Legacy of Suppression: Freedom of Speech and Press in Early American History* (Cambridge, MA: Belknap Press of Harvard University, 1960).

"Federalists and Republicans did not think of each other as alternating parties in a two-party system", and it was doubtful "that opposition, manifested in organized popular parties could sustain freedom without fatally shattering [social] unity."[94] Subsequently, the Federalists viewed the Republicans as traitors; the Republicans viewed the Federalists as "Monarchists". If this, however, is the standard by which we are to measure legitimate opposition, how have modern political parties achieved any sort of legitimacy? Put differently, the claims that the Federalists were monarchists may not be any different from the current claims that Democrats are socialists because rival parties will find opportunities to claim political opponents are somehow contrary to the accepted political order. History has not necessarily overcome the propensity to view rival parties as an unacceptable alternative in the two-party system. In other words, we must understand the development of legitimate opposition apart from the perceptions each party has of the other by looking at the procedural and substantive developments that facilitated the emergence of countervailing perceptions of the party-in-office and created an oppositional party-in-the electorate. In this way, the Sedition Act was less about suppressing political name-calling and critical opinions of governmental officials and more about prohibiting the participation of political parties and an opposition in the political arena.[95]

In general, the Alien and Sedition Acts provided one of the first tests for determining the nature and scope of the First Amendment's freedom of speech and freedom of press clauses. This test would indicate the important role newspapers would

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[94] Richard Hofstadter, *The Idea of a Party System*, pp. 8-9.

[95] Specifically see Stanley Elkins and Eric McKitrick, *The Age of Federalism.*

have in the democratic process. Moreover, although the Acts attempted to proscribe opposition, the countervailing responses to the controversial Acts helped define the constitutional mechanisms by which national legislation could be challenged by an opposition party without recourse to nullification. As such, the Democratic-Republicans response to the Acts demonstrated that an opposition can challenge the constitutional structure without necessarily destroying it. This is to say that the purpose and function of these early parties were defined by channeling political opposition through electoral politics rather than extra-legal and extra-constitutional means. And, in this way, early procedural norms for political parties were developed thereby making the oppositional politics work within rather than against the accepted constitutional order.

The Foundation for Democratic-Republican's First Amendment: Madison and the Printed Press

James Madison's belief in the importance and purpose of newspapers emerged long before the Federalists' attempts at silencing them. In 1791, Madison's work as party leader began by helping organize the publication of the *National Gazette*. Moreover his contributions to the newspaper would become vital in providing the foundational though for the newly emerging opposition party. With the help of his college friend Philip Freneau, Madison established a "lively, ardently republican, and nationally significant" newspaper in response to the *Gazette of the United States*, which both he and Thomas Jefferson considered as "a paper of pure Toryism, disseminating the doctrines of

monarchy, aristocracy, and the exclusion of the influence of the people."[96] Madison's contributions to the newspaper should not be overlooked because the *Gazette* was "the leading vehicle for the development and national dissemination of a powerful, coherent ideology of opposition, and there is every reason to believe that it was acting as the organ of a rapidly emerging party."[97] In essence, Madison's intent for and understanding of the printed press established an alternative, competing interpretation of the First Amendment than that would be later developed by the Federalists.

Madison's contributions to the *National Gazette* draw attention to two early developments that would be significant for the subsequent development of a formal two-party system. First, his intent for and understanding of the printed press would establish an alternative, competing interpretation of the First Amendment than that developed by the Federalists to justify the Alien and Sedition Acts.[98] Second, Madison would link

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[96] Quoted in Jeffrey L. Pasley, "The Two National" Gazettes": Newspapers and the Embodiment of American Political Parties." *Early American Literature* (2000), pp. 51-86; 64.

[97] Lance Banning, *The Sacred Fire of Liberty: James Madison and the Founding of the Federal Republic*. (Ithaca: Cornell University Press, 1998), pp. 57.

[98] See Stanley Elkins and Eric McKitrick, *The Age of Federalism.* For Elkins and McKitrick, the Sedition Act was less about civil liberty and more about the "state of political practice in America," particularly party practices. For, "Parties, in any modern sense cannot function at all under such a principle [as seditious libel], and "the Federalists…in all their distracted moments, were doing something more against "sedition"---more, even, than striking at their political opposition in the hope of

political parties with public opinion. This latter point reveals a tension in the scholarship on both Madison and political parties in general. For some scholars, Madison's appeal to public opinion is a significant departure from his position on public opinion in *The Federalist*.[99] In other words, later in his career, Madison became more democratic both

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suppressing it. Whether they knew it or not—perhaps nobody entirely knew it—they were striking out furiously at parties in general, in a desperate effort to turn back the clock" to what can be understood as the "constitution-against-parties (pp. 701). Subsequently, Elkins and McKitrick correctly emphasize the impact the Sedition Act would have on political parties. However, they understate the significance of the civil liberty discussion as it applied to the developing freedom of speech concept in relation to political parties. Put differently, Elkins and McKitrick's frame the acceptance of political parties at this time using the "necessary evil" argument and that the Democratic-Republican Party, while consciously established, would no longer be necessary once the Federalists were defeated. What Elkins and McKitrick miss, then, is that, by accepting a broader construction of the First Amendment, the Democratic-Republicans conceded the same civil liberty to the Federalists and their presses once the Federalist Party became the opposition party. So any Democratic-Republican attempt at suppressing or reconciling political opposition would now have to be done in accordance with this newly constructed civil liberty.

[99] See Gary Rosen, *American compact: James Madison and the Problem of Founding* (Lawrence: University Press of Kansas, 1999). Certain scholars have interpreted Madison to be completely opposed to democracy: see Charles A. Beard, *An Economic Interpretation of the Constitution* (New York: The Free Press, 1913); Robert Dahl,

in his political theory and his political practice. Others, however, provide an interpretation of a Madison who was more consistent in his political thought and commitment to democracy.[100] For many of these scholars, *Federalists No. 49* represents the clearest example of the tension within Madison's thought as he criticized Thomas

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Preface to Democratic Theory (Chicago: University of Chicago Press, 1956); and Richard Matthews, "James Madison's Political Theory: Hostage to Democratic Fortune." *Review of Politics* (2005) 67: 49-6. Other scholars have interpreted Madison to be more cautious of democracy: Gary Wills, *Explaining America: The Federalist* (Garden City, NY: Doubled, 1981) and Gary Wills, *Inventing America: Jefferson's Declaration of Independence* (Houghton Mifflin Harcourt, 2002); Drew R. McCoy, *The Last of the Fathers: James Madison and the Republican Legacy* (New York: Cambridge University Press 1991).

[100] See Martin Diamond, "Democracy and the Federalist: A Reconsideration of the Framers' Intent." *American Political Science Review* (1957) 53:52-68; Lance Banning, *The Sacred Fire of Liberty: James Madison and the Founding of the Federal Republic* (Ithaca, NY: Cornell University Press, 1995); Alan Gibson, "The Madisonian Madison and the Question of Consistency: The Significance and Challenge of Recent Research." *The Review of Politics* 64, no. 02 (2002): 311-338 and "Veneration and Vigilance: James Madison and Public Opinion, 1785–1800." *The Review of Politics* 67, no. 01 (2005): 5-36; Colleen A. Sheehan, "Public Opinion and the Formation of Civic Character in James Madison's Republican Theory." *Review of Politics* (2005) 67:37-48 and *James Madison and the Spirit of Republican Self Government* (New York: Cambridge University Press, 2009).

Jefferson's proposal for more frequent constitutional conventions to refer constitutional issues back to the people.[101] For those who attempt to provide a consistent account, Madison's democratic attachments are framed in terms of state's rights within federal system. And, in the case of the national government abusing its constitutional powers, Madison's consistent position was one in which the state legislatures are to "sound the alarm to the people, and…exert their local influence in effecting a change of federal representatives," to "annul the acts of the usurpers."[102] Key to this explanation is the difference between Madison's proposed electoral solution to avoid any revolutionary action or reoccurring constitutional convention. In other words, rather than following Jefferson's suggestions for the people to consider constitutional issues through constitutional conventions, Madison's recommendation is for the people to consider constitutional issues through elections and replacing the representatives who overstepped their constitutional boundaries. In this way, scholars, particularly Colleen A. Sheehan, connect Madison's position in *The Federalist* No. 44 with his propositions in the *Virginia Resolutions*.[103] Subsequently, as Sheehan points out, Madison combined a discussion of

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[101] Both Gibson (2005) and Sheehan (2009) acknowledge the difficulty *The Federalist* No. 49 presents to their argument for a more democratically consistent Madison. See also Jeremy D. Bailey, "Should We Venerate That Which We Cannot Love? James Madison on Constitutional Imperfection," *Political Research Quarterly* 65, no. 4 (2012): 732-744.

[102] *The Federalist* No. 44, pp. 290.

[103] For Sheehan, Madison "applied the theory of the importance of the states in marshalling public opinion to practice in his battle to overturn the Alien and Sedition

the how the Sedition Acts violated the Constitution with his own constitutional interpretation. Sheehan, however, does not take the argument to its full conclusion because the *Virginia Resolutions* were only a part of the Democratic-Republicans full plan to truly fulfill Madison's call to place constitutional limits on elected officials through elections. In other words, Madison's use and defense of the partisan press would not culminate with the *Virginia Resolutions*; the partisan press would an effective tool in the election of 1800, the Democratic-Republicans use of public opinion and majoritarian elections to settle the constitutional nature of the First Amendment by removing the Federalists from office. This is to say, the Democratic-Republican Party's efforts to elect Thomas Jefferson president presents a fuller account of Madison's position on public opinion and democracy.

Madison's endorsement of a partisan press is grounded in his commitment to majority rule because the freedom of the press would be invoked as a means of overcoming geographic distances in guiding and unifying public opinion. According to Madison, the extended republic presented a difficulty for the proper functioning of majoritarian politics. The extended republic would "enlarge the sphere" of politics and "divide the community into so great a number of interests and parties, that in the first place a majority will not be likely…to have a common interest separate from that of the whole or of the minority."[104] Unfortunately, it seemed to be too successful at multiplying

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Acts." See Colleen A. Sheehan, *James Madison and the Spirit of Republican Self Government* (New York: Cambridge University Press, 2009), pp. 133.

[104] James Madison, *Selected Writings of James Madison*, ed. Ralph Ketchum (Hackett Publishing, 2006), pp. 50. From here on *SWJM*.

local interests and parties as creating a national majority became difficult if not impossible. As a result, the *National Gazette* would become the constitutional means of uniting a legitimate opposition against the Federalist Party. Indeed, the importance of the First Amendment's protection of the speech and print would allow Madison to combine the "voice" and "sense" of the "millions of people" so as to facilitating "acting together" in a national, opposition majority.[105] For his opposition party to be successful, Madison used the partisan newspaper as a means of settling, or "fixing", public opinion. The essays published in the *National Gazette* "made a major contribution to the opposition's effort to define itself and carry its position to the public, which was a vital step in the formation of a popular political party."[106] Put differently, through his contributions to the newspaper, we begin to see Madison's view of the First Amendment, of political parties, and of a legitimate opposition. And, these early printed contributions by Madison would help ground the Democratic-Republicans subsequent opposition to the Federalists' First Amendment interpretation and Alien and Sedition Acts.

On December 5, 1791, the *National Gazette* printed an essay authored by Madison titled "Consolidation" expressing the importance of state governments in checking the concentration of national power, particularly in the executive. Madison, however, recognized the limitations to the state governments acting as a successful check on the consolidation of power "into one government", and protection against consolidation could not be accomplished by a single state government. Without these "local organs" acting together neither "the voice nor the sense of ten or twenty millions

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[105] *SWJM*, pp. 209

[106] Lance Banning, *The Sacred Fire of Liberty* (Cornell University Press, 1998), pp. 348.

of people, spread through so many latitudes as are comprehended within the United States, could ever be combined or called into effect." As a result, "the impossibility of acting together, might be succeeded by the inefficacy of partial expressions of the public mind, and this at length, by a universal silence and insensibility, leaving the whole government to that *self directed course*." The necessary means of preventing the consolidation of local government into a self-directed national government is the "greater mutual confidence and affection of all parts of the Union".[108] However, it is not quite clear how to accomplish this, especially in the extended republic.

In his essay titled "Public Opinion", Madison identified the problem newspapers and political parties would eventually solve. Printed on December 19, 1791, this essay continued the discussion of consolidation by reiterating the importance of public opinion to government. Once again Madison confirms that "Public opinion sets bounds to every government, and is the real sovereign in every free one." However, there is a problem with public opinion in the extended republic: "The larger a country, the less easy for its real opinions to be ascertained and the less difficult to be counterfeited" and "the more extensive a country, the more insignificant is each individual in his own eyes. This may be unfavorable to liberty".[109] Despite the importance of public opinion, Madison concedes that there are times when public opinion cannot be determined because it is not "fixed". In this case, opinion may be "influenced by the government."[110] This formulation determines the relationship between public opinion and the government. As

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[108] *SWJM*, pp. 209.

[109] *Ibid.*, pp. 210.

[110] *Ibid.*, pp. 210.

long as public opinion is fixed, the government must respond to it; if public sentiment is not fixed, then government may seek to influence it. Because of the extended republic, the probability of public sentiment being fixed is rather low. Therefore, government would be given substantial latitude to influence public sentiment. In this sense, the government would be acting upon the public more than the latter influencing the former bringing to question the authenticity of public sovereignty. As a result, Madison argues that "whatever facilitates general intercourse of sentiments…is equivalent to a contraction of territorial limits, and is favorable to liberty, where these may be to extensive."[111] This is to say that the proliferation of newspapers and the development of an organized party would serve both procedural and substantive purposes.

Madison's commitment to democratic and republican principles revealed a sobering and challenging electoral reality. In the great debate over governmental administration, Madison realized he was at a significant disadvantage. His preferred electoral outcome relied heavily on the "general coalition of sentiments".[112] Or, if republican principles were to guide the administration of government, candidates supporting this cause would need to unify a national majority in support of these principles. However, "the antirepublican party" while "weaker in point of numbers" could take "advantage of all prejudices, local, political, and occupational" thereby "preventing or disturbing the general coalition of sentiments."[113] Although Madison's believed his position was backed by national public opinion, "experience shews that in

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[111] *SWJM*, pp. 210.

[112] *Ibid.*, pp. 227.

[113] *Ibid.*, pp. 226.

politics as in war, stratagem is often an overmatch for numbers. This became particularly pertinent as many of the important decisions structuring the character of the government were made in Congress. Therefore, if the Federalists were able to secure a majority then "Anti-republican" principles would find little legislative opposition, particularly if the legislature and executive were united in their policy preferences. By the Second Congress (1791-1793), most members could already be identified as either Federalist or Republicans, and, as Aldrich argued, in the Third Congress (1793-1795) party affiliation substantially influenced voting as significant party voting blocs began to form.[114] Far from denouncing the activity of party politics, Madison needed to make his party "a check on the other, so far as the existence of parties cannot be prevented, not their views accommodated. If this is not the language of reason, it is that of republicanism."[115] Madison could not prevent the emergence of a Hamilton led party. Nor could he accommodate the competing views on governmental administration. The necessary and principled solution was to develop a constitutional construction of the First Amendment to counter that of the Federalists and to embrace an opposition party as a guardian and enforcer of republican principles.

The need to organize and unify public opinion reveals Madison's view of the freedom of speech and freedom of the press. While the Federalists attempted to limit these rights, Madison took a more expansive view of their application. In his later *Report on the Virginia Resolutions*, Madison related the First Amendment to the electoral process. Confirming that the right of electing popular officials is "the essence of a free

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[114] See John H. Aldrich, *Why Parties*.

[115] *SWJM*, pp. 213.

and responsible government", to properly exercise this right there must be organized opposition capable of evaluating and assessing those in office. For, "The value and efficacy of this right depends on the knowledge of the comparative merits and demerits of the candidates for public trust, and on the equal freedom, consequently, of examining and discussing these merits and demerits of the candidates."[116] Moreover, the Acts made electoral competition unequal as the Federalists were protected by the act while leaving the opposition "exposed to the contempt and hatred of the people without a violation of the act." Moreover, the language of the Acts specifically protects the president while remaining silent on the vice-president thereby subjecting Jefferson to malicious and seditious statements. Therefore, people are "not free" as they will be "compelled to make their election between competitors whose pretensions they are not permitted by the act equally to examine, to discuss, and to ascertain." Furthermore, "those in power derive an undue advantage for continuing themselves in it, which, by impairing the right of election, endangers the blessings of the Government."[117] As a result, the purpose of these rights guaranteed through the First Amendment was to not necessarily endow individuals with substantive protections from the government or popular majorities. Rather, as Akhil Amar argued, "The genius of the Bill was not to downplay organizational structure but to deploy it, not to impede popular majorities but to empower them."[118] In this regard, Madison's interpretation of the freedom of speech and freedom of the press would serve

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[116] *SWJM*, pp. 247.

[117] *Ibid.*, pp. 249.

[118] Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (New Haven: Yale University Press, 1988), pp. xii.

an electoral function by permitting an opposition to procedurally unify into a majority and have a substantive electoral impact without necessarily disadvantaging the rival party. Put differently, by accepting the partisan press under a broad interpretation of the First Amendment, the Democratic-Republicans also accepted the future prospect of the Federalists claiming the same broad interpretation for their partisan purposes.

The Alien and Sedition Acts of 1798

In 1798, amid escalating tensions between the United States and France, President John Adams placed the country into a "virtual state of undeclared war" as he increased the size of the army, established the Department of the Navy and ordered more warships, attempted to fortify the nation's harbors, authorized naval attacks on armed French ships, and nullified all treaties with France.[119] Loyal Federalists were quick to support Adams' efforts; Democratic-Republicans were weary of the expanding national power. Most of Adams' and the Federalists' proposals were easily adopted as they controlled majorities in both the House and Senate. Meanwhile, the mounting opposition to the Federalists accused them of using an exaggerated threat of war as a vehicle to pursue their partisan agenda of strengthening the national government. For example, Congressman Richard Brent (DR-VA) thought it more likely to be "transported before

[119] Quoted in Geoffrey R. Stone, *Perilous Times: Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism* (New York: W.W. Norton & Company, Inc., 2004), pp. 23.

night into the moon" than for France to invade.[120] Escalating political antagonism between the parties began to divide the nation, and, subsequently, the 5th United States Congress passed the Alien and Sedition Acts in response to this rising political hostility.

With the Alien and Sedition Acts, the Federalists calculatingly targeted their political adversaries in an attempt to circumscribe the Democratic-Republicans' political participation and suppress domestic opposition. The Federalists' attempt to subdue domestic opposition had one primary aim: to ensure the Democratic-Republicans could not broaden their base of political supporters. To accomplish their aim, the Federalists specifically targeted immigrants, particularly French and Irish immigrants who overwhelmingly supported the Democratic-Republicans, by raising the naturalization requirement to fourteen years, and the Federalists gave to the president the power to deport any foreign individual who he deemed to be a threat to the United States. In addition to targeting immigrants, the Sedition Act specifically targeted the Democratic-Republicans by criminalizing any form—written, printed, uttered, or published— of dissent against the United States or the laws passed by Congress. In this way, the Federalists attacked the most valuable asset available to the Democratic-Republicans in their organizing efforts to politically and electorally challenge the Federalists. As such, the Federalists' Alien and Sedition Acts challenged both the legitimacy of a political opposition and the nature and scope of the First Amendment. Accordingly, the justification of and challenge to the Alien and Sedition Acts, particularly the Sedition

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[120] Geoffrey R. Stone, *Perilous Times: Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism*, pp. 27.

Act, would determine the purpose of the freedom of expression and the place of a political opposition in American politics.

The Federalist's justification for the Alien and Sedition Act is derivative of their understanding of what was meant by the freedom of speech and press. Specifically, they feared the danger induced by misguided and false accusations against the government. This fear was particularly poignant given the violence of the French Revolution and how at the "commencement of the Revolution in France, those loud and enthusiastic advocates for liberty and equality took special care to occupy and command all the presses."[121] Moreover, as Judge Alexander Addison cautioned, "speech, writing and printing are the great directors of public opinion, and public opinion is the great director of human action." As a consequence, "command of the country" belongs to "any set of men [who have] command of the press."[122]

The Federalists were attuned to the potential effect defamation of public officers could have on those in office. As Alexander Hamilton warned, "no character, however upright, is a match for constantly reiterated attacks, however false" for "the public mind, fatigued at length with resistance to the calumnies which eternally assail it, is apt at the end to sit down with the opinion that a person so often accused cannot be entirely

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[121] Quoted in Geoffrey R. Stone, *Perilous Times: Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism* (W.W. Norton & Company, 2004), pp. 34.

[122] Alexander Addison, Reports of Cases in the County Courts of the Fifth Circuit, and in the High Courts of Errors & Appeals, of the State of Pennsylvania, 1791-1799, pp. 585.

innocent."[123] As a result, the Federalists feared the persistent, vehement attacks on the character of public figures would drive "our wisest and best public officers…from their stations" leaving only men "without virtue or talents" to replace them.[124]

These perceived dangers were not merely theoretical conjectures because the Federalists holding office were subject to and effected by the negative shift in public opinion. During his presidency, George Washington was cognizant of the malicious accusations and characterizations propagated by the Federalists' rivals. In 1792, as Washington approached the conclusion of his first term as president, he expressed serious doubts regarding his desire to remain in office and continue his administration. In a conversation with James Madison, Washington expressed his preference to "go to his farm, take his spade in his hand, and work for his bread, than remain in his present situation." According to Washington, there were two primary causes driving him from public service. The first cause was "a spirit of party in the Government" that "was becoming a fresh source of difficulty", alluding to the developing division within his administration between Alexander Hamilton and Thomas Jefferson. Second, Washington had observed an increasing proportion of "discontents among the people," and "althou' the various attacks against public men & measures had not in general been pointed at

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[123] Alexander Hamilton, *The Works of Alexander Hamilton*, ed. Henry Cabot Lodge (Federal Edition) vol.7 (New York: G.P. Putnam's Sons, 1904), pp. 377.

[124] Alexander Addison, *Reports of Cases in the County of the Fifth Circuit and in the High Courts of Errors & Appeals*, pp. 285.

him, yet in some instance it had been visible that he was the indirect object."[125] Even the honorable George Washington was ready to leave his public position due to the indirect attacks on his character and the growing disenchantment with his administration.

The attacks on public officers escalated, and the printed press became the battleground for partisan struggles. Benjamin Franklin Bache, Benjamin Franklin's grandson, was editor of the most prominent Democratic-Republican newspaper, *The Aurora*. Bache used this paper to openly insult Federalist officers and has been credited with printing a description of President John Adams as "blind, bald, crippled, toothless, [and] querulous."[126] Moreover, Bache claimed that the "American nation had been debauched by Washington," and once Washington stepped down from his presidential position, he was chastised for being "the source of all the misfortunes of [the] country."[127] In response, Washington believed Bache wanted to "weaken, if not destroy, the confidence of the Public" through a "malignant industry and persevering falsehoods."[128] The Federalist newspaper also responded as the most prominent

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[125] Memorandum on Washington's Retirement, May 1792 in *Papers of James Madison*, 14: pp. 299-304.

[126] Quoted in Miller, John Chester, and Alan M. Dershowitz. *Crisis in freedom: The Alien and Sedition Acts*, Vol. 38. (Little Brown, 1951).

[127] Quoted in James D. Tagg, "Benjamin Franklin Bache's Attack on George Washington." *Pennsylvania Magazine of History and Biography* (1976): 191-230, pp. 219.

[128] Letter from George Washington to Benjamin Walker, January 12, 1797, in Richard Rosenfeld, *American Aurora* (St Martin's, 1997).

Federalist paper, the *Gazette of the United States*, openly opposed the abusive and irresponsible accusations from the "worst and basest men." The *Porcupine's Gazette* labeled Bache as an "abandoned liar" to be dealt with like "a Turk, a Jew, a Jacobin, or a Dog."[129] The Alien and Sedition Acts emerged, in part, as a response to the Democratic-Republican's inflammatory, seditious journalism.

The Federalists' First Amendment

The Federalists' First Amendment understanding can be seen in the language of their controversial legislation. Accordingly, section II of the Act reads:

> That if any person shall write, print, utter or publish…any false, scandalous, and malicious writing or writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States, with intent to defame…or bring them, or either of them, into contempt or disrepute; or to excite against them…the hatred of the good people of the United States, or to stir up sedition within the Unites States…or to resist, oppose, or defeat any such law or act…then such persons…shall be punished by a fine not exceeding two thousand dollars, and by imprisonment not exceeding two years.[130]

According to the language of the Act, the Federalists were clearly attempting to eliminate political dissent. For the Federalists, the First Amendment did not grant absolute license on what can be said and printed, particularly when what was said or printed was against the government. As congressmen John Allen argued, the freedom of speech and the press were "never understood to give the right of publishing falsehood and slanders, nor of exciting sedition, insurrection, and slaughter, with impunity. A man was always

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[129] *Porcupine's Gazette*, March 17, 1798.

[130] *A Century of Lawmaking for a New Nation: U.S. Congressional Documents and Debates, 1774-1875*, Statues at Large, 5th Congress, 2nd Session, pp. 596-597.

answerable for the malicious publication of falsehood."[131] As such, in their view, the freedom of speech and the freedom of the press were understood in much more restricted terms as the Federalist constructed a more limited constitutional understanding the First Amendment. For the Federalists, those who printed seditious information against the government would be held accountable to the government and the First Amendment could not be invoked to protect them from any subsequent punishment from the government.

The Federalists relied heavily on William M. Blackstone to further justify their limited construction of the First Amendment. In his *Commentaries*, Blackstone stated the "liberty of the press consists in laying no *previous* restrains upon publications, and not in freedom from censure for criminal matter when published." Moreover, "to punish (as the law does at present) any dangerous or offensive writings, which, when published, shall on a fair and impartial trial be adjudged of a pernicious tendency, is necessary for the preservation of peace and good order, of government and religion, the only solid foundation of civil liberty."[132] Congressman Harrison Gray Otis, following Blackstone, argued the First Amendment contained language borrowed from English law that defined the freedom of speech as "nothing more than the liberty of writing publishing, and speaking one's thoughts, under the condition of being answerable to the injured party, whether it be the Government or an individual, for false, malicious, and seditious expressions." Similarly, the freedom of press was merely "an exemption from all

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[131] Quoted in Geoffrey R. Stone, *Perilous Times*, pp. 38.

[132] William M. Blackstone, 4 *Commentaries* (Chicago: University of Chicago Press, 2002), pp. 151-152.

previous restraints."[133] Therefore, utilizing Blackstone's construction of the freedom of speech and freedom of the press, the Federalists justified their narrow understanding of the First Amendment and the constitutionality of the Alien and Sedition Act.[134]

The Federalist's narrow interpretation of the First Amendment corresponded with their general democratic theory and understanding of representation in the United States' constitutional republic. As James P. Martin argued, "the repressive aspects of the Sedition Act served democratic purposes by keeping the public deliberation a representative, not a direct process."[135] In this regard, the Federalist's legislation coincided with Hamilton's assertion in the *Federalist Papers*:

> The republican principle demands, that the deliberate sense of the community should govern the conduct of those to whom they intrust the management of their affairs; but it does not require an unqualified complaisance to every sudden breeze of passion, or every transient implies which the people may receive from the arts of men, who flatter their prejudice to betray their interest.[136]

Hamilton believed the "people commonly INTENDED the PUBLIC GOOD." However, they were also susceptible to err in regards to what constituted this good because they

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[133] Quoted in Geoffrey R. Stone, *Perilous Times*, pp. 40.

[134] See Levy, Leonard Williams Levy, *Jefferson & Civil Liberties: The Darker Side* (Cambridge: Belknap Press of Harvard University Press, 1963).

[135] James P. Martin, "When Repression is Democratic and Constitutional: The Federalist Theory of Representation and the Sedition Act of 1798", *The University of Chicago Law Review*, Vol. 66, No. 1 (Winter, 1999), pp. 119.

[136] Alexander Hamilton, James Madison, and John Jay, *The Federalist: A Commentary on the Constitution of the United States*, ed. Robert Scigliano (New York: Modern Library, 2000), pp.458. From here on, *The Federalist*.

were "beset…by the wiles of parasites and sycophants; by the snares of the ambitious, the avaricious, the desperate; by the artifices of men who possess their confidence more than they deserve it; and of those who seek to possess, rather than deserve it."[137] In this regard, the developing opposition party presented a direct challenge to the representative institutions of government because it established a separate, undemocratic political body from that already created by the voice of the people. As Congressman Ames argued, the opposition "arrogantly pretended sometimes to be the people, and sometimes the guardians, the champions of the people. They affect to feel more zeal for a popular Government, and to enforce more respect for Republican principles, than the real Representatives are admitted to entertain."[138] The Republican efforts were a challenge to democratic politics because they sought to betray the public interest and undermine those who the people had entrusted to manage their affairs.

In further defense of the Acts, a "Minority Address" was offered by the Federalist minority in the Virginia legislature. The *Address of the Minority of the Virginia Legislature* constituted a publicized response to the recently adopted *Virginia Resolutions* and subsequent *Address of the General Assembly* in which Democratic-Republicans in Virginia challenged the constitutionality of the Alien and Sedition Acts as well as the

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[137] *The Federalist*, pp. 458.

[138] The Library of Congress, *A Century of Lawmaking for a New Nation: U.S. Congressional Documents and Debates, 1774-1875, Annals of Congress*, House of Representatives, 4th Congress, 1st Session, pp. 923.

legislative authority of the national government.[139] The Federalist minority issued their report to defend the constitutionality of the Acts and challenge the Democratic-Republicans' political response to the Acts that included prospects of nullification.[140] The author of the *Address* would detail a narrow interpretation of the First Amendment within the context of a much broader, more expansive understanding of the national government's legislative power.

The Address of the Minority of the Virginia Legislature

Although, written primarily as a response to the *Virginia Resolutions*, the nature and scope of the "Minority Address" extended beyond the *Virginia Resolutions* and focused on the Democratic-Republicans' overall political response to the Federalists' legislation. According to the author of the *Address*, the Democratic-Republican's response to the Alien and Sedition Acts presented a larger danger than the "present crises" because of the dangerous prospect of a "disunited America."[141] Furthermore,

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[139] See James Madison, *Virginia Resolutions* (1798), reprinted in Philip B. Kurland and Ralph Lerner, eds., *The Founders' Constitution* (Chicago: University of Chicago Press, 1987), pp. 136-139.

[140] Specifically, see Thomas Jefferson, "The Kentucky Resolutions" in *The Essential Jefferson*, ed. Jean M. Yarbrough (Indianapolis: Hackett Publishing, 2006), pp. 48.

[141] The Address of the Minority in the Virginia Legislature to the People of that State: Containing a Vindication of the Constitutionality of the Alien and Sedition Laws, reprinted in Philip B. Kurland and Ralph Lerner, eds., *The Founders' Constitution*. From here on *Minority Address*.

Virginia's legislature had overstepped its authority within the constitutional order because the Constitution established safeguards for a republican government, the amendment process and periodic elections. Subsequently, neither of these republican mechanisms included states uniting in an effort to repeal national legislation. As such, the Democratic-Republicans had opted for an illegitimate response to the legislation, and their actions presented a more severe danger to the security and perpetuation of the union than the Acts. In other words, according to the Federalists, achieving national security required "the equipment of a fleet, the raising of an army, a provision for the removal of dangerous aliens, and for the punishment of seditious citizens."[142] And, national (and Virginia's) security also required securing the supremacy and primacy of the national government within the federal system.

Having introduced federalism and national security as central to the justification for the Acts, the author of the *Address* proceeded with a constitutional defense of the controversial legislation by highlighting the novelty of federalism within the constitutional system. Within the federal system, authority and power is exclusively granted to the national government over the areas of treaty, war, and commerce. Moreover, the national government should have plenary power over these areas "because to that government we look for protection from enemies of every denomination."[143] One only has to retrospectively consider the Articles of Confederation and the failures of the states in these areas of political importance to recognize the necessity of granting the national government these powers. And, since the responsibility for security is placed

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[142] *Minority Address*.

[143] *Ibid.*

solely on the national government, the government, “with the force of the nation and the general power of protection”, should be allowed the latitude to protect the union “from hostilities of every kind” including external intrigue and internal sedition.[144] This is to say that, for the Federalists, the people who wrote and ratified the Constitution wanted to, and actually did, grant the national government exclusive power over concerns of national security.

Despite the argument for giving the national government exclusive power over security, the defense of the Alien and Sedition Acts offered in the *Address* did not immediately address whether the Constitution actually empowers Congress to pass the Acts. Instead, the author of the *Address* defended a broad reading of the Constitution by explaining the appropriate method to interpret the document. The author stresses the distinction between the Constitution and a congressional statute, and the former "must unavoidably be restricted in various points to general expressions" while the latter "is capable of descending to every minute detail."[145] In other words, one should not narrowly read the Constitution in the same manner as a piece of legislation because the framers' of the Constitution were required to deal with generalities while Congress must be as specific as possible. In this way, a strict reading of the Constitution reveals inconsistencies and indeterminacies, especially in regards to Congress' enumerated powers and the "Necessary and Proper" clause. At times, political expediency requires Congress to act beyond their enumerated powers to achieve other desirable political

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[144] *Minority Address*.

[145] *Ibid*.

outcomes. Justification for the Alien and Sedition Acts, then, would come from an argument based on the necessity of implied powers.

In addition to the necessity of implied powers, the author of the *Address* drew attention to the language of the tenth amendment. The specific language was taken from the Articles of Confederation which reads: "Each state retains its sovereignty, freedom, and independence, and every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled."[146] According to the author of the *Address*, the framers of the tenth amendment "wisely omitted" the term "expressly", and this deliberate omission signals that the scope of governmental action would extend beyond the limits of expressed powers to include, when appropriate, the exercising of implied powers as well.[147] Or, as Chief Justice John Marshall would later argue in *McCulloch v. Maryland*, "Even the 10th amendment, which was framed for the purpose of quieting the excessive jealousies which had been excited, omits the word 'expressly,' and declares only that the powers 'not delegated to the United States, nor prohibited to the States, are reserved to the States or to the people," and "there is no phrase in the [Constitution] which, like the articles of confederation, excludes incidental or implied powers; and which requires that every thing granted shall be

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[146] *Articles of Confederation* reprinted in *The Federalist: A Commentary on the Constitution of the United States*, ed. Robert Scigliano (New York: Modern Library, 2000), pp. 572.

[147] *Minority Address*

expressly and minutely described."[148] Consequently, Congress' constitutionally delegated powers should be "fairly, but liberally" interpreted and understood.

Given the broad interpretation of Congress' delegated powers, according to the author of the *Address*, the national government is constitutionally empowered to punish seditious libel because of the need, by means of the Necessary and Proper Clause, to punish actual and potential resistance to federal law. Utilizing the example of the Whiskey Rebellion, the author draws attention to use of seditious publications in inciting rebellion and the danger of promoting resistance to federal law. Accordingly, an unregulated press can be a danger to public safety. The Constitution was adopted as a means of securing "domestic Tranquility" by establishing a "more perfect Union" of the separate states. As such, the people are empowered to prevent or eliminate any practice that would undermine the purpose and function of the union, specifically regulating the use of the printed press because "in all the nations of the earth, where presses are known, some corrective of their licentiousness has been deemed indispensable." If, through the Necessary and Proper Clause, the national government is empowered to punish "actual

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[148] See also Kurt T. Lash and Alicia Harrison, "Minority Report: John Marshall and the Defense of the Alien and Sedition Acts," *Ohio State Law Journal*, Vol. 68, No. 2, 2007. The author of the *Address of the Minority of the Virginia Legislature* is questionable as the *Report* was written anonymously. Lash argues that John Marshall is the primary author of the *Report* by linking the logic defending the Alien and Sedition Acts to the same logic used by Marshall to justify his ruling in *McCulloch v. Maryland*. According to Lash, the broad reading of national power Marshall used in *McCulloch* is too similar to the broad reading of power in the *Address* to be mere coincidental.

resistance" to federal law, then only a "strange...unreasonable and improvident construction" of the Clause would not prohibit acts that "obviously lead to and prepare resistance."[149] In taking this position, the author of the Report directly refutes a previous claim made by James Madison during a congressional speech in which Madison argued that the First Amendment was not an admission of any existing governmental power that needed to be checked. Counter to Madison's position, had this power not previously existed "it would have been certainly unnecessary thus to have modified the legislative powers of Congress concerning the press."[150] For the author of the *Address*, in order for Madison's position to hold, Madison must concede that the government does not have the power to secure the peace and "tranquility of the American people" by defending itself against "false and malicious libels."[151] And, if the government cannot secure the peace and tranquility of the union, then the Constitution is for naught. The Alien and Sedition Acts, especially the act criminalizing seditious libel, then, are constitutionally justified as a means of accomplishing the purpose of the Union by protecting the public tranquility from actual and potential threats.

Turning again to the language of the First Amendment, the author of the *Address* offered one final justification for the constitutionality of prohibiting and punishing seditious publications by claiming the Democratic-Republicans were too liberal in their interpretation of the First Amendment by ascribing more force to the amendment than its language actually suggests. In a "solemn instrument" like the Constitution, words "are

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[149] *Minority Report.*

[150] *Ibid.*

[151] *Ibid.*

well weighed and considered before they are adopted." Furthermore, words and phrases are kept to their most basic forms so as to clearly convey meaning and intention, and "a remarkable diversity of expressions" is infrequently utilized unless to clearly "manifest a difference of intention."[152] Accordingly, the language of the First Amendment deploys such a diversity of expression when establishing the religious clauses with the expression clauses. Regarding religion, Congress is "prohibited from making any law respecting a religious establishment." However, as the amendment moves to the freedom of expression, the term "respecting" is consciously eliminated and replaced with the term "abridging". In other words, "Congress is prohibited from making any law respecting religious establishment, but not from making any law respecting the press," and "Congress is only refrained from passing law abridging its [the press'] liberty."[153] The difference in the language and construction of these two clauses, then, indicates a "difference of intention with respect to the power of the national legislature over those subjects." Put differently, Congress has no legislative powers regarding religion; it does have legislative powers regarding the press as long as Congress does not abridge the freedom of the press. For the Federalists', the constitutionality of the Alien and Sedition Acts is a matter of determining if the Acts do in fact abridge the freedom of the press.

For the author of the *Address*, the Alien and Sedition Acts were not against the language of the First Amendment because, unlike prior restraint, subsequent punishment does not abridge the freedom of the press. The freedom of press has always been understood as a protection from governmental censorship and punishment prior to

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[152] *Minority Address.*

[153] *Ibid.*

publication, and the Democratic-Republicans' First Amendment interpretation far exceeded the rational application of freedom of the press as a protected right. For "if by freedom of the press is meant a perfect exemption from all punishment for whatever may be published, that freedom never has, and most probably never will exist." Moreover, it is generally understood and accepted that persons who publish slanderous and malicious statements against the government should be readily accountable to the government and punished accordingly. And, according to the Acts, the punishments levied against those accused of "destroying the peace, and mangle the reputation, of an individual or of a community," were not more severe than previous allowed under English common law. In this way, the restriction placed on the press "does not punish any writing not before punishable, nor does it inflict a heavier penalty than the same writing was before liable to."[154] Put differently, following common law and a reasonable understanding of the freedom of the press, the restrictions on the press found in the Alien and Sedition Acts do not abridge the right, and Congress is, therefore, well within their legislative powers to pass such laws.

The Freedom of Press in the United States: An Early Expression

The Federalists justified their understanding of the First Amendment by primarily appealing to English common law. The Democratic-Republicans' understanding, however, constituted a break—or so they believed—from common law because declaring independence from England meant that the United States would no longer be required to adopt an articulation of the freedom of press according to common law. An early

[154] *Minority Address*.

expression of how the Democratic-Republicans would construct a distinctly American version of the freedom of the press came in 1774 as the Continental Congress articulated an understanding of the freedom of press in a letter written to the Citizens of Quebec. The letter specifically details an understanding of the freedom of press that breaks from the English common law tradition:

> "The last right we shall mention regards the freedom of the press. The importance of this consists, besides the advancement of truth, science, morality and arts in general, in its diffusion of liberal sentiments on the administration of government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officials are shamed or intimidated into more honorable just modes of conducting affairs."[155]

According to this early interpretation of the freedom of the press, the press would be used as a vehicle for disseminating political information, and the press must be free to "shame or intimidate" public officials so as to produce good governance. Under English common law, seditious libel was used to prevent the publication of materials that would cause an opposition to rise against the government. The Continental Congress in 1774, however, "declared that stirring up opposition to intimidate the government, far from being an abuse of press freedom, was one of the important benefits of a free press."[156] Furthermore, contemporary scholarship has shown that, during the time of the founding and ratification of the Constitution, "a robust freedom of speech flourished in America, and…the press was a trenchant and persistent critic of government and government

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[155] "To the Inhabitants of the Providence of Quebec," Oct. 24, 1774.

[156] Kenneth Shear, *Unoriginal Misunderstanding: Press Freedom in Early America and Interpretation of the First Amendment*, (Seattle, WA: Libertary Co.), 2009, 40.

officials."[157] This is to say that, just as the Federalists appealed to a tradition of common law, the Democratic-Republicans would also appeal to a "traditional" understanding of the freedom of the press that developed in the United States during the revolutionary era and continued through the ratification of the Constitution.

The Democratic-Republicans' Alternative First Amendment Interpretation

In June of 1798, Vice-President Thomas Jefferson left Philadelphia and returned to Virginia. At the time of his departure, congressional discussion regarding the Alien and Sedition Acts were still taking place. Despite his opposition to the Acts, Jefferson's presence could do little to prevent the Federalists from passing their legislation. Opposition to the controversial legislation would have to come from another organ of government. As such, Jefferson returned to Virginia to pursue a course of action that would involve state legislatures. According to Jefferson, the state governments were "the true barriers of our liberty in this country."[158] Moreover, his close friend and political ally James Madison shared a similar view of the role states could play in checking the national government. In *The Federalist* No. 51 Madison argued, "a double security arises

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[157] William T. Mayton, "Seditious Libel and the Lost Guarantee of a Freedom of Expression", *Columbia Law Review*, Vol, 84, No. 1 (Jan., 1984) 91-142, pp. 96. See also, Chamberlin, "Freedom of Expression in Eighteenth-Century Connecticut: Unanswered Questions", in *Newsletters and Newspapers: Eighteenth-Century Journalism* 247 (1977).

[158] Thomas Jefferson to A.C.V.C Destutt de Tracy, January 26, 1811, *Writings of Thomas Jefferson* 11:187.

to the rights of the people" as the Constitution fosters a mutual check between the national government and the state government, and, subsequently, these "different governments will control each other, at the same time that each will be controlled by itself."[159] Furthermore, this line of thinking was not unique to the Democratic-Republicans as Alexander Hamilton, in *The Federalist* No. 28 expressed a similar understanding of the role of the states in the American system. According to Hamilton, "the state governments will in all possible contingencies afford complete security against invasion of the public liberty by national authority". The genius of America's federal system allowed the states to "at once adopt a regular plan of opposition, in which they can combine all the resources of the community. They can readily communicate with each other in the different states: and unite their common forces for the protection of their common liberty."[160] As Madison had previously argued in his newspaper articles, if the national government posed a danger to liberty through the Alien and Sedition Acts, then the appropriate organ was a unified opposition from the separate states. Coordination and unification of opinion, however, would be a significant obstacle that the Jefferson and Madison led Democratic-Republicans would have to overcome. With the Federalists passing the Alien and Sedition Acts, the political stage was set for the Democratic-Republicans to utilize their alternative understanding of the First Amendment that had been developing since the revolution.

Jefferson and Madison's preliminary course of action resulted in the Kentucky Resolutions and the Virginia Resolutions with Jefferson secretly penning the former and

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[159] *The Federalist* No. 51, pp. 333.

[160] *The Federalist* No. 28, pp. 172.

Madison authoring the latter. Random protests and petitions to the national government would not suffice as Jefferson and Madison believed only a coordinated effort in the state legislatures would accomplish their political objectives. Jefferson and Madison undertook to challenge the Federalists' legislation by penning resolves to oppose the federal acts and encourage other states to join in a unified opposition. Accordingly, the Resolutions were intended to disseminate an understanding of constitutional principles to counter those that the Federalist used to justify the Alien and Sedition Acts. Put differently, the "Virginia and Kentucky Resolutions of 1798 should not be understood as the invention of distraught minds faced with extraordinary circumstances", but as "the touchstone of Virginia's constitutionalism."[161] As such, both Resolutions aimed to unify opposition to the Alien and Sedition Acts based on a constitutional argument centered on the nature and scope of delegated powers.

For Jefferson and Madison, delegated powers to the national government are the difference between an absolute and a limited government. Accordingly, the enumerated powers in the Constitution are vital in understanding the delicate and difficult division of governmental powers between the national government and local units and recognizing when authority has been exceeded. This division was a major concern during the ratification debates as opponents of the Constitution feared they were exchanging the Articles of Confederation, which secured state sovereignty, with a dangerously ambiguous document giving "the new government free access to our pockets, and ample

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[161] K.R. Constantine Gutzman, "The Virginia and Kentucky Resolutions Reconsidered: 'An Appeal to the Real Laws of our Country'", *The Journal of Southern History*, Vol. 66, No. 3 (Aug., 2000), pp. 473-498, 474.

command of our persons."[162] In the Virginia ratifying convention, Madison explained "the powers of the federal government are enumerated; it can only operate in certain cases; it has legislative powers on defined and limited objects, beyond which it cannot extend its jurisdiction."[163] Moreover, building on Madison's point, Frances Corbin stated, "the internal administration of government is left to the state legislatures, who exclusively retain such powers as will give the states the advantage of small republics, without the danger commonly attendant on the weakness of such governments."[164] Consistent with these observations, in the Kentucky Resolutions, Jefferson affirms the limited power of the national government as it was only "delegated…certain definite powers."[165] Similarly, Madison insists the national powers are "limited by the plain sense and intention of the instrument constituting that compact; as no farther valid than they are authorised by the grants enumerated in that compact."[166] Because of the limiting

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[162]New York (State). Convention, Vassar brothers institute, and NY, pub. *The debates and proceedings of the constitutional convention of the state of New York: assembled at Poughkeepsie on the 17th June, 1788. A facsimile reprint of an original copy in the Adriance Memorial Library*. Vassar Brothers Institute, 1788, pp.35.

[163] Quoted in William P. Murphy, "State Sovereignty and the Ratification of the Constitution-III." *Mississippi Law Journal* 33 (1961): 292.

[164] *Ibid*.

[165] Thomas Jefferson, *The Essential Jefferson*, ed. Jean M. Yarbrough (Hackett Publishing, 2006), pp. 48. From here on *EJ*.

[166] *SWJM*, pp. 240.

enumerated powers, Jefferson and Madison are then able to make the claim that the national government had exceeded its authority with the Alien and Sedition Acts.

After identifying the political problem, Jefferson and Madison explain the danger of the national government exercising inappropriate implied powers. According to Jefferson, the assumption of "undelegated powers" destroys all prescribed limits thereby reducing the sovereignty of the states to "the absolute dominion of one man" and the "barriers of the Constitution [are] thus swept away."[167] Likewise, Madison expressed "deep regret, that a spirit of sundry instances, been manifested by the federal government, to enlarge its powers by forced constructions of the constitutional charter which defines them" thereby resulting in a consolidation of the federal republic "into one sovereignty…into an absolute, or at best a mixed monarchy."[168] The very notions of self-government and federalism were in danger because the Alien and Sedition Acts were founded on principles of "undelegated" and "unlimited" powers thereby confirming the Anti-Federalists' initial fear that the Constitution would allow a consolidated government to swallow state sovereignty. Following this reasoning, the Alien and Sedition Acts was unconstitutional because the national government would be assuming an inherent power that would ultimately undermine federalism and distort the constitutional order.

The national government inappropriately assuming inherent powers was not the only constitutional issue as the meaning of the First Amendment was also at stake. Despite the general failure of the Kentucky and Virginia Resolutions, Madison agreed to offer an explanation and defense of the Virginia Resolutions, and in January 1800, the

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[167] *EJ*, pp. 48; 52.

[168] *SWJM*, pp. 241.

Report on the Virginia Resolutions was adopted by the Virginia legislature. According to Ralph Ketchum, the *Report* "served both as a culmination of Madison's long attention to states' rights and freedom of expression and as a Republican manifesto for the election of 1800."[169]

For Madison, the Federalists had incorrectly interpreted the amendment by assuming its meaning was derived from English common law and that the amendment only protected freedom of expression from prior restraint. Under English common law, "the danger of encroachments on the rights of the people, is understood to be confined to the executive magistrate." Parliament, however, as "sufficient guardians of the rights of their constituents," in principle, "is unlimited in its power, or in their own language, is omnipotent," and parliament is exempt from restrictions because it does not pose a threat to the peoples' rights. In this way, it is the executive, and only the executive, that is constrained by all the common law "ramparts" protecting the peoples' rights. On this point, however, the Constitution significantly deviates from the English common law because the direct subject of the First Amendment is Congress. Under the Constitution, it is the people who are considered sovereign, not parliament (or Congress). The people's rights, then, must be protected from encroachments by both the executive and the legislature. And, for Madison, the only way to assert the peoples' sovereignty and secure their rights is to have constitutions paramount to laws as opposed to the English case in which rights are secured by laws paramount to magisterial prerogative. Consequently, according to Madison, "this security of the freedom of the press, requires that it should be exempt, not only from previous restraint by the executive, as in Great Britain; but from

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[169] *SWJM*, pp. 248.

legislative restraint also; and this exemption, to be effectual, must be an exemption, not only from the previous inspection of licensers, but from the subsequent penalty of laws."[170] This is to say that the constitutional system in the United States constitutes such a drastic deviation from the English government that the former cannot be authoritatively referenced to explicate the rights guaranteed by the latter.

In addition to the constitutional differences between the United States and England, Madison makes reference to the ratification of the Constitution and Bill of Rights as further evidence of the unconstitutionality of the Federalists' broad understanding of congressional power and narrow interpretation of the First Amendment. During the ratification debates, many expressed apprehension that the absence of "some positive exception from the powers delegated, of certain, and of the freedom of the press particularly, might expose them to the danger of being drawn by construction within some of the powers vested in Congress."[171] More specifically, the Necessary and Proper clause could be used to as justification for congressional encroachment on political rights. In other words, the Federalists' justification for the Alien and Sedition Acts was a dominant concern during the ratification process. Indeed, on Madison's point regarding the ratification process, the probability of the Constitution being ratified based on the Federalists' constitutional interpretation was relatively low. Put differently, the Constitution ratified by the separate states was not one in which the national government was capable of invoking broad implied powers, and "the arguments now employed [by the Federalists] in behalf of the sedition act, are at variance with the reasoning which then

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[170] *SWJM*, pp. 254.

[171] *Ibid.*, pp. 257.

justified the constitution, and invited its ratification."[172] This is to say that, as an alternative to the Federalists' reliance on English common law to understand the Constitution, Madison provides the ratification process as an authoritative source for constructing constitutional meaning.[173] And, in defending a broader interpretation of the First Amendment and political opposition, the Democratic-Republicans would have to extend legitimacy to the Federalists.

Towards the Election of 1800

Understandably, the Democratic-Republicans did not respond well to the Federalists' position justifying the constitutionality of the Alien and Sedition Acts. Moreover, given the negative responses to the Kentucky and Virginia Resolutions, especially as talk of nullification began to emerge, another more palatable political path had to be constructed. In this regard, Madison's early propositions in the *National Gazette* of using the press to electorally organize would allow for the Democratic-Republicans to challenge the Federalists by working within the constitutional structure. This alternative to the Kentucky and Virginia resolutions, then, was more about defending a political opposition and calling others into opposition to challenge the Federalists and their controversial legislation. Somewhat differently, Madison's solution was an electoral one which including a more expansive First Amendment constitutional construction, the development of a political party, and the emergence of a legitimized

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[172] *SWJM*, pp. 257.

[173] Jack N. Rakove, *Original meanings: Politics and ideas in the making of the Constitution* (Random House LLC., 2010)

opposition. In this way, these developments became an important episode in America's political development because the Democratic-Republicans and Madison successfully altered the nature of the Constitution while remaining faithful to it.

Conclusion

The events surrounding the Alien and Sedition Acts resulted in a constitutional construction of the First Amendment that gave rise the emergence and exercise of a legitimate opposition. In attempting to proscribe the freedom of speech and the press, the Federalists constructed a narrow interpretation of the First Amendment aimed at protecting the Union from unnecessary political dissent. After all, one could ask if the ability to describe President Adams as "blind, bald, crippled, toothless, [and] querulous" is something in need of protecting. In response to the Federalists, the Democratic-Republicans responded with essentially two political alternatives, nullification or electoral opposition with the latter being more constitutionally appropriate than the former. Underlining each of these alternatives was a broadly constructed view of the First Amendment that recognized the function of evaluating the merits and demerits of public officials. Procedurally speaking, the Democratic-Republicans' response to the narrow, disadvantaging Alien and Sedition Acts aimed at allowing for an opposition no matter the party in power. In other words, while the Federalists aimed at disadvantaging the Democratic-Republicans, the latter's construction of the First Amendment would allow the former the same rights if they were to find themselves no longer in office thereby creating the foundation for a constitutional opposition, not just a Democratic-Republican opposition.

In addition to these procedural developments, the Democratic-Republican's response to the Acts also constructed substantive improvements to the electoral procedures in the United States. Specifically, Madison recognized the importance of an opposition, and not just a Democratic-Republican one, for democracy's fundamental feature of popularly electing members to governmental offices. In this regard, the Democratic-Republican concern over the oppressive legislation was more comprehensive than immediate electoral outcomes as they constructed new democratic principles to also govern the future. In order to achieve normatively better elections, the Democratic-Republicans would need to liberate the printed press, a vital organ for ensuring an opposition has the capacity to make substantive electoral impacts and overcoming the difficulties of the extended republic. As Tocqueville argued, the use of newspapers allowed a single thought to be deposited in the minds of thousands of people thereby creating a bond and a unity among individuals that would not be possible absent a free press. Overall, the Democratic-Republicans constructed a constitutionally based opposition that would effectively challenge the Federalists thereby enhancing American political practice and further influencing the development of political parties in American politics.

Chapter 3: Creating Durable Party Competition: The Twelfth Amendment and Political Opposition

"But no party can long hold an ascendancy in power; they will ill treat each other—or some of them will disagree, and from the fragments new parties will arise, who will gain power and forget themselves, and again disagree, to make way for new parties. The Constitution was predicated upon the existence of parties; they will always exist, and names will not be wanting to rally under, and difference of interests will not be wanting for pretexts."

James Hillhouse

While an opposition party was given a political voice through a constitutional construction of the First Amendment, a legitimate opposition could not fully emerge until the presidential selection system of 1787 was corrected. Under the original system, each member of the Electoral College would cast two votes with the candidate receiving the highest number of votes (and a majority of all electors) being elected president and the runner-up chosen as vice-president. However, if no candidate received a "majority of the whole number of electors" then the House, with each state having one vote, would select a winner from a list of the top five candidates receiving votes. With political parties forming and George Washington retiring, the 1787 system proved to be problematic as it resulted in undesirable presidential electoral outcomes.[174] As a result, the 1787 mode of

[174] In addition to the perceived deficiencies, in 1796, the system permitted political adversaries to share the executive office as John Adams and Thomas Jefferson were elected president and vice-president. Moreover, in 1800, the system resulted in a contentious election between Thomas Jefferson and Aaron Burr with the two Republican

presidential selection detached the executive from the public thereby failing to provide presidential leadership with, as Hamilton argued, "A sense of the people." Consequently, even if an opposition was capable of forming a majority, the election rules did not necessarily guarantee this new majority could elect a president who reflected their political principles and preferences. Thus, if the First Amendment allowed for an opposition to form a majority then the Twelfth Amendment allowed this new majority to elect a leader who reflected their collective voice.

Current scholarship on the Twelfth Amendment has recognized the relationship between the amendment and political parties and correctly argues that it was as an attempt to correct a flaw in an original constitutional design that did not account for political parties.[175] These accounts, however, incorrectly assume the relationship

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candidates receiving the same number of electoral votes thereby leading to the House selecting Thomas Jefferson as president without knowing if the electors actually intended Jefferson or Burr to be president.

[175] See Richard Hofstadter, *The Idea of a Party System* (Los Angeles: University of California Press, 1969); Bruce Ackerman, *The Failure of the Founding Fathers: Jefferson, Marshall, and the Rise of Presidential Democracy* (Cambridge, MA: Belknap Press of Harvard University Press, 2005); Susan Dunn, *Jefferson's Second Revolution: The Election Crisis of 1800 and the Triumph of Republicanism* (Boston: Houghton Mifflin Company, 2004); Akhil Reed Amar, *America's Constitution: A Biography* (New York: Random House, 2005); Garry Wills, *Negro President: Thomas Jefferson and the Slave Power* (Boston: Houghton Mifflin, 2003); and David P. Currie, *The Constitution in Congress: the Jeffersonians 1801-1829* (Chicago, Chicago University Press, 2001).

between parties and politics was inadvertent or temporary. In other words, the Twelfth Amendment was a temporary means of overcoming the Aaron Burr problem and that, under Jefferson's leadership, political parties, while recognized, would no longer be useful. As a result, important political and constitutional developments are obscured by an overreliance on Jefferson's attempt at consolidation and unanimity. Indeed, Jefferson's oft quoted statement from his 1801 inaugural address, "we are all Republicans, we are all Federalists" is used as evidence of his intent to produce a single-party system, and the Twelfth Amendment was the means of creating a "party to end all parties" by ensuring the Republicans could rally around a unified executive office.[176] In

[176] For example, Susan Dunn, using Jefferson's First Inaugural, argues that he viewed his electoral victory as creating "an invincible coalition" that would "ultimately absorb all Americans" by "equating his Republican majority with the entire nation" thereby defining "for all…the 'common good.'" In Susan Dunn, *Jefferson's Second Revolution: The Election of 1800 and the Triumph of Republicanism* (Houghton Mifflin Harcourt, 2004), pp. 223. See also Richard Hofstadter, *The Idea of a Party System: the Rise of Legitimate Opposition in the United States, 1780-1840* (Berkeley: University of California Press, 1969). After his election, Jefferson becomes the centerpiece of Hofstadter's argument that, despite an opposition party successfully winning the presidential election, the idea of a legitimate opposition did not replace the conviction of a "constitution-against-parties." According to Hofstadter, "Such… was Jefferson's view of the Federalists: a small faction creeping into the heart of the government under the mantle of Washington and the perverse guidance of Hamilton, addicted to false principles in politics, animated by a foreign loyalty, and given to conspiratorial schemes aiming at

this way, most traditional accounts of the Twelfth Amendment understand Jefferson and his politics as a continuation of the "Constitution-against-Party" thesis. Shifting the emphasis from Jefferson, however, reveals a different story and purpose for the Twelfth Amendment. Accordingly, to understand the importance of the amendment to America's political and constitutional development, we must understand what the framers of the

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the consolidation of government and the return of monarchy." And, Jefferson was "sustained" by his optimism that "before long the people through their faithful representatives would take over. And at that point it would be the duty of the Republican party to annihilate the opposition—not by harsh and repressive measures like the Sedition Act, but by the more gentle means of conciliation and absorption that were available to a principled majority party" (127). Leonard Livy pushed this argument to the extreme by emphasizing that President Jefferson's commitment to civil rights, particularly the broad understanding of the First Amendment that protected presses from seditious libel, was not absolute. In other words, Jefferson was not completely opposed to using seditious libel to ensure conciliation and, and Hofstadter phrased it, "annihilation" of an opposition. See Leonard Levy, *Legacy of Suppression: Freedom of Speech and Press in Early American History* (Cambridge, MA: Belknap Press of Harvard University, 1960). On Levy's point, Jefferson's suspect attachment to the First Amendment led him to accept state prosecutions of seditious libel by state officials because the scope of the Bill of Right's had yet to be extended to the states through incorporation. However, Jefferson did not believe, under the First Amendment, the national government had power to punish seditious libel.

amendment understood of their work, especially in regards to the mode of presidential selection.

Framing the Twelfth Amendment in terms of the presidential selection system raises a fundamentally important question: did the amendment's framers intend to institute a new electoral system that allowed for an opposition party and permanent party competition? In, *Presidential Selection* (1979), James W. Ceaser, acknowledges the connection between the amendment and parties as well as the connection between the amendment and the mode of presidential selection. For Ceaser, the framers of the original presidential selection system meant for the presidency to be the result of a non-partisan election process thereby reflecting their view of presidential power being non-partisan. This is to say, the original intent of the Constitution and presidential selection was contingent on the non-partisanship of the public and the president. Otherwise, presidential politics would be susceptible to their biggest fear, demagoguery. Consequently, for Ceaser, the changes in the selection process in 1800 were not the product of a conscious plan to "legislate" a new electoral system. They emerged under the pressure of events, as partisans sought to win power in order to further ideological goals." Put differently, political actors in 1800 did not frame the question of the Twelfth Amendment in terms of institutional design but rather "larger issues involved in the partisan dispute of the day."[177] This leads Ceaser to argue that although the political actors involved with the amendment recognized the emergence of political parties, under Jefferson's leadership, the Republicans' victory would establish a constitutional regime

[177] James W. Ceaser, *Presidential Selection* (Princeton: Princeton University Press 1979), pp. 88.

that would eliminate the need for a national opposition party. Therefore, Ceaser's account concludes with a difficulty prevalent in early party literature: the Twelfth Amendment "seemed to require parties—or a party—to perform the task of concentrating national support behind a candidate"; however, this "powerful new justification for recreating parties" was inadvertent.[178] In other words, political parties and the subsequent consequences of the Twelfth Amendment were unintended or accidental thereby necessarily drawing our attention to the framers' actual intent for the amendment. Consequently, although the Twelfth Amendment required party organization, because the amendment's framers maintained their antagonism towards institutionalizing partisan competition any developments regarding a two-party system or a legitimate opposition were unintentional.

Congressional debates in *The Annals of Congress*, however, convincingly demonstrate that Ceaser and the traditional scholarly approach to parties and the Twelfth Amendment is fundamentally incorrect. To substantiate the traditional view, debates during the amendment process would have to demonstrate the framers of the amendment viewed any changes to the constitutional mode of presidential selection as a means of ensuring a particular electoral outcome in 1804 i.e., Jefferson's victory and the end of partisan competition. This raises an important question: if we accept the claim the framers of the amendment recognized the emergence of parties and maintained their antagonism towards parties then why did they design a constitutional amendment that strengthened their role in the electoral process? In other words, claiming that the strengthening of political parties was an unintended consequence of the amendment

[178] James W. Ceaser, *Presidential Selection*, pp. 105-106.

essentially attributes the framers with a position of neutrality towards parties thereby undermining the claim they were actually antagonistic towards them. Furthermore, if this antagonism thesis is correct then the amendment should work against an opposition and reduce the likelihood an opposition party could gain political access. Returning to the congressional debates, we will see that the framers intended something entirely different than the standard scholarly accounts. While partisanship did animate debate in both the House and the Senate, the amendment was not adopted with the sole intent of securing a Republican electoral victory in 1804. Although the Republicans held majorities to unilaterally pass the resolution, they designed a proposition that recognized and accounted for an opposition's role in the political process. Put differently, the Republicans recognized they would not always be in the majority and adopted rules that would not disadvantage them in future elections. Thus, both Federalists and Republicans recognized the fluidity of party politics and agreed upon a system that would help ensure majoritarian election outcomes without disadvantaging a competitive opposition party.

Early Electoral Strategies and Outcomes: The Need for Change

Alexander Hamilton regarded the mode of presidential selection prescribed in the Constitution as "perfect" or "at least excellent."[179] However, this system quickly revealed glaring flaws. In retrospect, the deficiencies of the presidential electoral process were somewhat overshadowed by George Washington's popularity and the overwhelming consensus that he would be elected as president. Unfortunately, his unanimous selection was not guaranteed, and significant organization had to be employed

[179] *The Federalist* No. 68, pp. 435.

to ensure Washington was not elected vice-president rather than president. According to the constitutional mechanism for executive election, the states were given power to determine the selection of "Electors" equivalent to the sum of their congressional representatives. Each elector would then cast a ballot for his top presidential choices with at least one vote given to an out-of-state candidate. In 1789, while the clear election outcome was for George Washington to be president with John Adams as vice-president, there was no prescribed way to indicate the vote as such. Subsequently, if all electors had voted for Washington and Adams, they would have emerged with identical vote totals thereby indicating no real preference between a President Washington and a President Adams in the minds of the electors.

Recognizing the problem of an electoral tie, Hamilton undermined the selection process by attempting to organize the electoral vote so as to ensure Washington received more votes than Adams thereby indicating a clear electoral preference. To accomplish this, votes needed to be diverted away from Adams and given to other candidates. For example, in a letter to Hamilton, Jeremiah Wadsworth informed him that Connecticut's electoral voters were given "agreeably to your wishes—Washington, 7; Adams, 5; Governor Huntington, 2."[180] This election strategy was ultimately successful as Washington was unanimously elected president by the 69 appointed electors, and Adams was selected as vice-president with 34 votes with many of the remaining 35 votes strategically allocated to other candidates. As a result, Amar argues that these "cumulative results gave Washington an emphatic mandate reflecting his status as head

[180] The Works of Alexander Hamilton: Correspondence. 1769-1789. Wadsworth to Hamilton, February, 1789.

and shoulders above Adams" despite going against the "spirit of the [electoral] system created in Philadelphia."[181] Article II established a system in which presidential selection would be made by a "small number of persons" who were "most likely to possess the information and discernment requisite to so complicated an investigation" without being "tampered with beforehand to prostitute their votes" or influenced by a "sinister bias."[182] Although the election produced the desired outcome, the organization of blocs of electors and efforts to strategically allocate votes undermined the original Electoral College design and revealed the imperfections of the system.

From the initial presidential elections, it was clear the election system and the Electoral College needed to be addressed. Specifically, the 1796 election resulted in the election of John Adams, a Federalist, as president and Thomas Jefferson, a Democratic-Republican, as vice president. Not only was this the first contested presidential election, it would be the only time in history a president and vice president were elected from opposing tickets. As a result, many of the proposed solutions for presidential elections wrestled with the nature and scope of opposition in the constitutional system and the emergence and success of the Republicans. And, congressional debates from *The Annals of Congress* offer differing solutions to remedy the problem of "disputed elections for president." Of particular importance in these debates was the recognition of an opposition within the political arena and how this opposition was influencing election results. As such, these measures offer valuable insight regarding the desirability and

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[181] Akhil Amar, *America's Constitution: A Biography* (New York: Random House LLC, 2006), pp. 337.

[182] *The Federalist* No. 68, pp. 436.

promotion of a political opposition. Some propositions looked to minimize an opposition's influence by creating measures that aimed solely at disadvantaging the minority.[183] Others embraced the concept of opposition and looked to create rules that would help remedy electoral shortcomings while permitting the practice of a political opposition. The Twelfth Amendment became central to incorporating a political opposition into the constitutional system because it acknowledged the existence of a political opposition and resolved electoral uncertainty without disadvantaging a minority.

The Absence of Washington and the Consequences of Preventing an Electoral Tie: 1796

The presidential selection system greatly benefited from George Washington's prominence as he was unanimously elected in the previous two elections thereby masking a significant flaw in the election process, a flaw the election of 1796 would ultimately reveal. The first election without Washington was characterized by electoral division rather than unanimity, and the growing opposition to the Federalists' political agenda

[183] For example, in 1800 Senator James Ross (F-PA) proposed a bill to officially allow congressional regulation of the electoral count. The bill organized a grand committee comprised of six senators and six representatives along with the Chief Justice of the Supreme Court. The committee would have authority to examine "disputed elections of President and Vice President of the United States, and for determining the legality or illegality of the votes given for those officers in the different states." Given the Federalist advantage in both the House and the Senate and a Federalist Chief Justice, the party would maintain a significant advantage in reviewing Electoral College vote and could easily discredit votes for rival Republicans.

gained electoral outcomes as Democratic-Republican candidate Thomas Jefferson was eventually elected vice-president. This outcome was in large part due to the difficulty of finding a suitable presidential successor that most electors would support in the double-ballot system. Specifically, Washington functioned as an electoral heuristic in that voters readily recognized his name thereby simplifying the presidential selection process. An election without Washington's prominence and popularity would be substantially more difficult as there were few capable of captivating the electorate like Washington. James Madison identified this problem of presidential successors when consulting with the Washington as he considered retirement after his first term. Thomas Jefferson, John Adams, and John Jay were identified as the only potentially viable candidates to succeed Washington. According to Madison, however, Jefferson's candidacy was questionable because he had an "extreme repugnance to public life & anxiety to exchange it for his farm & his philosophy." Furthermore, even if Jefferson could be persuaded to take up public life, "local prejudices in the Northern States" could potentially become a "bar to his appointment." Adams' candidacy was to be feared if not highly improbable given his undeniable "monarchical principles" as he would be "disliked" by "republicans every where, & particularly in the Southern States." Finally, Jay's election "would be extremely dissatisfactory" because he entertained "the same obnoxious principles with Mr. Adams" and was susceptible to "propagating them." Likewise, "a pretty numerous class…disliked & distrusted him" as some viewed him "as their most dangerous enemy."[184] Thus, without the prestige of Washington's name carrying a national majority

[184] Memorandum on Washington's Retirement, May 1792 in *Papers of James Madison*, 14: pp. 299-304.

of electors, the probability of the election being thrown to the House was extremely high thereby resulting in the election of a president who was agreeable to only a fraction of the country.

As the election approached, the Federalists suffered most from Washington's absence as a geographic division also divided their ballot. Given his status as Washington's vice-president, a Federalist congressional caucus chose to support John Adams as president. Because Adams was a Northerner, the caucus also supported Southerner Thomas Pinckney so as to produce a balanced ticket. This balanced ticket, however, would pose serious problems for the Federalists. While most considered Adams to their first choice as president, many Northern Federalists did not necessarily view Pinckney as the appropriate second choice. Northern candidates such as Samuel Adams or Oliver Ellsworth would be preferred over Pinckney. Moreover, there was no guarantee that all Southern Federalist would support Adams at the top of the ticket rather than Pinckney. This division between Northern and Southern Federalists could have potentially led to various intra-party intrigues and an inverted Federalist ticket. For example, as done in previous elections, to ensure Adams clearly won the election, some votes would have to be diverted away from Pinckney. However, the Southern Federalists, to compensate for these diverted votes and to ensure a Pinckney victory, could divert votes from Adams. Therefore, without a clear presidential choice like Washington, various undesirable electoral outcomes could be imagined.

These intra-party problems were only exacerbated by the potential problems from inter-party conflict as well. Specifically, the Democratic-Republicans could also vote in ways that would upset the Federalists' ticket. Like the Federalists, the Democratic-

Republicans supported a balanced ticket with Southerner Thomas Jefferson leading the nomination and Northerner Aaron Burr as a distant second. If, however, the Republicans predicted an electoral defeat, they could cast their votes for Pinckney thereby inverting the Federalists' ticket. To counter this tactic, the Federalists would then have to further divert votes away from Pinckney to ensure Adams' election as president. If the Federalists employed this counter-strategy, however, they risked diverting too many votes away from Pinckney thereby creating space for the Democratic-Republicans to move their preferred candidate ahead of him. As a result, given the presidential selection system created by the Constitution, the Federalists hope of an Adams/Pinckney victory was replaced by the reality of an electoral defeat, an inverted ticket, or a divided executive administration.

At the conclusion of the 1796 election, the Federalists tasted electoral defeat despite retaining their hold on the presidency. Without Washington's reputation to bridge the geographic division within the Federalists, the diverted votes from the Northern Federalists ultimately provided Thomas Jefferson with the opportunity to secure the vice-presidency. Moreover, the Federalists' narrow electoral victory could have been easily been a defeat had it not been for the lone votes Adams received in North Carolina and Virginia. Far from enjoying Washington's electoral support, Adams' presidency would be a struggle between the waning Federalist support and mounting Democratic-Republican opposition. Recognizing this difficulty, even Jefferson expressed his preference for the vice-presidency as he remarked that "this is certainly not a moment to

covet the helm."[185] Moreover, bolstered by his electoral victory, Jefferson was confident in the eventual acceptance of the Democratic-Republicans' principles and his ability to persuade Adams to execute the government according to "it's true principles."[186] Put differently, Jefferson believed he and Adams could coexist and cooperate, assuming he could influence Adams. Hamilton, however, believed differently and did not express confidence in much cooperation between the political rivals:

> Our Jacobins say they are well pleased and that the *Lion* & the *Lamb* are to lie down together. Mr. Adams *personal* friends talk a little in the same way. Mr. *Jefferson* is not half so ill a man as we have been accustomed to think him. There is to be a united and vigorous administration. Sceptics like me quietly look forward to the event—willing to hope but not prepared to believe.[187]

Perceiving the impossibility of cooperation, Hamilton's comment reveals the disjunction between the executive office and the mode of presidential selection within the 1787 constitutional design. The current mode of presidential selection undermined what Hamilton viewed as the first ingredient for executive energy, unity.

1796 and the Crisis of Executive Unity and Good Government

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[185] Jefferson to Edward Rutledge, December 26, 1796 in Boyd, Julian P., Charles T. Cullen, John Catanzariti, Barbara B. Oberg, et al, eds. *The Papers of Thomas Jefferson*, (Princeton: Princeton University Press, 1950) 33 vols.

[186] *Ibid*.

[187] Alexander Hamilton to Rufus King, February 15, 1797, *The Life and Correspondence of Rufus King: Comprising his Letters, Private and Official, His Public Documents, and His Speeches*. Vol. 5. (GP Putnam's sons, 1898).

In *The Federalist* No. 70, Hamilton responded to the accusation that a "vigorous executive" was contrary to "genius republican government." Hamilton addresses this accusation by comparing an energetic executive with a feeble one. According to Hamilton, "Energy in the Executive is a leading character in the definition of good government."[188] Good government, for Hamilton, would require a vigorous executive during times of emergency and regular political life to provide protection from external dangers and internal threats. To illustrate this point, Hamilton makes reference to the Roman republic and how it was "obliged to take refuge in the absolute power of a single man, under the formidable title of Dictator" for Rome's safety from "the invasions of external enemies who menaced the conquest and destruction of Rome" and "the intrigues of ambitious individuals who aspired to the tyranny, and the seditions of whole classes of the community whose conduct threated the existence of all government."[189] Contrary to a vigorous executive, "a feeble Executive implies a feeble execution of the government." In other words, a feeble executive cannot protect from external forces and internal intrigues and fails to fulfill its function and execute good government. And, "a government ill executed, whatever it may be in theory, must be, in practice, a bad government." By contrasting a strong and weak executive, Hamilton intended to convince those supporting republican government to also accept the necessity of a vigorous executive despite any potential theoretical apprehensions to the contrary.

While the argument for a vigorous executive was easily accepted by "all men of sense", the necessary ingredients conducive to the necessary energy needed to be

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[188] *The Federalist* No. 70, pp. 447-448.

[189] *Ibid.*, pp. 448.

explained. According to Hamilton, a vigorous executive requires "unity, duration, an adequate provision for its support, and competent powers." Of the ingredients, Hamilton identifies unity as the first and then rejects the notion of a plural executive. Indeed, "decision, activity, secrecy, and dispatch will generally characterize the proceedings of one man…and in proportion as the number is increased, these qualities will be diminished." Moreover, unity is destroyed by vesting executive power in "two or more magistrates of equal dignity and authority" or by vesting it in "one man, subject, in whole or in part, to the control and cooperation of others, in capacity of counselors to him."[190] Simply put, the executive would be severely weakened if his every decision and action were undermined by a co-president or executive council disclosing confidential information or assisting an opposition in response to a controversial policy. As president, Adams would be surrounded by the George Washington appointees Adams chose to retain and the leader of the mounting political opposition. As a result, Adams could hardly expect executive unity from the Federalists in the administration whose allegiance was questionable or from his Republican political rival. Given Hamilton's prescription for a vigorous executive, Adams' presidency seemed destined for executive feebleness and, consequently, bad government.

The Consequences of an Electoral Tie: 1800

In an effort to avoid the problem of a divided executive, the Democratic-Republicans created a new issue: an electoral tie. As the 1800 presidential election neared, Democratic-Republicans made substantial efforts to avoid the Federalists 1796

[190] *The Federalist* No. 70, pp. 449.

electoral strategy that secured John Adams' presidential election at the expense of Pinckney's vice-presidential selection. Therefore, Democratic-Republicans were hesitant to expect or encourage electors to ensure Jefferson's presidential selection by diverting votes away from Burr. Therefore, if the Democratic-Republicans were unable to successfully coordinate electoral votes, they faced the same undesirable electoral outcomes the Federalists faced in 1796. Moreover, if "the electors voted 'fairly,' a term which contemporaries began to use in 1800 to mean 'faithfully' and in accordance with the expectations of those who had appointed them" then the Republicans would have to consider the very real possibility of the election ending in a tie.[191]

On 11 February 1801, American politics encountered novelty in consecutive presidential elections as the counted Electoral College votes revealed the presidential election had ended in a tie. The official results revealed the Democratic-Republicans had uniformly supported their candidates as Thomas Jefferson and Aaron Burr both received 73 votes. The Federalists, in a losing effort, demonstrated their mastery of the 1787 presidential selection system as John Adams received one more vote (65) than his running mate Charles Pinckney (64). Ironically, had the Federalists succeed with this strategy in 1796, Jefferson would have not been elected vice-president. The electoral tie, however, was not unforeseen by the framers of the 1787 Constitution as provisions were provided for such an event. According to the Constitution, the House of Representatives, because it was intended to be a closer reflection of the people, was empowered to break the tie with each state receiving one vote. Unfortunately, the procedure for a House

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[191] Tadahisa Kuroda, *The Origins of the Twelfth Amendment: The Electoral College in the Early Republic, 1787-1804* (Westport: Greenwood Press, 1994), pp. 99.

contingency did not provide the means of determining elector intent. In other words, because the system did not require electors to designate their vote for president and vice president, each vote for Jefferson and Burr was viewed as votes for president. Therefore, even if the Democratic-Republicans had intended Jefferson to be president, the Constitution did not recognize this designation, and, because Jefferson and Burr received the same number of presidential votes, the actual choice of president would be given to the House. Thus, the Democratic-Republicans' electoral strategy could still be frustrated if the House chose Burr over Jefferson.

The inverted ticket, however, was not the only concern for Republicans as the 1787 constitutional procedures further complicated the issue because (1) the "lame duck" House elected in 1798 would be voting, (2) each state had one vote, and (3) the House would make their choice from the candidates with the five highest vote totals. In the Fifth Congress, although the Federalists held a numerical majority, neither party could guarantee and command a majority of the separate states, and, because each state had one vote, a president could not be chosen without substantial agreement within state delegation and among individual states.[192] As a result, each party could prevent the election of an undesirable candidate yet they could not ensure the selection of their

[192] Tadahisa Kuroda (1994) pointed to the difficulty of delegations voting together, especially split delegations: "Whether Republican congressional delegates would vote consistently with their electors remained uncertain, for states generally chose representatives and electors in very different ways and for different purposes. How Federalist delegations, whose state electors had voted for Adams and Pinckney, would act became the central question" (100).

desired candidate. Furthermore, the Federalists theoretically maintained an advantage over the Republicans given the constitutional provision allowing the House to choose from five candidates. Because the Federalists had given one vote to John Jay, they would have three candidates on the ballot as the House would choose between Jefferson, Burr, Adams, Pinckney, and Jay. Consequently, while improbable but still constitutional, the House could elect as president the candidate who only received a solitary vote. Like the Federalists in 1796, the Democratic-Republicans faced the prospect of their electoral strategies and preferences being frustrated. Unlike the Federalists, however, the Democratic-Republicans were able to secure their desired outcome as the House, under extreme difficulty, elected Jefferson rather than Burr.

Given these unusual circumstances, the 1796 and 1800 election results would eventually lead to significant constitutional and political developments. Specifically, given the mounting political discord between the Federalists and the Democratic-Republicans, out of both principle and necessity, new election laws needed to be devised. Other constitutional rules, such as the previously discussed First Amendment developments, had solidified the existence and status of a political opposition and the presidential selection system had to accommodate these changes. As a result, an important question can be asked, would the changes in election law support or undermine the opposition's political role and access?

The Twelfth Amendment

As Congress convened in October 1803, two important issues would be on the agenda, the acquisition of Louisiana and amending the presidential selection system. For

the Republicans, fixing the Electoral College would be important so as to avoid the election crisis of 1801 in which the Federalists attempted to manipulate the vote to elect Burr as president. Moreover, the undesirable possibility of a Democratic-Republican president and a Federalist vice-president still remained. In previous elections with George Washington's uncontested victories, electors assumed their first vote for Washington was a vote for the president and their second vote was a vote for vice president. As the election of 1800 proved, the 1787 mode of presidential selection did not recognize votes for vice president. Therefore, to fix the Electoral College, the Constitution would need to be amended to include a mechanism by which electors could distinguish their votes for president and vice president.

Amending the Constitution to include candidate designation was the Democratic-Republicans' first step in correcting the presidential selection system. On 17 October, John Dawson (R-VA) introduced an amendment, "that in future elections of President and Vice President, the persons shall be particularly designated, by declaring which is voted for as President, and which as Vice President."[193] The selection system's lack of designation had substantive ramifications for Jefferson's previous election because he did not receive the majority of total Electoral College votes, receiving only 73 of 276 votes, and Congress had no way of determining elector intent in breaking the tie between Jefferson and Burr. According to James Hillhouse (F-CT), Jefferson's eventual election was fraught with ambiguity because, "You are told that, at the last election, one was

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[193] Library of Congress, *A Century of Lawmaking for a New Nation: U.S. Congressional Document and Debates, 1774-1875,* Annals of Congress, Senate, 8th Congress, 1st Session, pp. 19-20. From here on *Annals*, 8th Congress, Senate.

intended by the people for President, and the other for Vice President; but the Constitution knows no vote for Vice President."[194] If Hamilton was correct that presidential selection was meant to be an indication of the "sense of the people" so as to "afford as little opportunity as possible to tumult and disorder" then the election of 1800 demonstrated that a sense of the people could not be ascertained without designating votes between the president and vice president.[195] Even though the Democratic-Republicans intended to elect Jefferson as president, there was no constitutional mechanism by which they could express this preference, and, by receiving the same number of votes as Jefferson, Burr had just as much constitutional claim to the oval office as his running mate.

Distinguishing between a vote for president and one for vice-president, however, was not the only debated topic during congressional proceedings. A central point of contention would be: if the election was thrown to the House, what is the appropriate the number of candidates from which the House would choose? This matter, however, was further complicated by the difference in voting procedures from the general election to an election by the House. According to the 1787 Constitution, an election would be decided by the House if a single candidate failed to receive a majority of the whole number of electors. Moreover, according to Article II, "in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote." In other words, presidential selection was shifted from an election by state population to an election by state equality. In the eventual House election, as Jeremy D. Bailey pointed out, "the

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[194] *Annals*, 8th Congress, Senate, pp. 129.

[195] *The Federalist* No. 68, pp. 518.

people would nominate candidates and the states would choose from among them."[196] This electoral procedure harkened back to compromises made during the constitutional conventional as delegates confronted the tension between large states and small states. As a result, the 1787 mode of presidential selection was one of these compromises as the large states' advantage in the Electoral College was balanced against the small states' advantage in the House voting as each state was granted only one vote. To further structure the House election process, Article II states, "from the five highest on the List the said House shall in live Manner chuse the President." This structuring, however, would further add to the small states' advantage in presidential election. For example, in 1800, Thomas Jefferson (73 votes), Aaron Burr (73 votes), John Adams (65 votes), Charles Pinckney (64 votes), and John Jay (1 vote) were on the House's ballot. As the House considered the candidates, there was a possibility that neither Jefferson nor Burr would be selected as president. In the election, The Federalists' candidates carried six states: Vermont, New Hampshire, Massachusetts, Connecticut, New Jersey, and Delaware. Moreover, Maryland, North Carolina, and Pennsylvania electors distributed their votes among both parties.[197] Because each state had only one vote and a candidate only needed a majority of state votes for election, the Federalists could potentially elect

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[196] Jeremy D. Bailey, *Thomas Jefferson and Executive Power* (New York: Cambridge University Press, 2007), pp. 197.

[197] Maryland distributed their votes equally between parties with Jefferson, Burr, Adams, and Pinckney each receiving 5 votes. In North Carolina, Jefferson and Burr each received 8 votes while Adams and Pinckney received only 4; in Pennsylvania, Jefferson and Burr each received 8 votes with Adams and Pinckney received 7.

Adams, Pinckney, or Jay if the three states dividing their votes joined with the six states supporting Federalist candidates. As a result, the 1787 constitutional provisions for presidential selection could result in the state election of a minority candidate. This is to say, the number of candidates on the House ballot would need to be reduced so as to minimize the possibility of a presidential selection by a minority of states representing only a fraction of the voting population.[198]

Importantly, the solution to the mode of presidential selection would have significant ramifications for a legitimate opposition. Most scholars have understood the Twelfth Amendment in terms of solving the 1800 Aaron Burr problem by strictly grounding their understanding of the amendment in partisan terms.[199] Others have tried to elucidate the political significance of the amendment by focusing on the framers'

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[198] See, specifically, Jeremy D. Bailey (2007) in which he argues that the original constitutional mode of presidential selection undermined a president's ability to be an expression of the public will and unify public sentiment.

[199] See, for example, James W. Ceaser, *Presidential Selection* (Princeton: Princeton University Press, 1979); Bruce Ackerman, *The Failure of the Founding Fathers: Jefferson, Marshall, and the Rise of Presidential Democracy* (Cambridge, MA: Belknap Press of Harvard University Press, 2005); Akhil Reed Amar, *America's Constitution: A Biography* (New York: Random House, 2005); Garry Wills, *Negro President: Thomas Jefferson and the Slave Power* (Boston: Houghton Mifflin, 2003); and David P. Currie, *The Constitution in Congress: the Jeffersonians 1801-1829* (Chicago, Chicago University Press, 2001).

intent in constructing it.[200] Regarding the latter approach, designation and the number of candidates on the House ballot would determine the extent to which an opposition could unify and effectively win a presidential election. Designation would allow for an opposition to ensure a unified electoral ticket and secure a vigorous executive capable of pursuing alternative policy and principles. Reducing the number of candidates would also guarantee the newly elected executive would reflect the will of the public thereby providing the new opposition leader with a powerful mandate to pursue an alternative political platform. Moreover, reducing the number of candidate would reduce the risk of the new minority party electing a candidate from their displaced party. Notably, the genius of the Twelfth Amendment is that it solves the presidential selection problem without disadvantaging an opposition's political efforts. Put differently, the Amendment provides a party with all the advantages of effectively winning office without disadvantaging the other party. Thus, in a time when most scholars believed political parties should have disappeared, the framers of the Twelfth Amendment intentionally and constitutionally grounded party politics and allowed an opposition continued political access.

[200] See Jeremy D Bailey, *Thomas Jefferson and Executive Power*; Tadahisa Kuroda, *The Origins of the Twelfth Amendment*.

The House's Amendment

On 19 October, John Dawson (DR-VA) introduced the need to amend the Constitution to include the designation principle.[201] There real substantive debate, however, began once the designation principle was understood in relation to the remaining constitutional text establishing the procedure for a contingency election in the House. The number of names available to the House from which they were to choose a president would structure much of the debate on the amendment. Soon after Dawson proposed designation, Joseph H. Nicholson (DR-MD) moved to amend Dawson's proposition to maintain the 1787 constitutional provision setting five as designated number of candidates from which the House would choose a president. In response, John Clopton (DR-VA), representing one of the larger states, urged the number five be changed to two so as to be "more conformable to the principles of a representative Government."[202] Accordingly, representative government could not be guaranteed with the current proposition because it allowed for the House to make a presidential selection contrary to the results of the Electoral College. Clopton proceeded to provide an important definition of what is meant by representative government in the context of

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[201] Dawson's original proposition reads: "That in all future elections of President and Vice President, the person voted for shall be particularly designated, by declaring which is voted for as President, and which as Vice President." Library of Congress, *A Century of Lawmaking for a New Nation: U.S. Congressional Documents and Debates, 1774-1875,* Annals of Congress, House of Representatives, 8th Congress, 1st Session, pp. 373. From here on *Annals*, 8th Congress.

[202] *Annals*, 8th Congress, pp. 376.

presidential selection: the "ultimate election of President and Vice President" is to provide a sense of "the will of the people", and the "electoral votes are to be considered as their expression of the public will." Therefore, any alterations to the contingency election process had to ensure a selection was made that closely reflected the "will of the people."[203] As a result, Clopton affirmed the executive office would be representative of the general population and not the several states. Although states would still have one vote in the contingency election, reducing the number of candidates in the House election from five to two would eliminate small states from choosing a candidate contrary to the will of people thereby reducing, ultimately, the power of small states in the contingency election.

There was, however, another political element to this debate besides the amount of power given to the states in a contingency House election. In addition to their state allegiances, representatives also had partisan attachments, and these partisan commitments would also influence the debate and subsequent propositions. Specifically, designation and the number of candidates in the House contingency election would determine if an opposition party would be disadvantaged in the selection process. The same concern regarding small states electing an unrepresentative president applied to candidates from an opposition party. A supplanted party would want to maintain as much influence in this process as possible so as to have the potential of frustrating the new majority party's electoral victory. In this regard, Federalists had every incentive to keep the number of candidates in the House election high so as to increase the probability a Federalist candidate(s) would make the list from which the House would choose. On

[203] *Annals*, 8th Congress, pp. 377.

the other hand, the Democratic-Republicans, sure of their candidates receiving the most votes, would want to reduce this number so as to ensure the House decision more accurately reflected the results of the Electoral College.[204]

On 28 October, the House voted 88-39 to approve the resolution and pass it to the Senate. However, before the vote was taken, Gaylord Griswold (F-NY) and Benjamin Huger (F-SC) made closing arguments as to why the House should vote against the resolution. Griswold, despite representing a large state, attempted to mask his Federalist intentions behind a constitutional provision as he argued the original text was a compromise between the large states and the small states, and any provision that undermined this compromise deviated too far from the ratified text. Similarly, Huger argued designation would reduce state influence and the probability of a contingency election in the House. Moreover, he reminded the House that the Constitution was a union of states and not of the people and, by having elections decided in the House by the separate states, the mode of presidential selection would reflect the will of those for who the union was created. While Griswold and Huger opposed the motion on constitutional grounds, party conflict was at the center of their objections, and theirs was a highly

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[204] Jeremy D. Bailey (2007) explained why the approved House amendment maintained the number of candidates in the contingency election at five: "Either loyalty to House prerogatives or fidelity to their own small states was enough to keep some Republicans from conferring a brighter majority halo on future presidents" (205). The Senate did not retain the number five and the House would later approve the change to the current language of no more than three.

partisan attempt to hinder the progress of what they believed to be an unacceptable Democratic-Republican resolution.

In addition to the constitutional arguments, the Federalists also attempted to hinder the passing of the amendment by drawing specific attention to the partisan nature of the resolution. Specifically, Seth Hastings (F-MA) believed "the present resolution…[grew] out of an overweening anxiety to secure, at all hazards, the re-election of the present Chief Magistrate" and no changes to the election process should be made while it could benefit the incumbent president. Moreover, Hastings coupled this accusation with another regarding the three-fifths clause. Hastings reasoned that as long as the Democratic-Republicans were trying to make constitutional revisions to a flawed electoral process, attention should be given to the issue of how the three-fifths clause substantially impacted the number and distribution of presidential electors.[205] According to Hastings, the more pressing constitutional amendment should be one that creates "an equal representation of free citizens, and free citizens only," because, "one part of the Union has obtained a great, and in my opinion, unjust advantage over other parts of the Union," as "the Southern States have gained a very considerable in crease of representatives and Electors, founded solely upon their numerous black population."[206] Supporting Hastings, Samuel Thatcher (F-MA) calculated that the three-fifths clause would cause a "peculiar inequality" by adding "eighteen Electors of President and Vice

[205] *Annals*, 8th Congress, pp. 535-543.

[206] *Ibid.*, pp. 536.

President at the next election."[207] Despite these final efforts, the Federalists were unable to dissuade or delay the Democratic-Republican majority.

The Senate's Amendment

Before the House had passed their version of the resolution, the Senate had already begun discussing a designation resolution. DeWitt Clinton (DR-NY) had crafted his own version of an amendment outlining designation and hoped, given the Republican majority, proceedings would be swift. Clinton's proposition, however, was carelessly composed as fellow Democratic-Republicans drew attention to problems with language in the resolution.[208] Moreover, Clinton's proposal had a significant omission in the section pertaining to the procedures for a contingency election in the House: "if no person have a majority, then from the ___ highest on the list, the said House hall, in like manner, choose the president."[209] If the House debates were any indication, determining the

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[207] Annals, 8th Congress, pp. 536-538. Modern scholars have drawn attention to the importance of the three-fifths clause in Jefferson's victory over Adams. See Akhil Reed Amar, *America's Constitution: A Biography* (New York: Random House, 2005); Garry Wills, *Negro President: Thomas Jefferson and the Slave Power* (Boston: Houghton Mifflin, 2003).

[208] For example, Stephen R. Bradley (DR-VT) noticed the section reading "if there be more than one who have such majority, and have an equal number of votes" was impossible with designation. Clinton even seconded Bradley's motioned to have this language removed from the resolution. (*Annals*, 8th Congress, Senate, pp. 19-20)

[209] *Annals*, 8th Congress, Senate, pp. 17.

number of candidates in the contingency election would be no small ordeal. Therefore, any hopes of an expedited process would be hindered by much needed alterations to poorly constructed propositions and agreements on additions for omitted details.

In addition to these issues, the Federalists would voice substantial opposition to the resolution. On 22 October, as the Senate began reviewing Clinton's proposition, Jonathan Dayton (F-NJ) successfully moved that the proceeding be shifted to a select committee. Two days after the committee was formed, Dayton seized control over debates on the resolution by drawing attention to the implications of the proposition, specifically for the vice president. Dayton reasoned that designation reduced, if not completely eliminated, the purpose of the office of vice president because the vice president would no longer be the individual with the second most votes. The 1787 Constitution ennobled the vice president with the prestige of being the nations' second choice for president; designation debased the vice president by emphasizing the election of one candidate for president and stripping the vice presidency of its Constitutional dignity. Therefore, the Constitution should be amending so as to eliminate the Vice President thereby eliminating any need for designation. While Uriah Tracy (F-CT) seconded Dayton's motion to remove reference to the Vice President, DeWitt Clinton (DR-NY) accused Dayton of "put[ting] off or get[ting] rid of the main question" so as to delay the Senates proceedings and "stave off the question till the Legislatures of the States of Tennessee and Vermont are out of session."[210] In an effort to expedite the amendment process, Clinton wanted to send the resolution to the states for voting while state legislatures, like Tennessee and Vermont, were in session. Dayton's devised delay,

[210] *Annals*, 8th Congress, Senate, pp. 19.

however, would carry more weight than Clinton's expediency as even some Republicans now believed they "had not had sufficient time to make up [their] mind" on such an important amendment. Moreover, Wilson Nicholas (R-VA) reminded Clinton that "two-thirds or three-quarters of the State Legislatures would be in session in two or three months", and "it was impossible to act upon, or pass the amendment…with a full view of all its bearings at this time."[211] Dayton succeeded in delaying debate as the Senate narrowly (16:15) voted to postpone proceedings. His postponement tactics, however, would be more successful than originally anticipated and the Democratic-Republicans would have to wait substantially longer to resume discussion of the resolution.

The Senate would briefly return to the designation resolution before ultimately postponing discussion yet again due to an unexpected announcement from Clinton. The previous days exchange between Dayton and Clinton proved to be highly contentious with accusations of "rudeness and indecency of language" culminating in Dayton challenging Clinton to a duel.[212] As a result, before discussion on the resolution could resume, the Senate was informed that "Mr. Clinton was obliged to go home" and was "now gone," and voting on the proposition would be "postponed accordingly."[213] This postponement, however, lasted for nearly a month due to other circumstances including debate on the Louisiana Purchase, structural problems with the ceiling in the Senate

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[211] *Annals*, 8th Congress, pp. 21-22.

[212] *Ibid*., pp. 25. See also Tadahisa Kuroda, *The Origins of the Twelfth Amendment*, pp. 135.

[213] *Annals*, 8th Congress, Senate, pp. 26. On 4 November, Clinton formally resigned from the Senate to assume his new position as Mayor of New York City.

chambers, and numerous members of Congress attending the race track.[214] The Senate would not return to the amendment until 23 November.

As the Senate resumed discussion on 23 November, arguments were clearly based on partisanship as Democratic-Republicans and Federalists offered differing political principles animating their respective positions. John Taylor (DR-VA) provided one of the most straightforward articulations of the Democratic-Republican's preference of ensuring presidential selection reflected public will. According to Taylor, preserving America's constitutionalism required facilitating majority rule, even if the new majority was an opposition party. Otherwise "the minority may be through corruption made to govern." Therefore, regarding the question of candidate numbers in the contingency election, reducing the number to three was more conducive to uniting public will with presidential selection.[215] All Democratic-Republicans, however, were not of the same mind on this point as Pierce Butler (R-SC) opposed reducing the number in favor of the original constitutional design of five. Butler's opposition, however, mirrored the Federalists continued reliance on the debate between large and small states as he feared allowing "four of the large States the perpetual choice of President." Moreover, Butler reasoned, "When we were as Republicans out of power, did we not reprobate [the Federalists for being motivated by partisanship in their attempt to secure electoral victories]"?[216] The Democratic-Republicans, however, had the public on their side as

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[214] Tadahisa Kuroda, *The Origins of the Twelfth Amendment*, pp. 135; Jeremy D. Bailey, *Thomas Jefferson and Executive Power*, pp. 207.

[215] *Annals*, 8th Congress, Senate, pp. 98-100.

[216] *Ibid*., pp. 87-88.

their attempt to secure electoral victories reflected popular will, and their commitment was to the majority rule despite the accusations of the larger states overwhelming the small ones.

The arguments for protection of the small states from the large states were analogous to the concern for the Federalist Party in relation to the now majority Democratic-Republican Party. At the heart of the Federalists' insistence on maintaining the appropriate relationship between states was an anxiety over the seemingly new form of party politics and if the larger party would now consume the smaller. Put differently, if the Twelfth Amendment disrupted the balance of power between large states and small states, would it also aim to eliminate the existence of a political opposition? Addressing this concern, William Cocke (DR-TN), recognizing a change in perceptions towards an opposition, assured the Federalists the new rules would not disadvantage them in their political access amid the development of a new form of opposition politics:

> Gentlemen would not a few years ago listen to any advice or even complaints of a minority; they think now, as they said then, that there was no talents or virtue in the country but that they possess and they now tell us that minorities should govern. While [Federalists] stood in that House [they] would never submit to be governed by a minority, especially a minority which, when a part of the majority, declared the then minority deserved a dungeon. We shall not treat them in that way; they shall experience no persecution we will even endeavor to make their situation comfortable for them; but they must not expect our aid to set aside majorities, or to depart from the principles of the Constitution."[217]

[217] *Annals*, 8th Congress, pp. 98.

Far from persecuting the new minority, the Republicans would adopt a more tolerant position regarding an opposition recognizing that nothing in the proposed changed to the electoral system would eliminate their participation in the process.[218]

Cocke's sentiments represent an articulation of a new politics that would accommodate an opposition party, and they should not be construed as mere pandering to Federalist for support of the Republican's resolution. The Republicans were not the only ones supporting a system of opposition politics as James Hillhouse, a Federalist, articulated an understanding of the fluidity of party politics and the consequences of this new system:

> But no party can long hold an ascendancy in power; they will ill treat each other—or some of them will disagree, and from the fragments new parties will arise, who will gain power and forget themselves, and again disagree, to make way for new parties. The Constitution was predicated upon the existence of parties; they will always exist, and names will not be wanting to rally under, and difference of interests will not be wanting for pretexts.[219]

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[218] See James W. Ceaser, *Presidential Selection*, pp. 95-96. Here Ceaser recognizes the legal standing of political parties: "In the future, elected officials might attempt to discourage parties by policy or through expressions of disapproval, but they could not suppress them by legal means" (96). However, at this point in the argument, Ceaser chooses to underemphasize this point in favor of the unintentional thesis: "If parties began to disintegrate, the Twelfth Amendment had thus inadvertently provided a powerful new justification for recreating them" (106). I content that the "justification for recreating them" was not as inadvertent as Ceaser's account assumes.

[219] *Annals*, 8th Congress, Senate, pp. 130.

In retrospect, Hillhouse's comments were even more perceptive than he realized as his statement succinctly summarizes much of the modern scholarship on the political development of party politics.[220] Opposition had an electoral role in American politics, and, far from creating constitutional provisions that worked against political opposition, framers of the Twelfth Amendment understood their work as facilitating majority rule without disadvantaging the minority as the both parties understood they would not always be in the majority.

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[220] See Valdimer Orlando Key, "A Theory of Critical Elections," *The Journal of Politics* 17, no. 01 (1955): 3-18; Philip E. Converse, Angus Campbell, Warren E. Miller, and Donald E. Stokes, "Stability and Change in 1960: A Reinstating Election," *The American Political Science Review* (1961): 269-280; Walter Dean Burnham, *Critical Elections and the Mainsprings of American Politics* (Norton, 1970); James L. Sundquist, *Dynamics of the Party System: Alignment and Realignment of Political Parties in the United States* (Brookings Institution Press, 1983); Edward G. Carmines and James A. Stimson, *Issue Evolution: Race and the Transformation of American Politics* (Princeton University Press, 1989); Steven Skowronek, *The Politics Presidents Make: Leadership from John Adams to Bill Clinton* (Harvard University Press, 1993); and Alan I. Abramowitz and Kyle L. Saunders, "Ideological Realignment in the US Electorate," *The Journal of Politics* 60, No. 03 (1998): 634-652). This literature tends to understand political development as different political eras bounded by critical realignments or punctuated changes in which one party is favored over another with change coming through the creation of a new ruling majority.

The Twelfth Amendment, Opposition, and Leadership

While not typically studied, the importance of the Twelfth Amendment in American political development cannot be understated. At a time when many believed the need for national political parties had passed, the Twelfth Amendment solidified their place in American politics. George Washington's retirement from politics demonstrated the deficiencies in the original constitutional mechanism for presidential selection. The two subsequent elections were fraught with difficulty and dilemma as the presidential elections of 1796 and 1800 produced less than desirable and assured electoral outcomes. Significantly, the Twelfth Amendment, contrary to standard accounts, intentionally altered the presidential selection system by allowing electors to submit a completely separate ballot for vice-president. This change had important ramifications for the development of the party system as well as a legitimate opposition

In addition, The Twelfth Amendment significantly impacted presidential leadership by ensuring the "sense of the people" is expressed through electoral outcomes. Recent accounts have understood the amendment and designation principle as evidence for the theory of presidential mandates.[221] Building on this development, the amendment

[221] See specifically Jeremy D. Bailey, *Thomas Jefferson and Executive Power* in which Bailey uses the amendment as evidence against Robert Dahl's "The Myth of the Presidential Mandate" contention that the presidential mandate was a myth because there were no empirical tools or measurements by which early presidents were able to know if voters had selected them based on specific policies. Moreover, Dahl argues that the presidential mandate is "pseudo-democratic" or even imperialistic in that the belief to

can also be understood as creating and legitimizing opposition leadership.[222] The amendment essentially requires presidents to represent the majority of popular sentiment by ensuring elections are decided by the electorate and not the House. Moreover, reducing the number of candidates in a contingency from five to no more than three was an attempt to ensure that, if the House was called upon to decide an election, their choice would reflect popular will by eliminating the possibility of selecting a minority candidate. This detail is important for electorally legitimizing an opposition for two reasons: first, there was an increased likelihood of a congressional presidential election without designation, and this situation could include a minority of states mischievously selecting a president contrary to popular will. Second, retaining the number of five candidates in the contingency election would have increased the probability the elected president only represented a fraction of the population. Neither situation would allow for an opposition leader to claim a new policy direction was supported by popular sentiment. Subsequently, the change to the presidential selection system left little room to doubt the

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represent the people undermines other representative bodies, such as Congress, thereby undermining the Constitution's original executive design.

[222] See Stephen Skowronek, *The Politics Presidents Make* for his typology of presidential leadership and leadership categories, and two of his four categories (the politics of disjunction and the politics of preemption) are predicated on the existence of an opposition. Moreover, his concept of "political time" could not exist without the prospect of an opposition party winning political office. His account, however, does not satisfactorily detail how opposition gained legitimacy in "secular time", especially considering the standard view of opposition in the early republic.

legitimacy of a presidential selection, even if the president was attached to and represented an opposition party.

Conclusion

According to current scholarship, after Thomas Jefferson's presidential election, parties were supposed to wither away and no longer be useful for politics. The Twelfth Amendment, however, constitutionalized party politics by creating a party unified executive office. Understanding that the current method of presidential selection would weaken the party cohesion, the Democratic-Republicans proposed the Twelfth Amendment to ensure a party, supported by the popular will, would win both the presidency and the vice-presidency. The framers of the amendment recognized they were changing the electoral system to accommodate parties in competitive elections for popular support. In other words, because they recognized they would not always be in the majority, the Democratic-Republicans accepted the durability of this new form of party politics by acknowledging the continual existence of a political opposition competing in competitive elections. This is to say that, the Twelfth Amendment was a crucial step in developing a legitimate opposition because it ensured that a party—either an opposition party or a party-in-government—could claim a unified executive and legitimize their electoral victory because it was vindicated by popular will.

Regarding the constitutional incorporation of an opposition, the development and adoption of the Twelfth Amendment is necessary in explaining the manner in which political parties gained constitutional status through the system of presidential selection; it is not, however, sufficient. The purpose of unifying a presidential ballot is incomplete

without understanding the development of Electoral College vote distribution. Indeed, Seth Hastings' connection between the proposition that would become the Twelfth Amendment and the three-fifths clause was more important than the Democratic-Republicans recognized. The benefits of the Twelfth Amendment could only be achieved if the electoral rules regarding the method of choosing presidential electors and Electoral College vote allocation also reflected the public's general sentiment. In this regard, the Twelfth Amendment was not complete without the selection of electors by districts and a winner-take-all system of Electoral College vote distribution.

Chapter 4: Reassessing Party Development: Finding Reoccurring Patterns of Legitimate Opposition amid Emergent Structures of Party Politics

The regulation of these various and interfering interests forms the principle task of modern legislation, and involves the spirit of party and faction in the necessary and ordinary operation of the government

James Madison

A review of the history and fate of parties and factions will shew that it has been those who…refrained the most from suffering their personal feelings from being inflamed by their political rivalries and were most willing to leave the question of their individual advancement to the quiet and friendly arbitrament of their political associates that/whom? have in the end been the most successful.

Martin Van Buren

For many scholars, Thomas Jefferson's presidential election in 1800 was a revolution. For some it was a revolution of presidential power.[223] For others, it was revolutionary because of the "law-abiding willingness with which [the Federalists] turned over control" of the government to their rival Democratic-Republicans.[224] This singular electoral event, however, was part of a much larger revolution in which political parties began to assume a critical role in American politics, and, during this time, many of the rules dictating the nature and scope of party practices were determined. As discussed in the previous chapters, the First Amendment and the Twelfth Amendment contributed to

[223] See Jeremey D. Bailey, *Thomas Jefferson and Executive Power* (New York: Cambridge University Press, 2007)

[224] A. James Reichley, *The Life of the Parties: A History of American Political Parties* (Lanham, MD: Rowman & Littlefield Publishing, Inc., 2000) pp. 46.

defining party practices in the early republic. In this way, the election of 1800 was a crucial albeit singular event in the larger development of American political parties. Any the system of party politics would continue to be refined and defined years after President Jefferson's election as the method of selecting presidential electors would need to be settled. Somewhat differently, the election of 1800 marked the first time in American politics an opposition party would become the governing party and the party-in-government would assume the oppositional role. But the revolution did not start or stop there. As the Federalists assumed the role of opposition party, they would be privy to the same political resources as the Democratic-Republicans such as the newly accepted broad interpretation of the First Amendment that would allow the Federalists to use the newspapers as a means of politically uniting and organizing. Moreover, the subsequent Twelfth Amendment afforded Federalists the opportunity to unify their party's presidential ticket around a majority vote. In other words, once the Federalists became the minority, they could avail themselves of the political and electoral resources available to once again ascend to power. While Jefferson's election was an historic moment in American politics, it was part of a larger episode in the development of American political parties.

Previous accounts of American party development tend to interpret the rise of the Democratic-Republicans and the fall of the Federalists as a restoration of a constitutional order designed against political parties. According to these accounts, then, the Democratic-Republican Party was the party to end all parties and, eventually, the

"Constitution against Parties" would be restored.[225] As a result, this account, presents the development of political parties as fragmented, or as John Aldrich called it, a puzzle.[226] When taking a comprehensive view of political parties in the United States, parties have been accepted as politically indispensable in all eras with the exception of one, the very era in which the first parties formed. As Richard Hofstadter framed it, "here we are brought face to face with the primary paradox of this inquiry: Jefferson, the…co-founder of the first modern popular party, had no use for political parties…and the creators of the first American party system on both sides, Federalists and Republicans, were men who looked on parties as sores on the body politic."[227] In other words, substantial changes to the American constitutional and political order still had to be undertaken to incorporate the existence of political parties into the fabric of competitive two-party politics. When the first parties emerged, political opposition was deemed illegitimate; with the emergence of a national two-party system and the second party era, a political opposition was considered legitimate. In a way, then, the "puzzle" or "paradox" scholars have been trying to explain is the time of one-party politics, or the "era of good feelings," between the collapse of the Federalists and the creation of a national party system in 1840.

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[225] See, for example, Richard Hofstadter, *The Idea of a Party System: The Rise of Legitimate Opposition in the United States, 1780-1840* (Berkeley, CA: University of California Press, 1969); Sidney M. Milkis, *Political Parties and Constitutional Government*, (Baltimore, MD: The Johns Hopkins University Press, 1999).

[226] See John H. Aldrich, *Why Parties? The Origin and Transformation of Party Politics in America* (Chicago: University of Chicago Press, 1995), pp. 97.

[227] Richard Hofstadter, *The Idea of a Party System*, pp. 2.

Subsequently, the anti-party sentiments of the founders and the "constitution against parties" remain to be the overwhelming scholarly explanation for this early political party "puzzle" or "paradox" as one-party competition was a return to a non-partisan constitutional order. Put differently, scholars focus on this early party era for explanations on a myriad of political issues except for a positive account of party development and continuity with subsequent party history. The movement from the anti-party sentiments of the founding generation to an articulation of parties as a positive, democratic good is the premise on which scholars have based their understanding of American party development.

Based on current scholarship, then, there are two general ways to understand the history of political party development in the United States. The first is based on two-party competition, wherein the account of party development is divided between the founding era of anti-party sentiments and the subsequent development and adoption of a competitive two-party system thereby representing an abandonment of the constitutional order based on the "Constitution-against-Parties" thesis.[228] The second explanation is largely based on accounts of actual parties, and the history of American political parties is delineated by the fall of a preexisting party and the rise of a new party. Subsequently, within this second explanation, scholars have utilized the "Constitution-against-Parties" account to ground their understanding of the "first party era" consisting of the Federalists and Democratic-Republicans. Related to this second type of explanation, scholars have

[228] The most prominent account of this first explanation is Richard Hofstadter, *The Idea of a Party System*. Essentially, the "Constitution-against-Parties" thesis originates with Hofstadter's work.

developed other nuanced ways to describe party eras by emphasizing other historically contingent parameters, such as the evolving nature of electoral coalitions, which can serve as ways to distinguish one political era from another.[229] Despite the different approaches to and the vast literature on party development in the United States, scholarly accounts are still fundamentally based on the political party paradox, and any attempt at assessing the proper role of political parties in the American political system must grapple with the inconsistency in the constitutional system or completely disregard it.[230]

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[229] For example, V.O. Key Jr., "A Theory of Critical Elections," *The Journal of Politics* (1955) 17:1, pp. 3-18; Walter D. Burnham, "The Changing Shape of the American Political Universe," *American Political Science Review* (1965) 59:7-28, "Party Systems and the Political Process," in *The American Party Systems: Stages of Political Development*, ed. WN Chambers, WD Burnham (New York: Oxford University Press, 1967), pp. 277-307, *Critical Elections and the Mainsprings of American Politics* (New York: Norton, 1970); *James* L. Sundquist, *Dynamics of the Party System: Alignment and Realignment of Political Parties in the United States*, (Washington, D.C.; The Brookings Institute, 1983). See also, David R. Mayhew, "Electoral Realignments," *Annual Review of Political Science* (2000) 3:449-74 for a review of the electoral realignment literature and a critical evaluation of the empirical validity of realignment arguments.

[230] For example, in *Dynamics of the Party System: Alignment and Realignment of Political Parties in the United States*, Sundquist completely omits party practices prior to 1850 as, according to Sundquist, realignment could only occur once the two-party system became a permanent feature in American politics. As such, Sundquist does not have to

Sidney M. Milkis's *Political Parties and Constitutional Government* is a prime example of how scholars have used the "Constitution-against-Parties" to ground their subsequent account of political party development. Central to Milkis's work is a delineation of party history and party practices based on the "deliberate constitutional reform[s]" of particular eras.[231] In other words, Milkis's treatment recognizes how the particular constitutional commitments, or regime norms, of a given era dictate the nature of parties and circumscribes the type of activities available to them. Milkis's party history, then, emphasizes the nuances within the analogous relationship between the emergence of new parties and the established political rules and practices with the latter dictating the nature of the former. In this way, the prevailing commitments to local political participation at the state level during the Thomas Jefferson/Andrew Jackson era produced parties that functioned on the local level while the progressive era's regime norms "decentralized parties…and paved an alternative road to a stronger national government" and more administrative parties.[232] In the end, given the rise of the "administrative" state, Milkis emphasizes the role of political parties in creating vital link between the governed and the government.

Milkis's argument ends by expressing concern regarding the current state of parties as administrative political parties, which "[relegate] electoral contests to the

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overcome the "Constitution-against-Parties" thesis by starting his analysis after the supposed change in the constitutional system had already occurred.

[231] Sidney M. Milkis, *Political Parties and Constitutional Government*, (Baltimore, MD: The Johns Hopkins University Press, 1999), pp. 3.

[232] *Ibid.*, pp. 9.

intractable demands of policy advocates," no longer fulfill the central democratic role of providing citizens an opportunity to "redefine the Constitution's principles and reorganize the government."[233] As a result, Milkis insinuates that regime norms need to be altered so as to reshape parties to serve their more democratic function. Underlying his work, however, is an uneasy tension as Milkis tries to reconcile the positive good provided by parties and the anti-party sentiments from which parties emerged. More specifically, Milkis grounds his understanding of the proper function for parties—combating governmental centralization through mass participation— in the very era in which parties were assumed to be illegitimate or, at best, a necessary albeit temporary evil. So, when confronted with the party paradox, Milkis acknowledges the partisan contest between the Federalists and Democratic-Republicans "altered the Constitution, which was now joined to a doctrine of local self-government." However, he follows this claim by rehearsing the party paradox: "Jefferson and Madison were dedicated to transforming government, not necessarily to establishing a permanent, formal two-party system" because they "appeared to hope that [parties] would be short term," and "[o]nce the Federalists…were defeated [parties] could safely wither away."[234] In this way, Milkis wants to maintain Jefferson and Madison's role in perpetuating the constitution-against-parties thesis while also crediting them for establishing the regime norms that facilitated the subsequent emergence of the formal institutional two-party system. Indicative of the general scholarship on parties, Milkis conclusion unsuccessfully solves the party paradox

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[233] Sidney M. Milkis, *Political Parties and Constitutional Government*, pp. 185-186.

[234] *Ibid.*, pp. 22.

and any positive party prescriptions he offers are subject to the very paradox he fails to solve.

Even though Milkis' party history fundamentally relies on the "Constitution-against-Parties" thesis, he understates his point regarding the development of regime norms that facilitated the emergence of the two-party system. Somewhat differently, Milkis recognizes early institutional developments of the two-party system but resorts to an intellectual history to dismiss these developments. In this way, the standard scholarly approach to addressing the party paradox is essentially a task of reconciling intellectual history with institutional development.[235] But, as Milkis began to suggest, despite Jefferson's and Madison's statements, regime norms establishing party practiced were deliberately developed. What the accepted scholarly accounts, including that of Milkis, miss, then, are the emergent structures of constitutional norms that defined this first party era. As discussed in previous chapters, the construction of the First Amendment, the adoption of the Twelfth Amendment, and, as will be discussed in the subsequent chapter, the decision to allocate presidential electors by general ticket were all regime norms that were deliberately developed according to majoritarian commitments thereby ensuring a governing party could claim legitimacy based on the public will. And, as these norms

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[235] This is the central claim in Hofstadter's "Constitution-against-Parties" thesis. The reason the Constitution is understood to be against parties because Thomas Jefferson and James Madison, who Hofstadter uses as the authoritative thinkers on this matter, never expressed a positive account of parties. It was not until Martin Van Burn that we get a positive, intellectual account of party competition that coincided with the institutional development of the two-party system.

were developed, political actors were aware of parties and how these changes to the regime would lead to the durability of party competition. This is to say that, by focusing on institutional developments, the first party era is not necessarily a paradox.

Emergent Structures and Reoccurring Patterns of Political Opposition

Institutionally speaking, the history of party development can still be understood through party eras in which party activities are constrained by emergent structures of political norms. So, as explained in the first chapter, the political resources and actions available to the Democratic-Republicans and the Federalists were still constrained by patrician politics in which political success, particularly electoral, was dependent on the prominence of a candidate's name. Any search for continuity between these eras, however, is limited by the emergent political norms that define each distinctive era as the institutional commitments shared by 2014 Democrats and Republicans are far removed from the Whigs and Democrats in 1830. In other words, there is little to be gained by comparing the localized parties of the nineteenth century to the highly organized national organizations that parties have become. And, based solely on this type of study, there are severe limits to the extent this history can inform contemporary politics.

Rather than solely utilizing the distinctive eras to explain party development, the concept of political opposition can be utilized to provide continuity to a long and nuanced history of political parties in the United States. While previous scholarship has yet to account for a legitimate opposition during the first party era, this study emphasizes its acceptance during the contest between the Democratic-Republicans and the Federalists. Somewhat differently, opposition has never been used as a unifying concept because

scholars have been unable to account for its existence across the history of political parties. Through this study, political opposition can be understood within the context of the typology developed in chapter one, and the history and development of political parties in the United States can be reassessed for reoccurring patterns of political opposition within and across party eras. In this way, previous eras and parties can be of substantive interest for contemporary parties and party scholarship as what made the Democratic-Republicans' oppositional efforts legitimate can serve as an example for contemporary political parties who assume a similar role. This chapter, then, focuses on employing the reoccurring patterns of political opposition to reassess the oppositional efforts of the Democratic-Republicans and the Federalists. As a result, the Democratic-Republicans constituted a legitimate opposition because they were both effective and responsible. And, contrary to current scholarship that attributes the demise of the Federalist Party to general anti-party sentiments, the Federalists suffered as an opposition and eventually disappeared because they first failed to develop effectiveness and then responsibleness. In other words, the Federalist Party's demise was a result of their own inability to achieve legitimacy, not because political parties were deemed illegitimate.

An Example of a Legitimate Opposition: The Democratic-Republican Party

For an opposition to be considered legitimate, it must be effective, or capable of winning an election. Formally speaking, effectiveness means "there is sufficient credibility to the expectation that the party in opposition has a chance to oust the

governing party. In other words … the notion of competitiveness."[236] Effectiveness, as competitiveness, is not naturally inherent to an opposition. Somewhat differently, opposition parties, to be effective, must engage in political and electoral activities that will make them competitive. As an opposition, evidence of the Democratic-Republicans' effectiveness can be found as early as 1796 during the presidential election between Thomas Jefferson and John Adams as Democratic-Republicans' electoral strategies won Jefferson the vice presidency—being only two votes short of winning the presidency.[237] During the 1796 election, the Democratic-Republicans recognized the importance of Pennsylvania, predominately a Federalist state, to their electoral success. To win Pennsylvania, John Beckley, Benjamin Bache, Michael Leib, and Major John Smith executed a sophisticate statewide campaign. Prior to the election, the Federalist controlled Pennsylvania legislature changed the state law requiring presidential electors to be chosen by district. Seeking a way to minimize the influence of the Democratic-Republicans in the Pennsylvania legislature, the Federalists revised the electoral rules so that presidential electors would be chosen statewide by voters. In response to this electoral change, John Beckley organized a state caucus in which the Democratic-

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[236] Giovanni Sartori, *Parties and Party Systems: A Framework for Analysis, Vol. I*, (London: Cambridge University Press, 1976), pp. 186.

[237] Prior to the twelfth amendment, the individual receiving the highest number of Electoral College votes was elected president while the person receiving the second highest votes was elected vice-president. In the 1796 election, John Adams was elected president with 71 votes with Thomas Jefferson being elected as his vice-president with 68 votes.

Republicans chose presidential electors from as many prominent partisan names as possible. In addition, once this list was compiled, Beckley kept it secret so the Federalists could not vilify those selected or replicate the strategy. As the election neared, and it would be too late for the Federalists to either imitate or impede the plan, the Democratic-Republicans provided voters with important voting heuristics by distributing handbills in every district with the prominent names of the Democratic-Republican electors. Prior to the 1796 election, Major Smith and other Democratic-Republicans also went throughout the state holding local meetings to rouse voters in favor of "the Republican Jefferson". Moreover, election law allowed for parties to distribute their own ballots as long as the ballots were written out by hand, and a week before the election, a campaign committee successfully distributed fifty thousand of these handwritten ballots to local partisans.[238] As a result of these efforts, the Democratic-Republicans were able to overwhelmingly capture fourteen of Pennsylvania's 15 Electoral College votes in what was previously considered a Federalist state.[239]

As the election of 1800 approached, the Democratic-Republicans' electoral machinery became more sophisticated as they developed more effective strategies to

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[238] See Sean Wilentz, *The Rise of American Democracy: Jefferson to Lincoln*, (New York: W.W. Norton & Company, Inc., 2005), pp. 74.

[239] More to this point, Sean Wilentz pointed out that the Democratic-Republicans' efforts were most "staggering" in Philadelphia. According to Wilentz, "more than two in five eligible Philadelphians showed up at the polls and handed the [Democratic-Republican] slate more than 60 percent of the vote—a landslide in what [had] been a solidly Federalist city" (pp. 74).

challenge the incumbent Federalists. Vice-President Jefferson was looked to as the official party leader, and, as one Federalist described, he became "the 'rallying point,' the head quarters, the everything" for the rising opposition party.[240] Utilizing their successful experience with Pennsylvania in 1796, the Democratic-Republicans began to organize a campaign strategy with the goal of winning the presidency. To secure Jefferson's support from Virginia, Maryland and New Jersey, "elaborate local committees and networks of correspondence quickly appeared."[241] With organization from the 1796 election already established in Pennsylvania, local committees took on the responsibility of directing campaign efforts in local counties as well as creating and distributing Democratic-Republican ballots for the 1800 contest. Just as Pennsylvania was crucial for Jefferson's success in 1796, the Democratic-Republicans would need to win New York if they were going to capture the presidency. Recognizing this, Aaron Burr, a native New Yorker and Jefferson's running mate in 1796 and1800, oversaw a "highly sophisticated and effective electioneering operation" in Manhattan.[242] Under New York election law, the state legislature would appoint presidential electors, and New York would be holding their legislative election in the April before the presidential election. Thomas Jefferson explained to James Madison: "If the city election of N York is in favor of the Republican

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[240] James Nicholson Statement, December 26, 1803, in Noble E. Cunningham, *The Jeffersonian Republicans: The Formation of Party Organization 1789-1801*, (University of North Carolina Press, 1957), quoted on pp. 149.

[241] Sean Wilentz, *The Rise of American Democracy*, pp. 85.

[242] *Ibid*., pp. 85

ticket, the issue will be republican."[243] This is to say that, the outcome of the New York legislative races would determine the allocation of the state's Electoral College votes and, potentially, the outcome of the presidential election.

The Democratic-Republicans, particularly Burr, were successful with their campaign strategy as they captured control of the New York legislature and, eventually, the presidency. The Party's success in New York was largely due to Burr's efforts. Months before the legislative election, Burr made considerable efforts to personally visit his partisan contacts in New York City. In addition, he opened his home for "entertainment, meals, and even sleeping quarters" to those working on the campaign.[244] To further organize efforts, Burr held regular party meetings at Abraham Martling's Tavern. With the help of his friend Matthew L. Dickenson, Burr implemented the Pennsylvania strategy in New York City by creating a Democratic-Republican legislative ticket with prominent partisan names in hopes that these distinguished and influential political names would contribute to the party's electoral success. And, as in 1796, this list was largely kept secret, and the Federalists failed to implement a similar strategy or impede their opponent's. As the April election day approached, the Democratic-Republicans coordinated "their efforts with separate committees in each of the city's seven wards as well as with a citywide general committee," and Burr, with the help of other local party leaders, "toiled ceaselessly to distribute handbills and address as many bodies of assembled voters as they could."[245] Burr's efforts yielded the desired results.

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[243] Thomas Jefferson to James Madison, March 3, 1800.

[244] Sean Wilentz, *The Rise of American Democracy*, pp. 86.

[245] *Ibid.*, pp. 87.

The Democratic-Republicans captured New York's legislature with an overwhelming victory in New York City and a narrow victory throughout the state. Commenting on the campaign and election outcomes, James Nicolson praised Burr: "That business has been conducted and brought to issue in so miraculous a manner that I cannot account for it but from the intervention of a Supreme Being and our friend Burr the agent."[246] Burr's success was demoralizing to Alexander Hamilton. After losing the legislative election, Hamilton pleaded with Governor John Jay to hold a special legislative session before the Democratic-Republicans took office to revise the election laws so that New York's presidential electors would be selected by district rather than by the state legislature. Governor Jay never responded to Hamilton's request. The Federalists had lost control of the New York legislature, and, because of the Democratic-Republicans' effective campaign, the Federalists would soon lose control of Congress and the presidency.

The Democratic-Republicans and the Federalists were distinguished by more than their campaign effectiveness. In particular, the Democratic-Republicans also provided the electorate with an alternative choice in public policy and principles of governance. Put differently, the Democratic-Republicans constituted what can be considered as a legitimate opposition because they were both effective in their campaigning and responsible in their platform.[248] According to John Aldrich, the Democratic-Republicans

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[246] James Nicholson to Albert Gallatin, in Henry Adams, *The Life of Albert Gallatin*, (HardPress Publishing), 2010.

[248] See the American Political Science Association's document on responsible parties: Committee on Political Parties, *Toward a more Responsible Two-Party System* (New York: Rinehart, 1950).

and the Federalists were divided on what he called "the great principle". Or, the Democratic-Republicans and the Federalists offered competing principles of "exactly how powerful and positive the new federal government was to be or, even more deeply, what sort of nation America was to be."[249] The resolution of the great principle would be decided by both how the Constitution was written and how the party-in-government interpreted the document to justify their enacted policy. For, as Anti-Federalist Luther Martin argued during ratification, the Constitution may be "just so much federal in appearance as to give its advocates…an opportunity of passing it as such upon the unsuspecting multitude" and yet be "so predominately national as to put it in the power of its movers, whenever the machine shall be set agoing, to strike out every part that has the appearance of being federal, and to render it wholly and entirely a national government."[250] This is to say that, with the ambiguities of the Constitution, the national or federal nature of the document had yet to be determined. The election of 1800, then, would be a way in which the Federalists' constitutional interpretation and governing actions would be retrospectively evaluated and the future of the constitutional regime prospectively determined. In other words, the Democratic-Republicans fulfilled the role of a responsible opposition by providing the electorate with substantive alternatives to the Federalists' governing principles, and these new "republican" principles would determine the nature of the constitutional order for the foreseeable future.

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[249] John H. Aldrich, *Why Parties*, pp. 74.

[250] The Records of the Federal Convention of 1787 Vol. III, ed. Max Farrand, (New Haven, CT: Yale University Press, 1967), pp. 292.

The competition for the presidency in 1800 was a competition between party leaders as Thomas Jefferson and James Madison developed competing principles of governance to those of Alexander Hamilton, who, as early as 1791, Jefferson identified as the leader of the Federalist Party and the architect of the Federalists' ideology and theory of constitutionalism. In August 1791, after a conversation with Hamilton, Jefferson believed Hamilton was of the opinion that "the present government is not that which will answer the ends of society, by giving stability and protection to it's [sic] rights, and that it will probably be found expedient to go into the British form."[251] And, according to Jefferson, the measures taken by Hamilton as Secretary of Treasury—the assumption bill, the bank bill, and his financial program—were all methods aimed at mirroring English constitutionalism. In other words, Hamilton was "preaching up and pouting after an English constitution of kings, lords, and commons" in which there was "a kind of symbiosis—a link of influence, patronage, and personal relationships—between the king's ministers and the two houses of parliament."[252] Furthermore, Hamilton was corrupting Congress as it was becoming a "legislature legislating for their own interests in opposition to those of the people." In this way, Jefferson and Madison's characterization of the Federalists as the "anti-republican" party was tied to their perception of the Federalist Party as a party of "paper men," or "bank directors and stock-jobbers" in Congress who had an individual interest in ensuring Hamilton and his fiscal

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[251] Thomas Jefferson, "Notes of a Conversation with Alexander Hamilton," Aug. 13, 1791.

[252] See David N. Mayer, *The Constitutional Thought of Thomas Jefferson*, (Charlottesville: VA, The University of Virginia Press, 1994), pp. 109-110.

policies were successful.[253] Accordingly, Jefferson and Madison would lead a party dedicated to true "republican" principles.

Leading up to the election of 1800, the Democratic-Republicans had plenty to oppose given the preceding years of a Federalist controlled government, and as Jefferson took office, he would declare the new principles of government that would guide his administration. Madison had already used the newspapers as a means of promoting "republicanism" by opposing the "consolidation of the States into one government" as well as Hamilton's (and the Federalists') broad interpretation of executive power used to justify Washington' Neutrality Proclamation of 1793. The Federalists further added to the opposition's fervor by signing the Jay Treaty in 1796, bringing the United States to the brink of war with France, using a failed diplomatic mission (the XYZ Affair) as justification for strengthening the military, and passing the controversial Alien and Sedition Acts. According to the Democratic-Republicans, all these measures aimed at one goal, subverting the republican government designed by the Constitution, a major theme of the Kentucky and Virginia Resolutions. As Jefferson delivered his first inaugural address, he took the opportunity to declare the "essential principles" of government, those that guided the Democratic-Republicans to office and "those which ought to shape its administration."[254] As a direct alternative to Federalists principles,

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[253] Thomas Jefferson, "Notes of a Conversation with George Washington," July 10, 1792. See also, David N. Mayer, *The Constitutional Thought of Thomas Jefferson*, footnote 50, pp. 348-349.

[254] Thomas Jefferson, *The Essential Jefferson*, ed. Jean M. Yarbrough (Hackett Publishing, 2006), pp., 57. From here on *EJ*. See also, Jeremy D, Bailey, *Thomas*

Jefferson stated his administration would seek "peace, commerce, and honest friendship with all nations, entangling alliances with none," provide "support of the State governments in all their rights, as the most competent administrations of our domestic concerns and the surest bulwark against antirepublican tendencies," pursue "economy in the public expenses, that labor might be lightly burdened" and "the honest payment of our debts and sacred preservation of the public faith, the "encouragement of agriculture; and of commerce as its handmaid," and "the diffusion of information and arraignment of all abuses a the bar of the public reason." And, settling the controversy over the Alien and Sedition Acts, Jefferson would eschew the Federalists' constitutional interpretations and secure the "freedom of religion; freedom of the press, and freedom of person under the protection of the habeas corpus, and trial by juries impartially elected."[255] This is to say that, although Jefferson claimed conciliation between the parties, the principles guiding his administration would be distinctly Democratic-Republican. In the electoral

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Jefferson and Executive Power, (New York: Cambridge University Press, 2007). Specifically see chapter 5 in which Bailey argues that Jefferson used his first inaugural address as a means linking the presidency with public opinion. Jefferson would declare the guiding principles for his administration so the public would be able to hold him and his party accountable in subsequent elections. By linking Jefferson's view of the inaugural address with his view of the Bill of Rights, Bailey rightly argues that "just as Americans in 1789 needed a text of liberties by which they could test the powers of the national government, Americans in 1800 needed the president to state principles by which they could test his extraordinary and expansive acts of nation-building" (149).

[255] *EJ*, *First Inaugural Address*, pp. 57-58.

struggle over the "great principle", the Democratic-Republicans had provided the electorate with a substantively different mode of governance than that of the Federalists, and the people had spoken. In this way, the Democratic-Republicans were both effective and responsible. In other words, they were a legitimate opposition.

A Lesson for the Losers: The Federalists Party as an Example of a Diminished Opposition

Prior to the Democratic-Republican's ascendance to political power, the Federalist Party enjoyed twelve years of being the country's primary source of political commitments and expressions of ideology. The Federalist Party was now on the outside looking in; once the party-in-government, they now were assigned to the role of political opposition. The Federalists' status as a political opposition would be less burdensome than that of the Democratic-Republicans because of the political developments that allowed the Democratic-Republicans to replace the Federalists as the majority party. This is to say, the Federalist Party would be able to utilize the same electoral rules and strategies that the Democratic-Republicans had at their disposal to dislodge the Federalists from power. The success of the Federalists, then, would depend on how well they used the tools at their disposal and if they would be able to reinvigorate national support for their party platform. In other words, the question to be asked is: would the Federalist Party be a legitimate opposition?

The task of constituting a legitimate opposition would be no easy one for the Federalists. The Party was affiliated with a set of political commitments that had, in the course of events, been deemed as failed or insufficient responses to the political problems

of the time. A political party in this situation has the difficult choice of maintaining its current ideological commitments and policy positions thereby remaining associated with the political failures of the recent past. Or, the party can transform itself to reflect the newly established ideological commitments thereby risking alienation from both its own political identity and its own natural base support and allies. In this regard, the Federalist Party was caught between being responsible yet ineffective or irresponsible and effective. To add to the difficulty, the Federalists would be faced with a leadership crisis as Alexander Hamilton had effectively removed John Adams, and, shortly after, Aaron Burr would end Hamilton's life in a duel. The Federalists would have to rally around a new leader who would be capable of articulating a political strategy to match that of Thomas Jefferson's Democratic-Republicans

When considering the importance of the election of 1800, scholars tend to emphasize the Democratic-Republicans' victory rather than the Federalist's defeat. In this view, galvanized by opposition to the Federalists' ideology and constitutional interpretations, Jefferson's election united "fellow-citizens" with "one heart and one mind" and "[restored] to social intercourse that harmony and affection without which liberty and even life itself are but dreary things."[256] These accounts, then, lead to the assumption that the decline in the Federalist Party was primarily driven by anti-party sentiments and Jefferson's attempt at reconciliation. The Federalists, however, were not necessarily condemned by anti-party sentiments. For, as Jefferson claimed, the election had settled a "sacred principle, that though the will of the majority is in all cases to prevail, that will to be rightful must be reasonable; that the minority possess their equal

[256] *EJ*, *First Inaugural Address*, pp. 57-58.

rights, which equal law must protect, and to violate would be oppression."[257] Although the Federalists would now find themselves in the minority, anti-party sentiments would not prohibit them from partisan organization. And, as the Alien and Sedition Acts were set to expire (and President Jefferson was allowing them to expire), the Federalists would benefit from the broader interpretation of the First Amendment. Moreover, the Democratic-Republicans' electoral strategy had proved to be successful, and nothing would legally or politically prohibit the Federalists from duplicating their rival's campaigning effectiveness. In other words, the Constitution would not work against the Federalists, and anti-party sentiments are not a sufficient explanation for their collapse. In order to understand the demise of the Federalist Party, more detailed attention must be given to the Federalists efforts to fulfill the role as a legitimate opposition. In this way, the collapse of the Federalist Party was a result of their inability, as an opposition, to be effective due to their disunity and lack of leadership.

Inter-Party Strife

Shortly after John Adams was inaugurated president, he assembled Congress and recommended that immediate defense measures be taken given the escalating conflicts in Europe. Specifically, Adams recommended that officers be commissioned and arrangements for recruitment of a provisional army be made. What Adams did not request was the establishment of a large professional army. If Adams was going to war, he was going to rely heavily on the navy because, for Adams, an army was not a good

[257] *EJ*, *First Inaugural Address*, pp. 57-58.

instrument of defense or foreign policy.[258] In essence, Adams request was that, for as long as war was possible, the government should only ensure that plans for an army were in place. Adams' view, however, did not coincide with many of the Federalists', both in and out of Congress, as many were convinced that a large professional army was necessary for both defense against foreign attack and internal dissent, particularly from the southern Democratic-Republicans. In other words, President Adams would soon find himself in direct conflict with members of his own party and administration thereby alienating the president from the party that he was supposed to lead. John Quincy Adams would later write that "The army was the first decisive symptom of a schism in the Federalist party itself, which accomplished its final overthrow and that of the administration."[259] This is to say that, the demise of the Federalist Party started with an inter-party divide between leadership and membership.

George Washington's death further compounded the problems for the Federalist Party as they lost their most notable and respected leader. Although Hamilton drove much of the Federalists' platform and policy, George Washington was the face of the Federalist Party, and his presence, according to Hamilton, maintained party unity and discipline, and without Washington, the Federalist coalition would be electorally vulnerable. In a letter to Rufus King, Hamilton lamented that "the irreparable loss of an inestimable man removes a control which was felt, and was very salutary," and without

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[258] See Stephen G. Kurtz, *The Presidency of John Adams: The Collapse of Federalism, 1795-1800* (Philadelphia: The University of Pennsylvania Press, 1957).

[259] Quoted in Ron Chernow, *Alexander Hamilton* (Penguin, 2004), pp. 557.

Washington, Adams had become perverse and capricious in his policy decisions.[260] As the election approached, the Federalist Party lost their most valuable asset, a party leader who had unanimously won two presidential elections and provided stability to the Federalist Party and, importantly, to the country. After his death, the *Pennsylvania Gazette* wrote: "When WASHINGTON lived, we had one common mind—one common head—one common heart—we were united—we were safe."[261] This is to say that, rather than being unified under George Washington, the Federalist Party would experience an identity crisis entering the election of 1800 as Adams and Hamilton competed to fill the void in the Party left by Washington's death.

As Adams prepared for his reelection bid, Alexander Hamilton made his own preparations to turn the Federalist Party against Adams, and, despite opposition from his close allies, Hamilton published a pamphlet denouncing Adams during the middle of his presidential campaign. In May 1800, dissatisfied with Adams, Hamilton, in a letter to Theodore Sedgwick, expressed his desire to withdraw support from Adams even if it led to the election of his rival Jefferson: "I will never more be responsible for [Adams] by my direct support, even though the consequences should be the election of Jefferson. If we must have an enemy at the head of the government, let it be one whom we can oppose, and for whom we are not responsible."[262] This is to say that Hamilton's position towards

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[260] Alexander Hamilton to Rufus King, 5 January 1800, in *Papers of Alexander Hamilton*, ed. Syrett, 24:168.

[261] *Pennsylvania Gazette*, 8 January 1800, in Schwartz, *George Washington*, pp. 81.

[262] Hamilton to Sedgwick, 10 May 1800, in *Papers of Alexander Hamilton*, ed. Syrett, 24:475.

Jefferson's opposition party was not as severe as his distaste for Adams. For Hamilton, it would be easier to battle Jefferson on partisan grounds with a Federalist Party united behind leadership dedicated to Federalist principles, and, if the Federalist Party was willing to eschew their principles in support of a "weak and perverse man" then Hamilton would "withdraw from the party."[263] Finally, in August, just a few months before the presidential election, Hamilton decided to give "to the public my opinions respecting Mr. Adams" in a signed letter intended for all the Federalist leaders.[264] For Hamilton, the Federalist Party would be strengthened, and perhaps saved, behind a consolidation of leadership under what Hamilton deemed to be "true" principles.

Despite shared animosity towards Adams, many of the Hamilton's Federalist colleagues did not support his decision to publicly denounce Adams. James Bayard counseled Hamilton to not publish the article because Bayard recognized the effects of Hamilton's plan on the Federalist Party's chances in the upcoming election. According to Bayard's vote calculations, Adams potentially had enough support to win the presidential election, and the Democratic-Republicans would "beget a system of miserable intrigue between the members of the same Party whose efforts can not be united." In this way, Hamilton's anti-Adams pamphlet would undermine the Federalists' "mutual confidence," and the Party's "united efforts are absolutely necessary to maintain their ground against their adversaries." Put differently, contrary to Hamilton, Bayard

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[263] Hamilton to Sedgwick, 10 May 1800, in *Papers of Alexander Hamilton*, ed. Syrett, 24:475.

[264] Hamilton to Wolcott, 3 August 1800, in *Papers of Alexander Hamilton*, ed. Syrett, 25: 54.

believed winning the election with an undesirable candidate was more important than sacrificing electoral victory for party principle, and Bayard refused to make his disdain for Adams public because "I suppose we must vote for him and therefore cannot safely publish what we think of him."[265] Fisher Ames echoed Bayard's sentiments that an Adams victory was technically better than a Federalists defeat because it was "indispensably necessary" to support Adams' "inauspicious" reelection as most Federalists would prefer Adams to Jefferson, and, if Hamilton undermines Adams' reelection, he would be blamed for Jefferson's victory. Ames, however, questioned Adams' and the Federalists' electoral chances, and his advice to Hamilton was based more on the Party's future than the immediate election: "The federalist would be defeated which is bad, and disjointed and enraged against one another which wd. be worse. Now it seems to me that the great object and duty and prudence is to keep the party strong by it's [sic] union and spirit."[266] Both Bayard and Ames believed Hamilton's vendetta against Adams was more personal than political, and if Jefferson and the Democratic-Republicans were to win the upcoming presidential election, the Federalists would need to be united so as to function as a strong opposition to Jefferson. In this way, those opposed to Hamilton printing his pamphlet were making a case for strengthening parties (particularly the Federalist Party) in the same way James Hillhouse would make during the debates over the Twelfth Amendment regarding parties being unable to maintain their ascendancy to power. In both instances, members of the Federalist Party urged party

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[265] Bayard to Hamilton, 18 August 1800 in *Papers of Alexander Hamilton*, ed. Syrett, 25:71.

[266] Ames to Hamilton, 26 August 1800, *Papers of Alexander Hamilton*, ed. Syrett, 25:87

unification for the purpose of having a strong opposition once the Democratic-Republicans could no longer sustain their party discipline. Put differently, the Federalists needed to be united in case the Democratic-Republicans suffered the same fate as the Federalist Party, a loss of party cohesion.

Hamilton, nevertheless, did not follow the advice of his fellow Federalists, and, in a 53 page pamphlet, Hamilton berated Adams which consequently lead to the strengthening of Jefferson's campaign against the Federalists and the weakening of Hamilton's position within the Party. In the pamphlet, however, his stance towards Adams was less decisive as Hamilton adopted a position closer to Bayard and Ames in that, despite Adams' "disgusting egoism" and "vanity", Hamilton claimed Adams should still be supported in his reelection efforts: "To refrain from a decided opposition to Mr. Adams' re-election has been reluctantly sanctioned by my judgment; which has been not a little perplexied between the unqualified conviction of his unfitness for the station contemplated, and a sense of the great importance of cultivating harmony among the supporters of the government."[267] Moreover, Hamilton's plan to only distribute the

[267] *Letter from Alexander Hamilton, Concerning the Public Conduct and Character of John Adams, Esq. President of the United States*, 24 October 1800, in *Papers of Alexander Hamilton*, ed. Syrett, 25:169-234. See also chapter 8 in Susan Dunn, *Jefferson's Second Revolution* (New York: Houghton Mifflin Company, 2004). After discussing Hamilton's pamphlet, Dunn connects the pamphlet with the Alien and Sedition Acts to demonstrate how the policy was only applied to the Democratic-Republicans as Hamilton was not accused of sedition despite the content of his pamphlet

pamphlet to Federalists was undermined as his "Letter" was quickly leaked to the press and the *Aurora* in Philadelphia and the *New London Bee* in Connecticut printed selections from the "Letter" followed by the publication of the entire pamphlet. Soon both Federalists and Democratic Republicans responded to Hamilton's writings. George Cabot, a Federalist from Massachusetts, accused Hamilton of having the same character flaws Hamilton had attributed to Adams: "I am bound to tell you that you are accused by respectable men of egotism; and some very worthy and sensible men say you have exhibited the same vanity in your book which you charge as a dangerous quality and great weakness in Mr. Adams."[268] Following Hamilton's example, Noah Webster, a Federalist from Connecticut, wrote a public letter in which he accused Hamilton of allowing Jefferson to win the election because Hamilton had divided the Federalist Party.[269] James Madison, in a letter to Thomas Jefferson, recognized the damage Hamilton's letter had done to himself and his party: "added to these causes [of Adams' demise] is the pamphlet of H[amilton] which, tho' its recoil has perhaps more deeply wounded the author, than the object it was discharged at, has contributed not a little to

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mirroring the Democratic-Republicans' printed opinion of Adams for which they were held accountable.

[268] George Cabot to Alexander Hamilton, 29 November 1800, in *Life and Letters of George Cabot*, ed. Lodge, pp. 300.

[269] See Noah Webster, "Letter to General Hamilton Occassioned by his letter to President Adams".

overthrow the latter staggering as he before was in the public esteem."[270] Even if, as Fisher Ames had predicted, Jefferson's election was inevitable, the Federalists' prospects of organizing an opposition capable of challenging Jefferson were diminished by their internal division and lack of leadership as both Adams and Hamilton had lost or were losing credibility among the Party.

The Revolution of 1800's Other Side

In a matter of two years, the Federalist would lose the presidency as well as their majorities in the House and the Senate. The Democratic-Republican's victory, while enthusiastically hailed as a victory of true political principle, was actually a triumph of party principles. The electoral success of 1800 was the culmination of the Democratic-Republican's arduous efforts to create and organize a party capable of running and maintaining and extensive political campaign.

Prior to their electoral victory in 1800, the Democratic-Republicans served as the first opposition party, and, as an opposition party, their actions set precedent for future attempts to challenge the party-in-government through electoral means. Although the Federalist Party never fully recovered from their electoral loss in 1800, the party nevertheless served as the new opposition party in American politics. Subsequently, all the electoral rules and strategies developed by and available to the Democratic-Republicans were now at the Federalist's disposal. In other words, even though Jefferson aimed at conciliation, the political and electoral rules that allowed him to gain office

[270] Madison to Jefferson, 10 January 1801, in *Papers of James Madison*, ed. Mattern et al., 17:454.

could now be used against him. More importantly, the Federalists recognized that they could utilize the same party strategies as the Democratic-Republicans, and the organization and operation of political parties would become a crucial feature of American politics. This is to say that, rather than accepting defeat and conciliation, the Federalist would begin to revise their electoral strategies in an attempt to fulfill the role of a legitimate opposition.

Leaders of the Federalist Party understood that if they were to challenge the Democratic-Republicans, they needed to alter their electoral strategies, particularly their understanding of and relationship to public opinion. Fisher Ames recognized that the Federalist's response to their electoral defeat "must not begin with an impression on the popular mind that we are a disgraced if we are a disappointed party. We must court popular favor, we must study public opinion, and accommodate measures to what it is and still more to what it ought to be."[271] James A. Bayard agreed: "We shall probably pay more attention to public opinion than we have heretofore done, and take more pains, not merely to do right things, but to do them in an acceptable manner."[272] Even Hamilton recognized that the Federalists had neglected the role of public opinion, and, by capturing the public's sentiment, the Democratic-Republicans had gained a significant electoral advantage that would not be easily surmounted. According to Hamilton, the Federalists had "erred in relying so much on the rectitude and utility of their measures as to have

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[271] Fisher Ames to John Rutledge, Jan. 26, 1801, John Rutledge Papers (University of North Carolina).

[272] James A. Bayard to Alexander Hamilton, Apr. 12, 1802, *The Works of Alexander Hamilton,* ed. John C. Hamilton (N.Y., 1850-51), vol. VI, pp. 539.

neglected the cultivation of popular favor, by fair and justifiable expedients. Unluckily, however, for us, in the competition for the passions of the people, our opponents have great advantage over us." And "unless we can contrive to take hold of, and carry along with us some strong feelings of the mind, we shall in vain calculate upon any substantial or durable results."[273] If President Jefferson had claimed to embody public opinion, then the Federalists would need to court public opinion so as to shape it thereby facilitating a legitimate force capable of checking political power. This is to say that if the Federalist were going to legitimately challenge President efferson and the Democratic-Republicans they would have to do it through majoritarian means and public sentiment.

In the battle for public sentiment, the Democratic-Republicans recognized the possibility of the Federalists return to power. Importantly, the Democratic-Republicans understood that the Federalists' electoral failures could be attributed to their inter-party conflicts and lack of leadership as well as to their want of public support. Moreover, the former could be resolved so as to increase the Federalists' ability to capture the latter. Or, as Stevens T. Mason (DR-VA) remarked, "[the Federalists] are at present certainly

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[273] Hamilton to Bayard, Apr. 1802 in *The Works of Alexander Hamilton*. See also Todd Estes, "Shaping the Politics of Public Opinion: Federalists and the Jay Treaty Debate," *Journal of the Early Republic*, Vol. 20, No. 3 (Autumn, 2000), 393-422, pp. 403 and Todd Estes, *The Jay Treaty Debate, Public Opinion, and the Evolution of Early American Political Culture* (Amherst, MA, University of Massachusetts Press, 2008). Estes argues that the Federalists' tactics in winning the political battle over the Jay Treaty would eventually place them at odds with public opinion as they would fail to court public opinion during elections.

down, but yet they do not despair of rising again. I have no doubt that they will soon be re-organized, and should an opening be given by too much supiness [sic] on our part or by an unfortunate schism among ourselves, that they will come forward under some more puissant leader than John of Braintree and that taught by the fatal consequences of their late divisions they will form a phalanx not to be despised but perhaps seriously to be dreaded."[274] This is to say that the Democratic-Republicans had to maintain their unified and energized majority coalition while taking into consideration the positive role the opposition Federalists would have in being, as Fisher Ames (F-MA) articulated, a "champion who never flinches, a watchmen who never sleeps", and who is "deeply alarmed for the public good; that the [Federalists] are identified with the public."[275] Gouverneur Morris (F-NY) similarly argued, "Let the chair of office be filled by whomsoever it may, opposition will act as an outward conscience, and prevent the abuse of power."[276] As a result, this competition for public support would produce a more responsive and responsible government. In other words, the Federalists, then, had to develop an effective and responsible strategy for their new role as opposition party.

Aware of the necessity to develop a new political strategy, Hamilton began to organize the efforts to capture and shape public opinion. In a letter to James A. Bayard, Hamilton explained that the Federalist's opposition to the Democratic-Republicans could

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[274] Stevens T. Mason to James Monroe, July 5, 1801

[275] Fisher Ames to Theodore Dwight, March 19, 1801, in *Works of Fisher Ames,* ed. Ames, 1:293-294.

[276] Jared Sparks, *The Life of Gouverneur Morris: With Selections from His Correspondence and Miscellaneous Papers*, (Boston: Gray & Bowen, 1832), pp. 128.

not be "revolutionary". For Hamilton, the "present Constitution is the standard to which [the Federalists] are to cling," and one of the major changes to the "present" Constitution was the recently settled constitutional understanding of the First Amendment's freedom of the press, of association, and of speech. Hamilton worried the Federalist Party would never recover from their recent displacement from office unless they could "contrive to take hold of & carry along with us some strong feelings of the mind," and they would need to, in some degree, employ "the weapons which have been employed against [them]."[277] Hamilton had the newspapers in mind, and the Federalists would be able to utilize the press as an organ of organization because President Jefferson had allowed the Alien and Sedition Acts to expire thereby instituting the Democratic-Republicans' broad interpretation of the First Amendment. Hamilton wanted to build a Federalist association at the local, state, and national level in order to make the Federalists more competitive in elections. Subsequently, Hamilton's conception for this political association captured many of the features found in modern political parties.

Building an Effective Opposition: Alexander Hamilton's Christian Constitutional Society

Modern political parties are commonly defined as "a group organized to nominate candidates, to try to win political power through elections, and to promote ideas about public policies", and parties are described as having three interacting parts: the "party

[277] From Alexander Hamilton to James A. Bayard, [16-21] April 1802.

organization", the "party in government", and the "party in the electorate."[278] Hamilton's "Christian Constitutional Society" captured many of these features as he proposed an organization that included a hierarchical leadership structure at both the notational and state level with a "direct council consisting of a President & 12 Members, of whom 4 & the President to be a quorum.[279] Each then, would have "a sub-directing council in each State consisting of a Vice-President &12 Members." After describing the general organization, Hamilton explained the three fold means of the Society. First, the Federalists would have to attempt to reestablish general support for their policy preferences through "the diffusion of information" by means of "Newspapers" and

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[278] See Marjorie Randon Hershey, *Party Politics in America* (Indianapolis, IN: Pearson Education, Inc.), pp. 6-8. See also V.O. Key, Jr., *Politics, Parties, and Pressure Groups* (New York: Crowell, 1958), pp. 180-182.

[279] Hamilton's proposed "Christian Constitutional Society" has been largely overlooked by party scholars. Scholarship on the "Society" tends to focus on the "Christian" aspect and whether or not Hamilton was actually promoting Christian politics or merely using religion as propaganda. This scholarship is best summed up by two articles asking competing questions: "Was Alexander Hamilton a Machiavellian Statesman?" and "Was Alexander Hamilton a Christian Statesman?". See Douglas Adair and Marvin Harvey, "Was Alexander Hamilton a Christian Statesman?", *The William and Mary Quarterly*, Third Series, Vol. 12, No. 2 (April 1955), pp. 308-329; Karl Walling, "Was Alexander Hamilton a Machiavellian Statesman?", *Review of Politics*, Vol. 57, No. 3 (Summer 1995), pp. 419-447. These accounts largely miss the specific organization of the Society at the local, state, and national level to strengthen the Federalist Party's electoral base.

"pamphlets." Moreover, to financially support the Federalist's use of the press, "a fund must be created" with each member contributing "5 dollars annually for 8 years." And, "clubs should be formed to meet once a week, read the newspapers & prepare essays &ct." This is to say that they needed to solidify their "party organization". Second, in addition to an active press, the Federalists would make preparations to "use…all lawful means in concert to promote the election of *fit men*." To this end, the separate societies within the states would need to maintain "lively correspondence" so as to secure consensus in support of candidates and coordinate voting efforts and maximize electoral results. Through this effort, the Hamilton aimed to strengthen the "party in government". Third, to compete with the Democratic-Republicans, the Federalists would need to build and increase their party's base. To do so, Hamilton proposed to promote "institutions of a charitable & useful nature in the management of Foederalists [sic]." And, as an electoral strategy, Hamilton placed additional emphasis on Federalists efforts in "populous cities." Perhaps most important, Hamilton began to devise a strategy "for the relief of Emigrants." Prior to the Federalists' fall from political power, the Alien and Sedition Acts aimed to minimize the political influence of immigrants as the Federalists recognized immigrants tended to support the Democratic-Republicans. Now Hamilton recognized this demographic would be crucial for increasing the cumulative effect of the Federalist "party-in-the-electorate." Based on these recommendations, Hamilton's plan for strengthening the Federalist Party would have given the Federalists a political organization that mirrored modern political parties. Put differently, the Hamilton led Federalist Party would not accept President Jefferson's efforts at conciliation and, under

Hamilton's leadership, the Federalists would attempt to fulfill the role of a legitimate opposition, a role once occupied by the Democratic-Republicans.

Hamilton's strategy, however, never came to fruition as other Federalists rejected the idea because of their unwillingness to court public opinion and imitate the Jeffersonians. James A. Bayard, with who Hamilton had first shared his plan, rejected Hamilton's strategy because Bayard did not believe the Federalists needed to court public opinion. Somewhat differently, in place of holding the idea of a party as illegitimate, Bayard eschewed the notion of using public opinion as the basis for the Federalists Party. Rather, the Federalists would rely on their own political fortunes and prominent members: "We have the greater number of political Calculators and they [the Democratic-Republicans] of political fanaticks [sic]."[280] While Hamilton was urging the Federalists to change their relationship with public opinion, other members were intent on distancing themselves from public sentiment by continuing to rely on the perceived individual characteristics and merits of their candidates. The Federalists, however, were running short on notable names, and they refused to promote candidates beyond their strongholds in New England. As a result, as they approached the first presidential election as an opposition party, the Federalists put themselves at a severe disadvantage in their ability to challenge the popular incumbent Thomas Jefferson.

The Federalist Party as a Diminished Opposition

The Federalist Party would ultimately lack electoral effectiveness because they refused to court public opinion, and they did little to secure electoral outcomes outside of

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[280] Quoted in Thomas J. Fleming, *Duel: Alexander Hamilton, Aaron Burr, and the Future of America*. (Basic Books, 1999), pp. 11

New England. And, because political parties were still in their infancy, the prestige of the candidate and not the party label served as a heuristic for voters. In prior elections, the Federalists had national success because they were associated with names like George Washington and John Adams, heroes of the American Revolution. Their candidate in 1804, Charles Pinckney, hardly carried the prestige and national renown as a George Washington or Thomas Jefferson. Moreover, the Federalist Party was still associated with the failures of the previous administration. As such, if the Federalists were going to challenge the Democratic-Republicans, they would have to find a name equal to that of Thomas Jefferson to place on their ticket, and one whose prominence could overcome the unpopularity of their party's name. Unfortunately, many of the more notable Federalists were only prominent in New England, and they refused to enter the fray of electoral politics. For example, Fisher Ames, who had been dedicating his efforts to the Federalists' cause, finally declared in 1803 that he would "not be a Tom Paine on the federal side" as he renounced "the wrangling world of politics, and [devoted himself] in future to pigs & poultry."[281] Indicative of this lack of notable leadership capable of garnering national support, by 1812, the Federalist failed to run a member of their own party in the presidential election.[282] And, in 1816, Rufus King would be the last

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[281] Fisher Ames to Oliver Wolcott, March 9, 1803 in Oliver Wolcott, Jr., Papers

[282] In 1812, the presidential election was between the incumbent president James Madison and DeWitt Clinton from New York. DeWitt Clinton was a dissident Democratic-Republican, and the Federalists chose him as their presidential candidate rather than nominating someone from their own party organization and leadership.

Federalist on the presidential ticket as, in 1820, Democratic-Republican James Monroe ran unopposed.

Additionally, the Federalists choice to pursue other political means, such as secession, to challenge the Democratic-Republicans thereby further diminished their electoral effectiveness. In late 1803, in the place of Hamilton's proposed electoral strategy, Timothy Pickering began to organize and lead a Federalist plot to create a "Northern confederacy" that would "unite congenial characters, and present a fairer prospect of public happiness." And, Pickering predicted this separation would be mutually beneficial for the Northern and Southern States because "mutual wants would render a friendly and commercial intercourse inevitable."[283] The Southern States would require the Northern States' naval protection; for commerce and navigation, the Northern States would require the products of the Southern States. Numerous Federalists members of Congress joined Pickering, and efforts in the upcoming elections were focused on Federalists winning key congressional seats in New England rather than the presidency. The Federalists also believed that, for their plan to be successful, they would need New York to be the center of their Northern confederacy. For Pickering calculated that Massachusetts, Connecticut, and New Hampshire would be welcome participates. But, if New York joined, so would Vermont, New Jersey, and Rhode Island. To capture New York, Vice President Aaron Burr, who knew he would be dropped as Jefferson's running mate in the upcoming election, joined the Federalists and would content for New York's gubernatorial seat. If elected, Burr would lead New York and other New England legislatures in dissolving the current Union that was corrupted by Jefferson and his "blind

[283] Timothy Pickering to George Cabot, January 29, 1804.

worshippers". In other words, while the Federalists maintained a semblance of a responsible opposition, they began to sow the seeds of secession, and many members of the Federalist Party would ultimately abandon their efforts of electoral effectiveness in favor of this divisive alternative.

In 1804, the Federalists' efforts to create a Northern confederacy were ultimately futile, and their inefficiency as an opposition party resulting in a landslide reelection for President Jefferson. Pickering had severely overestimated support in New England as the Federalists lost in many of the state legislative races thereby placing Democratic-Republicans in the majority.[284] Adding further to the failure, Burr lost the New York gubernatorial race and any chances at New York leading the secession efforts. After losing the New York election, Burr would return to serve the remainder of his term as vice president only to have Jefferson and the Democratic-Republicans distance themselves from him. Subsequently, the ineffective Federalists fared even worse in the presidential election as their nominee Charles Pinckney would only carry two states and fourteen total Electoral College votes. On the other hand, President Jefferson received 162 Electoral College votes including the majority of votes from the New England states. This is to say that, because the Federalists were ineffective as an opposition, the

[284] See Kevin M. Gannon, "Escaping 'Mr. Jefferson's Plan of Destruction': New England Federalists and the Idea of a Northern Confederacy, 1803-1804", *Journal of the Early Republic*, Vol. 21, No. 3 (Autumn, 2001), pp. 413-443; Charles Raymond Brown, *the Northern Confederacy According to the Plans of the "Essex Junto." 1796-1814* (Princeton, 1915).

Democratic-Republicans convincingly won elections at both the state and national level and further solidified their control over national policy.

The Federalist ineffective campaign efforts and failed attempt at a Northern confederacy in 1804 would continue to diminish their electoral effectiveness. With little to no opposition during the election, Jefferson understood his convincing reelection as a validation of both his principles declared in his first inaugural and his (and the Democratic-Republicans') actions during his first term, including the Louisiana Purchase.[285] Jefferson used the occasion to further solidify the place of public sentiment in a constitutional democracy. In this way, by making the president more democratic, the Federalists would be further disadvantaged in elections if they did not, as Hamilton had advocated, pay attention to public opinion. Given this development, a legitimate opposition would become all the more important for politics. As Robert A. Dahl argued, the presidential appeal to the public was nothing more than a tool to obscure the realty that the pseudo-democratic president is really an imperial one.[286] Accordingly, scholarship has responded by addressing ways in which the imperial president can be

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[285] See Jeremy D. Bailey, *Thomas Jefferson and Executive Power* (New York: Cambridge University Press, 2007). Specifically, chapter 8 in which Bailey correctly argues that the Twelfth Amendment was to ensure Jefferson could unequivocally claim public support for his use of executive power and his performance as president.

[286] Robert A. Dahl, "The Myth of the Presidential Mandate," *Political Science Quarterly* 105 (1990): 355-372. See also Arthur Meier Schlesinger, *The Imperial Presidency*, (New York: Hougton Mifflin Company, 1973).

checked, if a check can be established at all.[287] Jefferson's approach to executive power provided an early method of checking presidential imperialism. During his 1804 reelection bid, Jefferson opened space for the public to assess his performance as president, particularly the Louisiana Purchase, and a political opposition could have reprimanded Jefferson for his use of prerogative and settled the constitutionality of the Louisiana Purchase differently. The Twelfth Amendment was a crucial development in this process because the Federalists taking control of the vice-presidency would not have provided the necessary check on Jefferson's executive power. The only legitimate check on executive power would have been if the opposition, supported by majority will, had been able to capture the executive branch. As such, having a legitimate opposition is one effective way to check a pseudo-democratic, imperial president, especially when the courts or congressional opposition led by legislative elites are unable to do so.

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[287] See Benjamin A. Kleinerman, *The Discretionary Presidency: The Promise and Peril of Executive Power*, (Lawrence, KS: University of Kansas Press, 2009). Kleinerman argues that the judiciary branch cannot successfully check presidential prerogative because the Court, more often than not, will defer to the executive branch. Accordingly, the constitutional solution to the president's extra-constitutional power is legislative elites capable of altering the public to abuses of constitutional powers by the executive. Kleinerman's solution, then, relies on these legislative elites to counter the president's appeal to the public by making one of their own. See also Harvey C. Mansfield, Jr., *Taming the Prince: The Ambivalence of Modern Executive Power* (Baltimore, MD: Johns Hopkins University Press, 1993). Counter to Kleinerman, Mansfield is less optimistic about checking presidential prerogative.

The Federalists' Illegitimate Opposition

With little prospect of winning an election outside of their diminishing New England strongholds, the Federalists would never again become an effective opposition. The final stage of the Federalists' demise would come at the conclusion of the War of 1812 because they would no longer offer a responsible alternative to the Democratic-Republicans' mode of governance. The politics of 1812 offered the Federalists an opportunity to establish a responsible opposition by opposing the Democratic-Republicans' war with England, which was opposed by groups across the nation other than the Federalists.[288] And, although still sectional, the Federalists managed to strengthen their numbers in the both state legislatures and Congress.[289] Importantly, the Federalists were able to regain control of Massachusetts' gubernatorial seat and the General Court, which they had lost to the Democratic-Republicans in 1806. Once war was declared, the newly elected Massachusetts governor Caleb Strong became an

[288] Morison, Samuel Eliot. 1968. "Our Most Unpopular War." *Massachusetts Historical Society Proceedings*, 80: 38-54.

[289] By winning elections in New England and part of upstate New York, the Federalists had managed to almost double their representation in Congress. Despite these modest gains, the Federalists still, however, only constituted roughly one-third of the total members Congress. See Norman K. Risjord, "Election of 1812." *History of American presidential elections* 1968 (1789): 249-272.

outspoken opponent of President Madison and the war.[290] As a result, the Federalists, and those opposed to the war, began to unify around fundamental principles. In other words, as long as the Democratic-Republicans continued their war efforts, the Federalists maintained a position as a responsible opposition, even if they would not be able to, based on their opposition, immediately be effective in national elections. However, the end of the war would quickly result in the Federalists losing their ability to responsibly oppose the Democratic-Republicans, and their choice to hold the Hartford Convention would ultimately hinder any further prospects of electoral effectiveness.

In place of using their success opposing the War of 1812 to make further electoral progress, the Federalist organized the Hartford Convention, an extralegal convention which would further alienate the Federalists from the electorate. While work on the Convention is scarce, scholars have provided various interpretations of the purpose for

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[290] See Donald R. Hinkey, "New England's Defense Problem and the Genesis of the Hartford Convention," *The New England Quarterly*, Vol. 50, No. 4 (Dec., 1977), pp. 587-604. Specifically, Governor Strong, along with Governor Roger Griswold of Connecticut and Governor William Jones of Rhode Island, declined to fulfill the Democratic-Republicans requisition of New England's militia. The three governors constitutionally justified their refusal to send their militias because, according to the Constitution, the national government could not call upon the state militias unless the country had been invaded or if invasion was imminent, and, according to the governors, neither situation existed. Accordingly, Hinkey uses this point to argue that the Hartford Convention was primarily called as a means of ensuring they would have the necessary troops and resources to protect New England.

which the Federalists called the convention. In general, early explanations for the Convention tend to view it as part of the Federalists' continued efforts to create the "Northern confederacy" through secession.[291] Later explanations frame the Convention in terms of protecting New England's place within the Union by proposing constitutional amendments.[292] More recent studies have emphasized the role the Convention would have in determining the nature of the Federalist Party as the meeting would serve as a way for Federalist leadership to avoid extremism and the false perception that they were secessionists.[293] For the purpose of understanding the Federalists' efforts as an

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[291] John Quincy Adams to Harrison Gray Otis et al., December30, 1828, and J. Q. Adams, "To the Citizens of the United States," [1829], in Henry Adams, Editor, *Documents Relating to New-England Federalism*, 1800-1850 (Boston, 1877), 56, 221, 238, 245, 265. Also Henry Adams, *History of the United States during the Administrations of Jefferson and Madison* (New York, 1889-1891), VIII, 4-7, 297.

[292] Samuel Eliot Morison, *The Life and Letters of Harrison Gray Otis, Federalist, 1765-1848* (Boston and New York, 1913), 11, ch. XXIV; Morison, *Harrison Gray Otis, 1765-1848: The Urbane Federalist* (Boston, 1969), ch. XVII.

[293] James M. Banner, Jr., *To the Hartford Convention: The Federalists and the Organization of Party Politics in Massachusetts, 1789-1815* (New York: Alfred A. Knopf, 1970). Of particular note is the absence of Timothy Pickering from the Convention. As the leader of the plan to create the "Northern confederacy" through secession, Pickering was not invited to the Convention perhaps as a way of excluding perceived extremists from the Federalist Party. See also J.C.A. Stagg, *Mr. Madison's War: Politics, Diplomacy, and Warfare in the Early American Republic, 1783-1830*

opposition party, the preliminary understanding of the Convention as a plot to secede are most relevant because it was the public perception of the Convention that would determine the Federalists' future electoral viability. Somewhat differently, the Federalists would potentially suffer in upcoming national elections if the public perceived the Convention as the means of seceding from the Union. Although those in New England, including numerous New England newspapers, praised the Convention for its moderate proposal and its "high character of wisdom, fairness, and dignity," those outside of New England did not view it as such.[294] Unfortunately for the Federalists, outside of New England, the Convention was seen for its original purpose when a joint committee in the Massachusetts legislature led by Harrison Gray Otis proposed it: "a radical reform in the national compact."[295] And, even if the Federalists were attempting to formulate a more moderate, non-secessionist response to the War of 1812, the public would perceive it as an extralegal attempt to illegitimately undermine the national government and the Union.[296]

(Princeton, NJ: Princeton University Press, 1983). Stagg agrees with Banner and that those at the Convention were not attempting to commit treason, and Stagg emphasizes the Federalists' efforts to avoid secession by excluding extremists like Timothy Pickering from the proceedings.

[294] See Banner, *Hartford Convention*, pp. 343-8. The quotation is from Timothy Pickering, quoted on pp. 346.

[295] *Columbian Centinel*, October 12, 1814.

[296] The Federalists' proposals, however, were moderate only in the sense that they considered them proposals. The content of the proposals would radically restructure the

Shortly after the Hartford Convention, the Federalists' anti-war platform would be eliminated with the negotiation of peace with England, and the end of the war ended the Federalists means of being a responsible opposition. Moreover, having never achieved effectiveness, the loss of responsibility would make the Federalists an illegitimate opposition that would eventually disappear from the political scene. Having created a report of the Hartford Convention, including essential constitutional amendments, Governor Strong arranged for a three-person committee of Harrison Gray Otis, Thomas H. Perkins, and William Sullivan to travel to provide President Madison with a summary of the Convention's proposals/report. Unfortunately, on February 14, a day after the committee arrived in Washington, a peace treaty was negotiated and signed thereby ending the war. With the majority of the grievances expressed in the Hartford Convention report being related to the war, the Federalists lost the central piece of their opposition to the Democratic-Republicans' governing principles and policy. The Federalists recognize that the end of the war meant their efforts against the Democratic-Republicans would be futile, and the war's termination signaled a "glorious opportunity for the Republican party to place themselves permanently in power."[297] Had the war persisted, Otis believed the Federalists would have succeeded: "I believe however we should have succeeded and that the little Pigmy [President Madison] shook in his shoes at

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constitutional system. Moreover, while the proposals did not specifically mention plans to secede and create the "Northern confederacy", nullification and secession were implied if the War of 1812 persisted.

[297] Joseph Story to Nathaniel Williams, February 22, 1815, in William W. Story, ed., *Life and Letters of Joseph Story* (Boston, 1851), 1: 254.

our approach."[298] Making matters worse for the floundering opposition, the New England Federalists had spent the war trying to undermine the Democratic-Republicans' war efforts, and their demands to end the war would have essentially favored England, who New England merchants had been trading with throughout the war. The Federalist Party had become completely discredited by losing effectiveness and responsibility. In this way, the end of the Federalists was a result of the public's discontent with the Federalist Party and not general anti-party sentiments. The Federalists' illegitimate opposition would result in one-party politics until the Democratic-Republicans experienced a party fracture and a new opposition would arise to compete and strive for legitimacy.

Conclusion

In general, the history of the Democratic-Republicans and the Federalists is rarely utilized as a source to understand modern political parties. For the most part, because of their institutional development, modern political parties are considered too far removed from these early parties to render any useful information directly applicable to modern party principles and organization. Furthermore, scholars maintain that early party practices were, at best, a necessary albeit temporary evil whereas modern political parties perpetually help make democracy viable. Looking for reoccurring patterns of political opposition, however, brings the Democratic-Republicans and Federalists closer to their modern counterparts. Framing political parties in terms of a legitimate opposition reveals

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[298] Harrison Gray Otis to Mrs. Harrison Gray Otis, February 22, 1815, in *Harrison Gray Otis Papers*.

many similarities between the Democratic Republicans and the Federalists as well as between later iterations of parties in their modern form. All opposition parties, in order to gain legitimacy, must achieve effectiveness and responibleness, whether or not they win an election. This is to say that all political parties in the minority, no matter the era, will face the same task of gaining legitimacy through appropriate political processes.

Within the first party era, the Democratic-Republicans and the Federalists followed a similar trajectory in their preliminary efforts to act as a political opposition. It was, however, the Federalists' inability to adhere to the evolving political norms and accepted methods of opposition that hastened their exit from the political arena. As outspoken members of the opposition, both Thomas Jefferson and Timothy Pickering advocated secession as a preliminary response to a growing national government (although Jefferson never politically endorsed secession). Similarly, both the Democratic-Republicans and the Federalists also considered challenging the party-in-office through means of state convention. As an opposition party, the Democratic-Republicans distinguished themselves from the Federalists in that the former followed developed acceptable electoral alternatives when their preliminary plans were perceived as illegitimate and extra-constitutional. By ultimately remaining committed to illegitimate political strategies, the Federalists failed to replicate the Democratic-Republicans success and never became a legitimate opposition primarily because they never embraced the electoral strategy that allowed the Democratic-Republicans to take office. Moreover, early in the parry era, the Federalists benefited from the patrician politics of the time. With George Washington winning unanimous presidential elections, the Federalists enjoyed the electoral advantage of prominent names carrying their

electoral tickets. However, after Alexander Hamilton effectively removed John Adams from the party (and presidency), George Washington's death, and Hamilton's own death, the Federalists were left with no prominent name to match the rising popularity of Thomas Jefferson. Exacerbating the problem was the War of 1812 in that all notable war heroes, including Andrew Jackson, came from the Democratic-Republicans. Put slightly differently, the Federalists never adhered to and were unable to capitalize on the emergent structures of party action that, in the end, brought the Democratic-Republicans repeated electoral success.

Perhaps more important than the strategies adopted by the opposition party is the content of their opposition. Specifically, when each party served as an opposition, each party defended states' rights. This development indicates a pattern in the particular character of the party-in-government and the nature of an opposition party. For "those who have the power may feel an inclination to abuse it, for it begets in itself a spirit somewhat wanton, unjust, and oppressive. Men may feel power and forget right."[299] In this way, no matter the political era, the opposition party maintains the important role of providing a check on the party-in-government. The manner in which an opposition party differs from other institutions, like the Supreme Court, charged with protecting rights. As an institution, the Court has assumed the contemporary role of protecting a minority from an overbearing majority. For some scholars, then, the Supreme Court acts as a countermajoritarian institution when exercising its responsibility to protect minority

[299] Proceedings and Debates of the Convention of the Commonwealth of Pennsylvania. Constitutional Convention, 1837-39, Vol. 3 (Pennsylvania State University Libraries), pp.408.

rights thereby raising a problem for democratic theory.[300] A political opposition, however, can protect minority rights through majoritarian, electoral means because in order for the opposition to successfully check an oppressive party-in-government, it must do so by achieving legitimacy, or effectiveness and responsibleness, within the emergent structures of a given party era.

Overall, when framed using the concept of opposition, the experiences of the Democratic-Republicans and the Federalists can inform contemporary party politics. Of particular importance is the interaction between the reoccurring patterns of political opposition and the emergent structures that define party practices in a particular era. And, while the political norms that ultimately shape the actions available to political parties vary across political eras, the concepts of effectiveness and responsibleness—what makes an opposition legitimate—are applicable within and across party eras. This study, then, introduces the possibility of understanding political parties in American political development anew by searching for and understanding the emergent structures of party norms, particularly constitutional ones, and the reoccurring patterns of political opposition.

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[300] See Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Bobbs-Merrill Company, Inc., 1962). Since then, scholars have responded by challenging the countermajoritarian thesis. See, for example, Keith Whittington, "'Interpose Your Friendly Hand': Political Supports for the Exercise of Judicial Review by the United States Supreme Court." *The American Political Science Review,* Vol. 99, No. 4, (November 2005).

Chapter 5: Constructing a Majority Will in Competitive Elections: Determining the Rules for Electoral College Vote Distribution

"Each State shall appoint in such Manner as the Legislature therof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress."

Article II, Section I

"The electoral college method of electing a president of the United States is archaic, undemocratic, complex, ambiguous, indirect, and dangerous."

American Bar Association

Previous scholarship has rightly linked the Twelfth Amendment to the emergence and development of political parties.[301] However, the story and purpose of the amendment is incomplete without connecting it to the Electoral College and the method of selecting electors and allocating their votes. The framers of Twelfth Amendment intended for it to ensure that the results of the House contingency election reflected the popular will, and reducing the number of candidates on the House ballot was a means of further eliminating the possibility of the House selecting a minority candidate. In this regard, the amendment can be understood, in part, as the means of securing Thomas Jefferson's (and his opposition party's) political legitimacy by connecting the opposition

[301] See Tadahisa Kuroda, *The Origins of the Twelfth Amendment: The Electoral College in the Early Republic, 1787-1804* (Westport, CT: Greenwood Press, 1994); James W. Ceaser, *Presidential Selection: Theory and Development* (Princeton, Princeton University Press, 1979).

party with the will of the people. Put differently, the amendment has important implications for a legitimate opposition because the legitimacy of an opposition's ascension to and exercise of political power will be problematic if the party is unable to claim popular support. Unfortunately, the amendment alone could not ensure this result as the public will was only manifest through the Electoral College, and without accounting for how electors were determined and their votes allocated, the House could still select a candidate who did not receive the greatest number of Electoral College votes. In this way, the development of a legitimate opposition is closely related to the Twelfth Amendment and, importantly, the electoral rules determining elector selection and Electoral College vote allocation because an opposition is only legitimate if it has real possibilities for winning an election and if the opposition's ascent to power is in accordance with popular will. In this way, even after the Federalist Party had all but vanished from national politics, political actors were still creating rules to refine the system of competing political parties in competitive elections.

This relationship between the Electoral College and popular will became a central issue after the election of 1824 when the House selected John Quincy Adams over Andrew Jackson in the contingency election even though Jackson received more Electoral College votes. As a consequence, supporters of Andrew Jackson who believed he truly won the 1824 election proposed a constitutional amendment in 1826 to abolish the Electoral College (and Twelfth Amendment) and change the mode of presidential election to popular selection.[302] The nature and construction of a national majority was

[302] This was not the first time an amendment was proposed to alter the Electoral College. For example, in 1817 an amendment was proposed requiring the district election of

the central point during the congressional debates as participants struggled with the meaning and place of democracy in a constitutional republic. In this way, the debates provide an important political construction of constitutional meanings regarding presidential elections thereby producing norms needed to govern political institutions related to the election process.[303] In other words, the political participants in the debates infused the discussion of presidential selection with political principles and social concerns that framed and, in turn, constrained future debates on the merits of the accepted mode of the election process. Regarding presidential selection, these debates would determine if the Electoral College would survive in American politics. Furthermore, if the Electoral College was to be a sustainable institution, advocates of the system would have to defend its continued use and existence by connecting its function to the purpose of the presidential election. In this way, the crisis of 1824 forced participants in the

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presidential electors as a way to eliminate the variation in selection based on political expediency. Proponents of the amendment believed it would be more democratic while opponents claimed the district system would result in undemocratic gerrymandering. See John B. McMaster, *A History of the People of the United States* (New York: D. Appleton and Company, 8 vols., 1883-1913), vol. IV, pp. 369-370. I have chosen to focus on 1826 as this amendment was proposed following the failure of the system to select the candidate with the most votes (both popular and electoral). In this way, the purpose of, and debates concerning, the amendment are more relevant for the topic of legitimate opposition.

[303] See Keith Whittington, *Constitutional Construction: Divided Powers and Constitutional Meaning* (Cambridge: Harvard University Press, 2001).

debates to ask important questions about the relation between democracy and constitutionalism, questions immediately relevant to contemporary American politics: why was the Electoral College adopted and why should it continue to be used?

The Electoral College is no stranger to criticism as political scientists, historians, and legal scholars have consistently listed the institution when discussing the undemocratic features of the Constitution.[304] Moreover, those critical of the institution tend to emphasize that the "Electoral College was cobbled together nearly at the last minute and adopted not because the framers believed it would work, but because it was less objectionable than two more obvious alternatives: election of the president by the people or by Congress…. It had no positive advantages of its own."[305] For these scholars, the institution fails because of its tendency to violate political equality and majority rule, and the indirect presidential selection by electors needs to be replaced by a

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[304] See George C. Edwards III, *Why the Electoral College is Bad for America* (New Haven: Yale University Press, 2011); Robert A. Dahl, *How Democratic is the American Constitution* (New Haven: Yale University Press, 2003); Bruce Ackerman, *The Failure of the Founding Fathers: Jefferson, Marshall, and the Rise of Presidential Democracy* (Cambridge: Belknap Press of Harvard University Press, 2007); Jack Rakove, "Presidential Selection: Electoral Fallacies," *Political Science Quarterly*, Spring 2004, vol. 119, 1, pp. 21-37; Jack Rakove, *The Unfinished Election of 2000: Leading Scholars Examine America's Strangest Election* (New York: Basic Books, 2002); Sanford Levinson, *Our Undemocratic Constitution: Where the Constitution Goes Wrong (And How We the People Can Correct It)* (New York: Oxford University Press, 2008).

[305] Jack Rakove, "The Accidental Electors," *New York Times*, December 19, 2000.

direct, popular election to comply with modern definitions of democracy and attain "democratic values."[306] Furthermore, according to George Edwards, there is little to no substantially informed debate over the Electoral College because "supporters…are extraordinarily insouciant about their claims on its behalf. They virtually never marshal data systematically or evaluate supposed benefits rigorously. Nor do they cite relevant literature. Instead, they make assertions."[307] Edwards, then, insists on directly and systematically answering the same questions asked during the 1826 debate: why was the Electoral College adopted and does it warrant a continued role in American democracy?

Before making his normative claim against the Electoral College, Edwards addresses what he views as "one of the most serious assertions in opposition to abolishing

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[306] Robert A. Dahl, *How Democratic is the American Constitution* pp. 3. See also chapter 4 in which Dahl argues the United States' mode of presidential selection by means of an Electoral College fails to fulfill the requirements of democracy compared to other democratic nations. Following Dahl, George Edwards III, also attacks the Electoral College for its antidemocratic design and violation of political equality in that certain states' votes (and the votes of voters living in those states) matter more than others. Moreover, in the Electoral College, there is an inequality in representation between large states and small states because each state is automatically granted two votes according to representation in the Senate. See George Edwards III, *Why the Electoral College is Bad for America*.

[307] George Edwards III, *Why the Electoral College is Bad for America*, pp,10-11.

the electoral college," the need to preserve the federal system.[308] Regarding the federal system, Judith Best argues that replacing the Electoral College with a direct election would "deform our Constitution" because it would be a serious "implicit attack on the federal principle" as "the electoral vote system is the very model of our federal system."[309] In this way, Best challenges critics, like Edwards, who claim the Electoral College has no positive advantages and any motives the framers of the Constitution had for adopting the system are simply irrelevant for contemporary politics.[310] In response to these arguments, Edwards dismisses the connection between the Electoral College and

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[308] George Edwards III, *Why the Electoral College is Bad for America*, pp.167. Edwards also address other ways in which individuals have defended the Electoral College such as the need to protect state interests, to maintain cohesion, and to preserve the party system.

[309] Judith Best and Thomas E. Cronin, *The Choice of the People?: Debating the Electoral College* (New York: Rowman & Littlefield Publishers, 1996), pp. 55; 7. See also James R. Stoner Jr., "Federalism, States, and Electoral College," in Gregg, *Securing Democracy*, pp. 51-52; Larry J. Sabato, *A More Perfect Constitution* (New York: Walker, 2007); Tara Ross, *Enlightened Democracy: The Case for the Electoral College* (Dallas: Colonial Press L.P., 2012).

[310] For example, in *Presidential Selection*, James W. Ceaser attributes the acceptance of the Electoral College to variations in states' suffrage laws and slavery. Others, such as George Edwards III, Jack Rakove, Robert A. Dahl, Sanford Levinson, and Bruce Ackerman contend the framers adopted the proposed Electoral College as a desperate, last minute attempt at compromise due to fatigue and impatience and the desire to get the proposed Constitution to the states for ratification.

federalism by arguing the presidency has nothing to do with the federal system because the executive office is the "one elective part of the government that is designed to represent the nation as a whole." Moreover, Edwards asserts the founders did not design the Electoral College based on the federal principle, and the College "does not enhance the power or sovereignty of the states."[311] As a result, scholars have come to conflicting conclusions regarding the function of the Electoral College despite using the same historical records, and an unresolved question remains regarding the relationship between the system of presidential selection and federalism.

The relationship between the mode of presidential selection and the federal system can be clarified by systematically returning to the foundation and early developments of the presidential selection system. In other words, for Edwards to be right, the political actors involved in designing the system could not have fully considered their work in terms of federalism and state sovereignty. Unfortunately, history does not support Edwards' claims. Specifically, Edwards narrows his focus to the way presidential representation undermines the "federal" part of the Electoral College ratio – what James Madison described in *The Federalist* No. 49 as party federal and party national.[312] What Edwards misses, then, is the federalism requirement stated in Article II Section I in which the states are empowered to choose how electors are chosen. The historical record is clear: the Electoral College was designed with the intent of reserving

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[311] George Edwards III, *Why the Electoral College is Bad for America*, pp. 167-168

[312] See Alexander Hamilton, James Madison, and John Jay, *The Federalist: A Commentary on the Constitution of the United States*, ed. Robert Scigliano (New York: Modern Library, 2000). From here on, *The Federalist*.

power to the states by constitutionally establishing the states' plenary power in determining the mode of presidential elector selection. Consequently, after ratification, any alterations to the system had to account for the states' constitutional role in the election process, and, importantly, subsequent developments defined rather than eliminated this important state function. This is to say that the Electoral College was designed with the intent to divide sovereignty between the national government and the various state governments, and Article II, Section I enhances state sovereignty by placing the responsibility to determine elector selection solely with the states.

James Wilson, a delegate at the constitutional convention, described the decision regarding presidential selection as "[one] that has greatly divided the House and will also divide the people out of the doors. It is in truth the most difficult of all on which we have had to decide."[313] Despite Wilson's proclamation, Alexander Hamilton would later argue "the mode of appointment of the Chief Magistrate of the United States is almost the only part of the system…which has escaped without severe censure…. I venture somewhat further, and hesitate not to affirm that if the manner of it be not perfect, it is at least excellent."[314] Hamilton's praise of the electoral system was short lived as elections without George Washington proved problematic. Indeed, as Wilson predicted, subsequent elections without Washington politically divided the people and caused many political actors to reevaluate the mode of presidential selection and the decisions made at the constitutional convention to determine if the mode needed to be altered. To fully

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[313] James Madison, *Notes of Debates in the Federal Convention of 1787*, ed. Adrienne Koch (New York: W.W. Norton, 1969) pp. 578. From here on, *Debates*.

[314] *The Federalist* No. 68, pp. 435.

reevaluate the system, special attention had to be giving to the decisions made during the convention so as to understand the purpose behind the electoral design and, importantly, what the delegates wanted to prevent by creating the system of presidential electors. Returning to the debates at the convention, the fundamental division over presidential selection was between an election by Congress and an election by the people. The proposal for congressional election was ultimately rejected as the delegates adopted provisions for presidential selection by the people mediated by electors, and central to this system was the role states were given in determining the mode of elector selection. Furthermore, the Twelfth Amendment, keeping with the decision at the convention, attempted to keep presidential selection out of congressional control.[315] In other words, the development of presidential selection centered on refining a system that aimed to keep presidential elections out of Congress while maintaining the role of the people and the separate states within the process.

The Constitutional Convention

At the convention, debate over the mode of presidential selection officially began as plans were presented to rectify deficiencies in the Articles of Confederation. The two most prominent proposals, traditionally known as the "Virginia Plan" and the "New Jersey Plan", both viewed the lack of a "National Executive" as a major deficiency in the Articles of Confederation. Moreover, both plans proposed that the "National Executive"

[315] More to the point, even if the presidential election was thrown to the House for a contingency election, the rules established by the Twelfth Amendment aim to secure that the results of the House election reflect popular will.

be selected by the "National Legislature". One possible explanation for the delegates' initial preference for a congressional selection of the executive was the general desire to avoid tyranny. And, under this general desire, separate coalitions of delegates formed to eliminate two distinct sources of tyranny based on previous experience: the British monarchy (the New Jersey Plan) and the separate states under the Articles of Confederation (the Virginia Plan). Regarding the former source, fearing a monarchical president, the congressional selection of the executive was a measure of security as, according to Roger Sherman, this mode would ensure the president was "absolutely dependent on that body, as it was the will of that which was to be executed. An independence of the Executive on the supreme Legislature, was…the very essence of tyranny."[316] In other words, certain delegates feared executive power and began to devise measures to ensure the president did not become an oppressive monarch with a will separate to that of the legislature.[317] Being less concerned with executive tyranny,

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[316] *Debates*, pp. 48.

[317] I would argue that those who supported the New Jersey plan were concerned about this form of executive tyranny. The classification of tyranny as executive independence from the legislature came shortly after a preliminary debate on the number of individuals who would constitute the executive. Roger Sherman expressed his preference for having a plural executive because he considered "the Executive magistracy as nothing more than an institution for carrying the will of the Legislature into effect, that the person or persons out to be appointed by and accountable to the Legislature only, which was the depository of the supreme will of the Society. As they were the best judges of the business which ought to be done by the Executive department, and consequently of the number necessary

for those supporting the Virginia Plan, the congressional selection of the president was preferred as a means of circumscribing state authority. In general the Virginia Plan sought to "establish a national policy making system independent of the state governments and armed with most of the authority to govern the national economy."[318] Since the Virginia's plan design was to replace the deficient Articles of Confederation with a system of governance that would function effectively at the national level, the states' role in the government needed to be minimized so as to avoid the previous vices produced by the confederation of states "[jealous]…with regard to their sovereignty."[319]

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from time to time for doing it, he wished the number might not be fixed but that the legislature should be at liberty to appoint one or more as experience might dictate" (*Debates*, pp. 46). In other words, the multi-person executive coupled with selection by the legislature was a preliminary attempt at circumscribing and checking executive power thereby preventing the institution of a monarchy. Subsequently, this line of reasoning persisted throughout the constitutional convention and ratification debates as a single, energetic executive raised concern, particularly for the Anti-Federalists. See Herbert J. Storing, *What the Anti-Federalists Were For*, ed. Murray Dry (Chicago: University of Chicago Press, 1981); *The Anti-Federalist Writings of the Melancton Smith Circle*, ed. Michael Zuckert and Derek Webb (Liberty Fund, Inc., 2009); *Paulina* Maier, *Ratification: The People Debate the Constitution, 1787-1788* (New York: Simon & Schuster, 2010).

[318] David Brian Robertson, *The Constitution and America's Destiny* (New York, Cambridge University Press, 2005), pp. 20.

[319] *Debates*, pp. 29.

In this way, because the states had proven their inability to produce sound national policy, their role in the new national government would need to be minimized by removing their ability select those charged with the execution of national law.[320] Put differently, the solution to the insufficient Articles of Confederation was a federal government in which the states would have limited influence in the national sphere. As a result, the election of the "National Executive" by the "National Legislature" was a means of overcoming two separate forms of governmental tyranny; although most delegates initially agreed on this mode of selection, they agreed for different reasons. And, as the delegates began to adopt other proposition, these differences would alter this initial agreement thereby leaving the system of presidential selection unsettled. Somewhat differently, the departure point for the debate regarding the mode of presidential selection at the convention would be the initial preference for a congressional election. However, the mode of presidential selection would become intertwined with determining congressional representation and the nature of the executive and legislature would determine the relationship between the two branches.[321]

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[320] More to this point, the Virginia Plan also minimized the states' role in selecting members of Congress as the "members of the first branch of the National Legislature ought to be elected by the people of the several State." And, the "first branch" would then elect members of the second branch based on "a proper number of persons nominated by the individual Legislature" (*Debates*, 31).

[321] On the relationship between presidential selection and presidential character, see James W. Ceaser, *Presidential Selection: Theory and Development*, (Princeton: Princeton University Press, 1979).

In response to the Virginia plan, and as an alternative to congressional selection, James Wilson proposed selection by popular vote. Wilson, "in theory…was for an election by the people [because] experience, particularly in N. York & Mass., shewed that an election of the first magistrate by the people at large, was both a convenient & successful mode," and this mode "would produce more confidence in among the people in the first magistrate."[322] Importantly for Wilson, this method of selection would produce a president of a particular character: "the objects of choice in such cases must be persons whose merits have general notoriety."[323] In addition to presidential character, another substantial benefit to election by the people is establishing the necessary relationship between the executive and the legislature. For Wilson, and many other delegates against a congressional election, an election by the people would provide the foundation for the separation of powers: Wilson "wished to derive not only both branches of the Legislature from the people, without the intervention of the State Legislatures but the Executive also; in order to make them as independent as possible of each other, as well as of the States."[324] All this is to say that the mode of presidential selection would determine the character of the executive, and Wilson preferred an executive chosen by the people who would be independent of the other branches of government and the states.

On 2 June, Wilson officially made his proposal to establish an executive elected by the people. Wilson's resolution, however, did not include a proposal for a direct election. Rather, he devised a system based on districts and the beginnings of an

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[322] *Debates*, pp. 48; 50.

[323] *Ibid.*, pp. 48.

[324] *Ibid.*, pp. 49.

Electoral College. Accordingly, the states would be divided into districts with those who were qualified to vote for members of "the first branch of the national legislature"[325] selecting electors, or "members of their respective districts," to "elect by ballot, but not out of their own body…the Executive authority of the national Government."[326] Furthermore, Wilson's resolution did not provide the separate states with a role in selecting a president.[327] Put differently, Wilson's introduction of a district based Electoral College was a fundamental departure from selection by Congress, and, in general, Wilson preference was for a mode of presidential election that minimized the influence of the separate states in the process. Importantly, Wilson's proposal framed the ensuing debate over presidential selection by addressing both a proposed and potential system of electing an executive officer. In this way, Wilson attempted to modify the manner of selection proposed by Edmund Randolph (the Virginia Plan) by enlarging the role of the people in the separate states, and he made his opinion strongly known regarding any potential plans in which the separate states would be involved in presidential selection.[328] Contemporary criticism of the Electoral College typically

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[325] This would later become the House of Representatives.

[326] *Debates*, pp. 50.

[327] As Wilson stated, his plan favored an "election without the intervention of the States." (50)

[328] Perhaps Wilson had in mind a potential mode of presidential selection based on the Articles of Confederation. Given the circumstances in which the delegates were to "revise, correct, and enlarge" the Articles, it is plausible that an executive election system would be proposed in which, following the Articles of Confederation, the states would be

centers on the founders' preference for an undemocratic, indirect election by electors rather than a democratic, direct election by the people. Based on Wilson's proposal, however, the departure point for understanding presidential selection and the system that emerged from the constitutional convention was the distinction between a congressional election and an election by the people through an Electoral College. And, once William Patterson would introduce his plan (the New Jersey Plan), presidential selection by Congress would center more on state legislature and less on the people, the exact situation Wilson wanted to avoid. Moreover, compared to Randolph's plan, which only indirectly involved the people in electing the president, Wilson's "declarations in favor of an appointment by the people" were meant to enlarge the sphere of influence by the public and "produce more confidence among the people."[329] In other words, critics of the

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the primary agents in electing a president. More to the point, the later plan proposed by William Patterson (the New Jersey Plan) relied on Congress for presidential selection. Patterson's original plan, however, does not provide any indication of how Congress would be organized and members of selected. Since Patterson emphasized that "the articles of Confederation ought to be so revised, corrected & enlarged," Congress under the New Jersey Plan would follow the design of the Articles of Confederation in which the separate states retained sovereignty and the separate state legislatures elected members of Congress. If the New Jersey Plan was meant as an amendment to the Articles of Confederation, then the state legislatures would select members of Congress and the president would be selected by this Congress thereby placing the separate states at the center of the presidential selection system.

[329] *Debates*, pp. 49-50.

Electoral College miss just how democratic Wilson's proposal was compared to other modes of presidential selection.

After rejecting Wilson's alternative to the Virginia Plan's mode of presidential selection, on 15 June, William Paterson introduced the New Jersey plan which reintroduced the election of the president by Congress and changed the nature of debate.[330] Having rejected election by the people, a new question emerged: if Congress was to select the executive, how much power would each state have in electing the president? While the Virginia Plan and the New Jersey Plan both called for congressional selection, the answer to this question was in the how each plan proposed to configure Congress. Furthermore, these details would prove to be some of the most significant in the early stages of the convention compelling delegates to "sacrifice theoretical propriety to the force of extraneous considerations." And, according to Madison, the compromise between large and small states introduced a "fresh struggle" over "the greatest share of influence."[331] This is to say that before the delegates could determine presidential selection, they had to determine the composition of Congress. Subsequently, the decision to base the House of Representatives on proportional representation, including counting slaves as three-fifths of a free person, and the Senate on equal representation would have significant impact once the delegates returned to discuss the mode of presidential selection because selection by the House would yield drastically different results than selection by the Senate.

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[330] See *Debates*, pp. 119-120: "Resolved that the U. States in Cong. Be authorized to elect a federal Executive."

[331] *The Federalist* No. 37, pp. 227.

On 17 July, the discussion over presidential selection resumed with a return to the merits of an election by the people framed in terms of the newly determined distribution of state power in the national legislature. Gouvernor Morris spoke against selection by Congress comparing it to "the election of a pope by a conclave of cardinals," and, in this case, presidential selection would "be the work of intrigue, of cabal, and of faction [and]…real merit will rarely be the title of the appointment." Responding to Morris, Roger Sherman defended legislative selection as "the sense of the Nation would be better expressed by the Legislature, than by the people at large" because the public "will generally vote for some man in their own State, and the largest State will have the best chance for the appointment."[332] Adding to Sherman's position, Charles Pinckney argued that popular election would favor the larger states in selecting a president who would ultimately be biased in his proper execution of the law. Rather, "the Nat. Legislature, being most immediately interested in the laws made by themselves, will be most attentive to the choice of a fit man to carry them properly into execution."[333] Shortly after, the proposition for an election by the people rather than the Legislature was soundly defeated

[332] *Debates*, pp. 306.

[333] *Ibid*,, pp. 307. Hugh Williamson echoed Sherman's position: "The people will be sure to vote for some man in their own State, and the largest State will be sure to succeed." Williamson then pointed to a bigger problem the delegates would have to face: "This will not be Virg[inia] however. Her slaves will have no suffrage."

(9-1).[334] Immediately after this vote, Luther Martin, repeating Wilson's previous motion, moved that "the Executive be chosen by Electors appointed by the several Legislatures of the individual states. This resolution, without any further debate, was quickly defeated (8-2)[335] thereby reconfirming the delegates desire for congressional selection.

At this point in the convention, although delegates preferred a congressional election, the procedure for such an election had yet to be determined, and, in response to concerns over executive independence from the legislature, the issue of selection became connected to presidential reelection. The fundamental principle of a free government, according to Madison, was "that the Legislative, Executive, & Judiciary powers should be *separately* exercised, it is equally so that they be *independently* exercised," and a combination of the Executive and the Legislature would be "immediately & certainly dangerous to public liberty."[336] A congressional election, then, posed two serious problems: first, "It will hold [the executive] in such dependence that he will be no check on the Legislature, will not be a firm guardian of the people and of the public interest. He will be the tool of a faction, of some leading demagogue in the Legislature"[337] and

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[334] Massachusetts, Connecticut, New Jersey, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia all voted "nay" with Pennsylvania the lone "ay." (309).

[335] Massachusetts, Connecticut, New Jersey, Pennsylvania, Virginia, North Carolina, South Carolina, and Georgia all voted "nay" with Delaware, Maryland voting "ay". (309).

[336] *Debates*, pp. 326-327.

[337] *Ibid*., pp. 324.

second, "it will destroy the great incitement to merit public esteem by taking away the hope of being rewarded with reappointment."[338] This is to say that a congressional selection would result in what Alexander Hamilton referred to as "bad government" and a "feeble executive" because this mode of election would deprive the president of necessary "energy" and fail secure the "ingredients which constitute safety in the republican sense [which] are a due dependence on the people and a due responsibility."[339] As a result, if the delegates wanted the executive chosen by Congress, they had to reject the proposition of reelection; if the delegates wanted to secure the benefits and security of executive duration and reelection, they would have to abandon the proposition of congressional selection.

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[338] *Debates*, pp. 323-324.

[339] *The Federalist* No. 70, pp. 448. On this point, Hamilton argued, in *The Federalist* No. 71 that "There are some who would be inclined to regard the servile pliancy of the Executive to a prevailing current, either in the community or in the legislature, as its best recommendation. But such men entertain very crude notions, as well of the purposes for which government was instituted, as of the true means by which the public happiness may be promoted." Furthermore, "But however, inclined we might be to insist upon an unbounded compliance in the Executive to the inclinations of the people, we can with no propriety content for a like complaisance to the humors of the legislature. The latter may sometimes stand in opposition to the former, and at other times the people may be entirely neutral. In either supposition, it is certainly desirable that the Executive should be in a situation to dare to act his own opinion with vigor and decision" (458-459).

Legislative selection began to lose support due to the difficulties of executive independence from the legislature, and another proposal aiming at a compromise between a popular election and a congressional election was introduced. After returning to the "constitution of the Executive," Oliver Elseworth moved to replace congressional appointment with a system that allotted each state, based on population, one, two, or three "electors [to be] appointed by the Legislatures of the States."[340] This is to say that the larger states would be given three electoral votes while the smaller would be given one. While Wilson's previous motion for presidential selection by electors was rejected, this new proposition gained significant support as the motion to appoint the "Nat Executive" through electors passed (6-3), and the motion giving state legislatures plenary power in appointing electors likewise passed (8-2).[341] One of the key differences between Wilson's and Elseworth's proposal was the inclusion of the states in the selection

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[340] *Debates*, pp. 328. The entire resolution reads: "to strike out the appoint by the Nat Legislature and insert 'to be chosen by electors appointed by the Legislatures of the States in the following ration: towit—one for each state not exceeding 200,000 inhab[itants] two for each above y number & not exceeding 300,000. and three for each State exceeding 300,000." This motion was further revised by Elbridge Gerry: "He moved that the electors proposed by Mr. E. should be 25 in number, and allotted in the following proportion to N.H. 1, to Mas. 3, to R.I. 1, to Con. 2, to N.Y. 2, to N.J. 2, to P. 3, to Del, 1, to M. 2, to V. 3, to N.C. 2, to S.C. 2, Geo. 1."

[341] *Ibid*., pp. 328. On the first motion, Massachusetts was divided and only North Carolina, South Carolina, and Georgia voted "no"; on the second motion, only Virginia and South Carolina voted "no".

process. Under Wilson's proposal, Congress would have selected electors; under the new proposal, this power was granted to the states. This new mode of presidential selection was more palatable because it successfully removed the election from Congress and reserved a measure of state power and participation in the process.

Debate over presidential selection did not resume until 23 July when Richard Dobbs Spaight and William Houston moved to reconsidered appointment by electors chosen by state legislatures due to the "extreme inconveniency & the considerable expense, of drawing together men from all the States for the single purpose of electing the Chief Magistrate."[342] And, on 24 July, Houston moved to return presidential appointment back to the "Nat. Legislature." Hugh Williamson defended returning selection back to Congress because the executive is to have a "kind of veto on the laws" and the states would lack uniformity in interest: "there is an essential difference of interests between the N. & S. States, particularly in the carrying trade, the [veto] power will be dangerous, if the Executive is to be taken from part of the Union, to the part from which he is not taken."[343] Shortly after, the delegates approved (7-4) returning presidential appointment back to the Congress, and, the debate returned to the topic of reelection because a decision on one would necessarily affect the nature of the other. As a result, the delegates tentatively agreed to a single, seven year term, and the issue was given to the Committee of Detail.

On 6 August, the Committee of Detail reported that the executive "shall be elected by ballot by the Legislature. He shall hold office during the term of seven years;

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[342] *Debates*, pp. 355.

[343] *Ibid.*, pp. 357.

but shall not be elected a second time" thereby settling the issue of presidential selection.[344] This resolution, however, was problematic because of the indeterminate meaning of "Legislature" that would reinvigorate the underlying tension between states. Delegates were consequently faced with an important detail: Did "Legislature" mean the House, the Senate, or both? Predictably, delegates from the larger states preferred a joint ballot combining the entire membership of Congress because this method would provide them with the greatest benefit based on their numerical advantage in representation. This method, however, deprived the smaller states of their equal representation in the Senate, and these states preferred a mode that reflected the compromise in representation upon which the framework of the bicameral legislature was founded in that the president would be selected by separate ballots and each house would have to agree on the selection. Because of this detail, presidential selection remained unsettled, and multiple modes of presidential selection were again proposed with no consensus as to the appropriate (or agreeable) method. [345] As a result, on 31 August, because the delegates could not decide

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[344] *Debates*, pp. 392.

[345] The delegates did, amid vehement opposition from New Jersey, Connecticut, South Carolina, and Georgia, pass the resolution to appoint the president by "joint" ballot. To augment this point, a resolution to have voting on the joint ballot by states with each state having one vote was introduced but ultimately failed. Gouvernor Morris again opposed Legislative selection, and a resolution to have the president selected by popular vote was rejected. Among other propositions, the "abstract question" of the president being "chosen by electors" failed although gaining support with a vote of 4-4 with two states abstaining (526).

on a method, the question of presidential selection was assigned to a new Committee of Eleven.

On 4 September, as a resolution to the issue of presidential selection, the Committee of Eleven recommended selection by electors with the state legislatures determining the method of appointing electors. Included in their recommendation was a resolution for a contingency election in the Senate if the electors failed to produce a winner supported by a majority of electors.[346] Having served on the Committee of Eleven, Gouverneur Morris defended the change in presidential selection because it "[took] away the opportunity for cabal" as it was desirable for the president to be eligible for reelection and independent of the Legislature.[347] George Mason confessed "that the plan of the Committee had removed some capital objections, particularly the danger of cabal and corruption." The problem, however, was that this new system "was liable…to this strong objection, that nineteen times in twenty the President would be chosen by the Senate, an improper body for the purpose."[348] Abraham Baldwin, however, doubted Morris' concern would be relevant because "the increasing intercourse among the people of the states, would render important characters less & less unknown; and the Senate

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[346] *Debates*, pp. 576.

[347] Morris points to the "difficulty of establishing a Court of Impeachments, other than the Senate which would not be so proper for the trial nor the other branch for the impeachment of the President if appointed by the Legislature." Moreover, "A conclusive reason for making the Senate instead of the Supreme Court the Judge of impeachments, was that the latter was to try the President after the trial of the impeachment" (576-577).

[348] *Debates*, pp. 577.

would consequently be less & less likely to have the eventual appointment thrown into their hands."[349] Subsequently, opposition to the Committee's proposed method of presidential selection focused primarily on the details of the contingency election because many delegates feared placing power in the Senate's hands if the electors failed to produce a majority winner.

While questioning certain details, the delegates accepted the Committee's recommendation for an election by electors, and subsequent debates addressed the nature of a legitimate majority and replacing the Senate with the House of Representatives in the case of a contingency election. As James Ceaser noted, one of the reasons why the elector plan was adopted "was to increase the chance of creating an acceptable national majority" and "the electoral system was…carefully designed to help promote what could be regarded as a legitimate national majority."[350] Not all the delegates, however, were convinced that an individual candidate would be capable of commanding a majority even with the system of electors. As such, Madison and Hamilton proposed to lower the requirement of receiving a majority of electoral votes to a plurality.[351] These alternatives, however, were quickly rejected as the delegates adhered to their preference for a majority so as to ensure the president was not a creature of a particular state or region. Given the preference of a majority over a plurality, replacing the Senate with the House was a necessary step in completing the mode of presidential selection. Placing the contingency

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[349] *Debates*, pp. 578.

[350] James W. Ceaser, *Presidential Selection*, pp. 79-80.

[351] Madison proposed that a candidate would be eligible for election if he received one-third or more of all the electors' votes. Hamilton, however, preferred a simple plurality.

election in the Senate would allow "the representatives of a *minority* of the people [to] reverse the choice of a *majority* of the states and of the *people*" because the preference of an entire state would be in the hands of two representatives casting one ballot.[352] The House of Representatives, then, would be the more appropriate location for a contingency election because the number of representatives participating in the election would be proportionate to the number of people (and preferences) in a given state. Furthermore, to ensure the president was not a product of a single state or region, the delegates maintained the arrangement that granted each state one vote in the contingency election. This is to say that the accepted mode of presidential selection emphasized a key element missing from the original design of appointment by Congress, an election by a national majority constructed by electoral representatives from the separate states.

Hamilton, Jefferson, and Madison: The District Plan

After the constitutional convention, the states employed a variety of methods for selecting presidential electors because the Constitution explicitly reserves this power to the states. This point is underscored by the fact that, during the convention, there was no actual discussion of a uniform mode of selecting electors because the Constitution empowered states to appoint electors by any mode its legislature deemed appropriate. As such, consistency in method was rare as states constantly altered their mode of selecting electors between three common modes of selection: selection by state legislature, selection by popular elections in districts, and selection by general ticket. The emergence and acceptance of a political opposition had significant impact on the development of

[352] *Debates*, pp. 595.

appointing presidential electors because it provided incentive to aggregate a state's Electoral College votes in favor of one candidate and, in theory, maximize and enhance a state's influence on the election.

By 1792, the method utilized by legislatures for choosing electors became the subject of political debate in response to the emerging Democratic-Republican opposition. While Washington's reelection was all but ensured, Alexander Hamilton feared John Adams' vice-presidential victory would be less than unanimous because of the mode of selecting presidential electors. In a letter to John Steele, Hamilton lamented that "Mr. Adams [would] have a nearly unanimous vote…in New York if the *electors* were to be chosen by the people, but as they will be chosen by the Legislature, and as a majority of the existing Assembly are Clintonians, the *electors* will, I fear, be the same complexion."[353] For the Federalists, ensuring Adams received all of New York's electoral votes was crucial for his election as Hamilton attempted to predict election outcomes.[354] This is to say that the electoral rules in each state would affect the outcome of the election, and, given the absence of a uniform form of selecting electors, parties would have to account for these variations. For Hamilton, because "the *electors nominated* by the same interest will all, or nearly all, favor Mr. Adams," the Federalists

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[353] Alexander Hamilton to John Steele, October 15, 1792.

[354] Hamilton predicted that Adams would secure all the votes in New Jersey, Delaware, and probably Pennsylvania and he believed Adams would receive some votes from Maryland and South Carolina—although he was unsure as to the proportion of votes in South Carolina. Moreover, he presumed Adams would receive no votes from Virginia and Georgia, and he was unsure about North Carolina.

would prefer a winner-take-all system in states controlled by the Federalists. In states where Democratic-Republicans would carry a majority, the Federalists would be best served by system that awarded electoral votes based on district outcomes.

Hamilton's preference for the general selection of New York's electors, however, was short lived. In 1800, As Jefferson's popular support grew, Hamilton turned to New York's mode of elector selection as a means of circumscribing Jefferson's influence in the coming presidential election. With electors being selected by the New York Legislature, and the "moral certainty…that there [would] be an anti-federal majority in the…Legislature," Hamilton reached out to Governor John Jay to call together the existing legislature with the object of "*choosing of electors by the people in districts*." Being aware of "weighty objections to the measure", Hamilton believed this political strategy was "justified by unequivocal reasons of PUBLIC SAFETY." However, Hamilton needed Jay to "appreciate the extreme danger of the crisis" and convey this sense of urgency and necessity to the legislature because the "measure will not fail to be approved by all the federal party; while it will, no doubt, be condemned by the opposite."[355] Unfortunately, Hamilton was unsuccessful in securing Jay's support on the measure, and he received no response from Jay. As for Jay, Hamilton's letter was put away among other personal correspondences with the label, "Proposing a measure for party purposes which it wont become me to adopt."[356] Despite Jay's inaction, Hamilton, in 1802, tried once again, albeit unsuccessfully, to secure the district selection of electors

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[355] Alexander Hamilton, "Works, Comprising His Correspondence and His Political and Official Writings," ed. John C. Hamilton, vol. VI (New York, 1850), pp.439.

[356] From Alexander Hamilton to John Jay, 7 May 1800.

by endorsing a constitutional amendment introduced in the New York legislature that required the division of states into districts. Importantly, political actors recognized that their party success was contingent on the rules regulating the allocation of electoral votes. Those who were in the majority preferred a winner-take-all system so as to maximize their advantage; the minority preferred a district system so as to potentially fragment the majority's vote total. As Hamilton's party began to dwindle, so did his preference for the general ticket system.

Like Hamilton, Thomas Jefferson also recognized the importance of using the various modes of elector selection to his advantage in securing Democratic-Republican electoral outcomes. In a letter to James Monroe, Jefferson acknowledged that, "All agree that an election by districts would be best, if it could be general; but while 10 states chuse either by their legislatures or by a general ticket, it is folly & worse than folly for the other 6 not to do it."[357] Jefferson understood that the winner-take-all system would provide the greatest advantage for his party, and the states carried more weight in the election if their electoral votes were unified rather than fragmented by the district system. Politically speaking, without ensuring all votes went to their party, the Republicans could suffer from the same misfortune as their rivals in the 1796 election in which Jefferson captured the vice presidency. If, for example, Virginia fragmented their electoral vote while Federalist states did not, the Republicans would be susceptible to losing votes without the prospect of gaining others in Federalist states. Put differently, the best election strategy would be to ensure a state's entire electoral vote was allocated to the preferred candidate. Although his preference was the district system, Jefferson

[357] Thomas Jefferson to James Monroe, 12 January 1800.

recognized the need to unify a state's electoral vote, especially in the states with a Democratic-Republican majority; otherwise his party could be vulnerable to electoral defeat.[358]

In addition to the electoral disadvantage, the problem, according to Jefferson, with the general ticket system was the status of minorities, and, more importantly, his minority party. In the states not using the district system, "the minority is entirely unrepresented; & their majorities not only have the weight of their whole state in their scale, but have the benefit of so much of our minorities as can succeed at a district election." Adopting the general ticket in states where the Democratic-Republicans were minorities meant that the districts supporting Jefferson would be lost to the Federalists. This electoral effect would likewise have significant impact on the development of electoral representation and the construction of public sentiment.

For Jefferson, then, there are essentially three methods of constructing public sentiment: the one (a national sentiment), the few (a state sentiment), and the many (a district sentiment). The question becomes which provides the best representation of the public for "a representation of a part by great, & a part by small sections, would give a result very different from what would be the sentiment of the whole people of the U.S.,

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[358] On this point, in states where there "would be no doubt" of the Democratic-Republican majority, the party would go so far as to guarantee all electoral votes went to Jefferson that "the republican party…will not consent to elect either by districts or by general ticket. They chuse to do it be their legislature." In other words, in states where one party clearly controls the legislature, legislative appointment of presidential electors was the surest way of ensuring a unified allocation of electors' votes.

were they assembled together." In other words, "it is…a question whether we will divide the U.S. into 16 [states] or 137 districts."[360] According to Jefferson, the result of the presidential election should reflect public sentiment and the district method "being more chequered, & representing the people in smaller sections, would be more likely to be an exact representation of their diversified sentiments."[361] In this regard, the one neglects to capture the diversity of sentiments in the few, and, in like manner, the few fails to reflect the diversity of the many. Because the mode of presidential selection places the president closest to the national will, understanding public sentiment would become important for Jefferson as his presidential politics attempted "to bring their wills to a point of union and effect." For Jefferson, selection of presidential electors by districts best constructed and represented public sentiment, and if the president's job was to "bring public opinion to a set of declared principles," the district system, which accounts for more diversity, would provide a more precise estimation of public opinion.[362]

Like Jefferson, James Madison endorsed selecting presidential electors through the district system going so far as to recommend an amendment "for the faulty part of the Constitution" regarding presidential selection. In an 1823 letter to George Hays, Madison described the "final arrangement" for presidential selection as "not exempt from a degree of the hurrying influence produced by fatigue and impatience in all such Bodies, tho' the degree was much less than usually prevails in them." In particular, Madison

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[360] Thomas Jefferson to James Monroe, January 12, 1800.

[361] *Ibid.*

[362] Jeremy D. Bailey, *Thomas Jefferson and Executive Power*, (New York: Cambridge University Press, 2007), pp. 225.

opposed the provision providing states plenary power in selecting electors and to the "present rule" of a contingency in the House of Representatives with each state having only one vote. [363] Regarding the former point, Madison believed the "district mode was mostly, if not exclusively in view when the Constitution was framed and adopted."[364] And, more to the point, the states began using the general ticket or legislative election as the "only expedient for baffling the policy of the particular States which had set the example." Since the Articles of Confederation, Madison recognized the 'injustice of the laws of States" and the "multiplicity" and "mutability" of their laws apt to bring "more into question the fundamental principle of republican Government."[365] To this point, the

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[363] For Madison this arrangement was a "great departure from the Republican principle of numerical equality, and even from the federal rule which qualifies the numerical by a State equality, and is so pregnant also with a mischievous tendency in practice, that an amendment of the Constitution on this point is justly called for by all its considerate & best friends." See James Madison to George Hay, 23 August 1823 in *The Writings of James Madison*. Edited by Gaillard Hunt. 9 vols. (New York: G. P. Putnam's Sons, 1900—1910).

[364] This may have been how Madison interpreted the preference at the convention because it is not quite clear from his own notes that the district system was "mostly, if not exclusively" in mind while designing the mode of presidential selection.

[365] James Madison, "Vices of the Political System of the United States" in James Madison, *Selected Writings of James Madison*, ed. Ralph Ketchum (Hackett Publishing, 2006), pp. 35. More to this point, during the constitutional convention, Madison

refusal to implement the selection of electors by districts was, for Madison, further evidence of the states' "vicious legislation" that needed to be remedied. Put differently, the states, by adopting the general ticket or legislative selection, created a concentration of state power in presidential elections that needed to be contained and dissipated. Then, for Madison:

> "The States when voting for President by general tickets or by their Legislatures, are a string of beads; when they make their elections by districts, some of these differing in sentiment from others, and sympathizing with that of districts in other States, they are so knit together as to break the force of those geographical and other noxious parties which might render the repulsive too strong for the cohesive tendencies within the Political System."[366]

To this end, an amendment providing for the selection of electors by district and allowing for a joint ballot in Congress in the case of a contingency election would, in Madison's mind, remedy these constitutional deficiencies, and, in 1826, an amendment calling for uniform mode of elector selection was proposed.

1824: The District Plan and Amending the Constitution

As previously discussed, the Twelfth Amendment, in part, was designed to ensure the result of a contingency election in the House reflected the result of the popular election. However, the presidential contest in 1824 demonstrated the Amendment did not necessarily secure this desired outcome. John Quincy Adams claimed electoral victory in

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proposed empowering the national legislature with a "universal negative" on all state laws believing this negative was necessary for a perfect system of governance.

[366] James Madison to George Hay, 23 August 1823.

1824 despite losing both the popular and Electoral college vote to Andrew Jackson.[367] Because 131 Electoral College votes were required to secure the presidency (Jackson's 99 were well short of the required majority), the election went to a contingency election in the House. Following the Twelfth Amendment's rules, the House would choose from the top three candidates, Andrew Jackson, John Quincy Adams, and William H. Crawford. Henry Clay was eliminated because he received four electoral votes less than Crawford despite receiving more popular votes. Clay, however, would play a significant role in the election because he, as an influential Speaker of the House, would use his authority to help secure Adams' election.[368] In other words, the 1824 election serves as

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[367] Andrew Jackson received 153,544 popular votes and 99 electoral votes while Adams only received 108, 740 popular votes and 84 electoral votes. William H. Crawford received 40,856 popular votes and 41 electoral votes and Henry Clay received 47, 531 popular votes and 37 electoral votes.

[368] As an example of the extent to which the House went against popular will, Clay convinced his home state of Kentucky to support Adams who was not even on the ballot in Kentucky during the election (only Jackson and Clay were on the ballot). Moreover, Adams did not even run in Kentucky due to lack of popular support. Originally, the Kentucky delegation was instructed to vote for Jackson, from neighboring Tennessee, as a "regional" candidate. However, Clay convinced them to support Adams. In response, Jackson accused Adams and Clay of entering into a "corrupt bargain," calling Clay the "Judas of the West". Because of his role in the election, Adams rewarded Clay by naming him Secretary of State thereby signaling Clay as Adams' preferred presidential successor. Jackson regarded this appointment as Judas' "thirty pieces of silver" (quoted

poignant evidence of everything that was to be feared from presidential selection by the National Legislature.

Adams' seemingly "anti-democratic" election victory would challenge the system of presidential selection because it created a new question of electoral legitimacy. In the previous nine presidential elections, the system had produced a president who had won the electoral vote and who was arguably the popular choice and few would dispute the legitimacy of these outcomes.[369] Now the public and the electoral system would be forced to address the legitimacy of a House election that deviated from the "sense of the people." Or, as Landy and Milkis phrased the legitimacy question: "the public had never had to declare whether it would support the House if its choice was at great variance with the popular will."[370] Unlike the election of 1800, the electoral of crisis of 1824 did not result in a constitutional amendment. However, significantly, many were proposed to change the nature of Article II Section I of the Constitution and alter, if not abolish, the Twelfth Amendment. Consequently, the debate in *The Register of Debates* contains an underutilized repository of constitutional arguments regarding the mode of presidential selection. In short, the 1826 amendment should be understood as a continuation of the debates at the constitutional convention over state sovereignty as political actors dealt

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in Robert Remini, *The Election of Andrew Jackson*, Philadelphia: J.B. Lippincott, 1963, pp. 25).

[369] Although the election of 1800 ended in a tie, it was clear that Jefferson was the popular choice.

[370] Marc Landy and Sidney M. Milkis, *Presidential Greatness* (Lawrence: The University of Kansas Press, 2000), pp. 84.

with textual indeterminacies regarding the intent of Article II, Section I and the process of presidential selection. In this way, the debates over presidential selection are a continuation of the debate started at the constitutional convention regarding the function and development of the Electoral College.

In an attempt to redress the crisis of 1824, an amendment was proposed in the House that would require a uniform method of voting by districts and would remove the constitutional provision for a contingency election in the House.[371] Commenting on the resolution, George McDuffie (SC) argued for a "permanent [and] a uniform system of voting for president" because allowing states to determine elector selection would make the election rules "all liable to be changed according to the varying views and fluctuating fortunes of political parties."[372] Without the amendment, the states would continue to adopt methods of selecting electors that would best promote their individual interests thereby creating "gross and palpable injustice[s]" and "political inequalities."[373] Permanently and uniformly adopting the general ticket system, however, was not an

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[371] The actual resolution reads: "That, for the purpose of electing the President and Vice President of the United States, the Constitution ought to be so amended, that a uniform system of voting by districts, shall be established in all the States; and that the Constitution ought to be further amended, in such manner as will prevent the election of the aforesaid officers from devolving upon the respective Houses of Congress." See The Library of Congress, *Register of Debates: Debates and Proceedings, 1824-1837Annals*, 19th Congress, 1st Session, pp. 1365. From here on *Register*.

[372] *Register*, pp. 1368; 1367.

[373] *Ibid*., pp.1368.

appropriate remedy because it, according to McDuffie, would destroy "the vote of the minority in the state" and "transfers the votes which that minority give in favor of one candidate to another."[374] In this way, the general ticket method distorts the popular vote and leads to voter misrepresentation thereby incorrectly ascertaining the will of the people. And, if the purpose of presidential selection is to reflect public will then the mode of selection should be conducive to creating the "real will of the People, instead of the artificial will of the State."[375] This is to say that McDuffie refused to sacrifice the central tenants of republicanism, as he understood them, for arguments concerning federalism.

For McDuffie, ascertaining the "real" will of the people was a necessary component of republican government as it was the only means of checking executive power. The purpose of the proposed amendment was to conserve the "great…principle…that pervades and sustains the whole machinery of our Government…the responsibility of public functionaries to the People."[376] According to McDuffie, there was no limitation on executive power unless explicitly prohibited by the Constitution, and these prohibited powers are limited only by Executive discretion. In other words, the framers of the Constitution specifically defined the powers of Congress, but gave "an almost unlimited charter to the President" through the indeterminate phrase of "all Executive power…which amounts to neither more nor less than that he shall have

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[374] *Register*, pp.1370.

[375] *Ibid.*, pp. 1372.

[376] *Ibid.*, pp. 1378.

power to do whatever any other Executive on earth may do."[377] To illustrate this point, McDuffie referred to Thomas Jefferson's justification of the Louisiana Purchase (or, as McDuffie called it, an "empire to the West") by "virtue of the treaty-making power."[378] McDuffie's position, however, was not that Executive power is an "evil" to be feared as it is the "indispensable means of conferring the greatest national blessings." The abuse of this power, not the exercise thereof, is to be feared. And, the only restriction and subsequent check on this "undefined" and "illimitable" power is a "well connected system of responsibility." In this way, Executive energy is connected with the will of the people, and Executive power can only be legitimately exercised if it is derived from the peoples' confidence.

McDuffie's justification for the amendment, then, was the necessity of creating electoral rules that accurately provided a sense of the public's confidence as a means of checking Executive power—the principle of elective responsibility. Despite referencing

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[377] *Register*, pp. 1379.

[378] On this point, McDuffie argues, "Sir, our own experience will exclusively demonstrate how delusive it would be to rely for the security of our liberty upon restrictions on the Executive power. When we pass a law, by the concurrence of all the branches of the legislative power, for the internal improvement of the country, we are told that we have transcended the limits of the Constitution, to the imminent jeopardy of public freedom; but when the President, by virtue of the treaty-making power, buys an empire to the West, and adds it to the Republic, we are told that there is no limit to the treaty-making power but the discretion of the Executive, and that a treaty is the supreme law of the land." (*Register*, pp. 1379).

Jefferson and the Louisiana Purchase to illustrate the abuse of Executive power, Jefferson and McDuffie shared a similar view of elective responsibility. As Jeremy D. Bailey has rightly argued, Jefferson defended the Louisiana Purchase based on an understanding of public sentiment rather than an argument from Article II in the Constitution. Moreover, the Twelfth Amendment was intended to create a "union of opinion" thereby making it "theoretically possible for Jefferson to claim approval of his first term in office" including his use of Executive power in the Louisiana Purchase.[379] In this way, Jefferson's reelection was an attempt at elective responsibility in that the public was given the opportunity to reprimand Jefferson if he had abused his power. According to McDuffie's position, Jefferson's justification, however, was ultimately suspect as the "union of opinion" was constructed using electoral rules that may have inflated his support. Subsequently, a common criticism of the Electoral College is its tendency to inflate the margin of victory in a presidential election.[380] In other words, Jefferson could

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[379] Jeremy D. Bailey, *Thomas Jefferson and Executive Power*, pp. 193-194. Also, according to Bailey, "Jefferson meant for the Second Inaugural's statement of 'performance' to further unite public opinion around the presidency." (193). In this way, Jefferson did not verbally engage in a broad construction of the Constitution to justify his actions.

[380] For example, in the 2004, the Electoral College exaggerated George W. Bush's victory over John Kerry as Bush received 35 more Electoral College votes. The popular vote, however, indicates the race was much closer as Bush won 50.7% of the vote to Kerry's 48.3%, a difference of roughly three million votes. In 2012, a similar exaggerated Electoral College victory can be seen. Based solely on the Electoral

not know if his actions were justified unless public sentiment was assessed through the more accurate district system thereby accounting for the opposition voices typically silenced by the winner-take-all system. In this way, the "moral elevation arising from the idea of being loved and venerated by those whose destines are committed to his charge" can only be achieved through the district system that, according to McDuffie, provided an accurate assessment of the public's confidence and produced the necessary check on executive power.[381]

College, Barack Obama margin of victory was 126 Electoral College votes as he received 332 to Mitt Romney's 206. Yet, the popular vote appears closer as the candidates were separated by roughly five million votes with Obama receiving 51.1% of the vote to Romney's 47.2%. In both cases, each winning candidate barely received a majority of the popular vote, but the margin of victory in the Electoral College was more substantial. In other words, the Electoral College votes exaggerated the popular support received by the winning candidates. In 2004 and 2012, however, President Bush and President Obama could still claim a majoritarian victory. In 1992, Bill Clinton only received 43% of the popular vote to George H.W. Bush's 37.5%. Yet, Clinton's easily won the Electoral College vote 370 to 168. Following George Edward's criticism of the Electoral College, as president, Bill Clinton would not be able to claim a presidential mandate to govern according to popular will (in fact a candidate failed to receive a majority of the vote in 1948, 1960, 1968, 1992, 1996, and 2000). But again, this assumes that we should only understand presidential representation in terms of the popular vote.

[381] *Register,* pp. 1387.

Henry R. Storrs (DR-NY) responded to McDuffie's arguments by articulating a defense of maintaining the states' plenary power in selecting presidential electors by a general ticket rather than by districts. The point of departure for Storrs' defense of Article II (and subsequent Twelfth Amendment) was the constitutional convention and the "sacred path" and "holy ground" produced by "highly gifted" men who were "deeply versed in political knowledge…having been educated in the principles of civil liberty, and well understood the temper and genius of their country, its interests, and the spirit of its institutions."[382] At the convention, of all the constitutional features, the most difficult to decide upon was the mode of presidential selection, and this "delicate" system was eventually grounded on principles consistent "with the separate sovereignty of the States, and the preservation of the just relative influence and interests of each." Moreover, "this part of the plan of the Federal Government was received in the State Conventions with less objection than almost any other."[383] In this way, any changes to the system had to keep with the "original principles and "practical operation" of the electoral distribution of power had to be consistent with the constitutional intention of presidential selection. For example, Storrs argued, the Twelfth Amendment did not change the original distribution of elective power as the language empowering states to choose electors was not altered. Rather, the amendment gave "that true constitutional impulse to the system…of carrying into effect the will of the majority of the People."[384] Furthermore, had the constitutional prescription for a contingency election in the House been so adverse to the "Rights of the

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[382] *Register*, pp. 1397-1398.

[383] *Ibid.*, pp. 1398.

[384] *Ibid.*,, pp. 1399.

People," Jefferson's "sagacity" and the "keen-sighted politicians of those days" would have "detected and reformed this vicious inclination of the system."[385] Given his acceptance of the Twelfth Amendment, Storr's position, then, was founded on more than constitutional veneration and more than simple opposition to a particular candidate. For opponents of the proposed amendment, no changes to the mode of presidential selection would be made if it disrupted the distribution of electoral power among the states and prevented the will of "majority of People" from being realized. Storr, however, must justify retaining the current system despite John Quincy Adams' election which undermined a crucial aspect of Storr's defense.

Rather than addressing the nature of Adams' election, Storr instead challenged the premise that the public supported the amendment and the adoption of a uniform district system thereby shifting the emphasis on the "will of the majority of the People" from the presidential election to the proposed amendment. Referencing his home state of New York, Storr's challenge reaffirmed his original position regarding state sovereignty over constitutionally conferred electoral powers: "the People there have laid their own reforming hand on their political institutions," and "the whole vote in favor of the district system was but a comparatively small part, about sixty or seventy thousand out of nearly three hundred thousand electors."[386] If other states, like New York, did not support the amendment then any changes to the mode of presidential selection would be contrary to constitutional principles that preserved the "just influence and power of the several states." Put slightly differently, Storr understood the Constitution to be a "compact

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[385] *Register*, pp. 1399.

[386] *Ibid.*, pp. 1400.

between the People of the respective States", and, in creating the "Confederated Republic, the People of the States (and state legislatures) were willing to relinquish certain "powers of sovereignty" while retaining others. In particular, through Article II, the states explicitly retained sovereignty over the method of selecting electors, and this sphere of sovereignty could not be abridged without the consent of those who constituted the compact, the "People of the respective States."[387] Furthermore, "the tendency of this suicidal policy may chiefly be to paralyze her State power and influence,"[388] and, in terms of presidential elections, any mode of selection "not in harmony with the nature and analogies of the Constitution…goes to expunge the expression of the public sentiment of the People, as States, totally from the election."[389] Furthermore, "in the election of President, the expression of the will of the *People* of the *several States*, as *distinct political communities*, was intended to be preserved inviolably" by the Constiution.[390] This is to say that Storr shifts the commitment to majoritarian politics from a notion of a "People" constructed from a national majority (as McDuffie had previously articulated) to one based on the original parties of the constitutional compact, a majority consisting of the "People" in a state. And, in this way, the nature of presidential representation moves away from a commitment to represent the national or community as a whole to representing the coalition of "People" in the separate states

[387] *Register*, pp. 1402.

[388] *Ibid.*, pp. 1401.

[389] *Ibid.*, pp. 1404.

[390] *Ibid.*, pp. 1404.

thereby framing presidential representation in terms of federalism rather than strictly relying on the concept of partisanship.[391]

Given this shift, Storr then criticizes the district system because of its tendency to fragment and weaken the majority of a given state. To illustrate this point, Storr considers the effect of the district system on New York's presidential vote: "Let us suppose that the aggregate of all the surplus majorities in nineteen of these districts, every one of the which are in favor of one person, is fifteen thousand votes—and that the aggregate of these majorities in the remaining seventeen districts, all of whom are for a different person, amount to twenty thousand." In this regard, the winning candidate would not have received a majority of popular votes despite winning the majority of districts. Or, by the district system, "the minority of a State may effectually defeat the will of a majority," and the district system would make states susceptible to intrigue as it would "enable party leaders to bring into market a large share of [a State's] electoral votes, who would otherwise despair of success, on a general ticket throughout the State."[392] In this sense, the "general will of the People of all the States" is created by the

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[391] See B. Dan Wood, *The Myth of Presidential Representation* (New York: Cambridge University Press, 2009). Wood frames the argument of presidential representation solely in terms of partisanship, and according to Wood, the framers of the Constitution created the presidency that would be above partisanship because they failed to account for political parties. As such, modern, partisan presidents are far from the Madisonian ideal in *The Federalist* No. 10 of an "enlightened statesmen" who will put country over sectional interests.

[392] *Register*, pp. 1410; 1401.

individual majorities in each state, and only through the general ticket is "the will of the People of the several States…strictly regarded, and takes its full effect on the election of the President."[393] In this way, the general ticket logic coincides with that of the Twelfth Amendment in that the result of the presidential election should reflect popular will. Storr's popular will, however, is a federal will constructed from the popular will of the separate states. Or, put differently, the general ticket system tends to produce an artificial, national majority from the various natural majorities found in each state, and the district system tends to break, if not undermine, these majorities.

Conclusion

The Electoral College has been the subject of numerous proposed amendments, and the institution is under constant indictment as a constitutional deficiency in modern, democratic practices. Given its prevalence amid constant criticism, the Electoral College raises enduring questions that have been asked since its inception: why was it adopted and what function does it serve? Unfortunately, the answers to these questions are unsettled and there continues to be disagreement about the role of the Electoral College in contemporary American politics. One group of scholars finds that it has no role and should be abandoned due to clear violations of majority rule and political equality, while another finds the College is integral to our federal system. In addition, both groups of scholars provide an interpretation of the intention behind those who instituted the system, and the interpretations are as different as their conclusions regarding the Electoral College. Clarifying the purpose of the Electoral College, then, requires scholars to fully understand what the framers understood of their work.

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[393] *Register*, pp. 1410.

Returning to the debates at the constitutional convention reveals the Electoral College was designed with the intention of enhancing state sovereignty in presidential selection by providing the states with plenary power over selection of electors. In this way, scholars who deny the Electoral College has any ramifications for federalism misinterpret the founders' intention. Unfortunately, the constitutional convention cannot provide all the answers to Electoral College questions because of the indeterminate language of Article II, Section I. In other words, even though the Constitution empowers states to select electors and, subsequently, the allocation of the state's Electoral College votes, the method and rules regarding this practice did not emerge at the constitutional convention. Rather, they developed politically as political actors infused the Constitution with meaning by defining the procedures of how states would select electors and allocate votes. In this way, the Electoral College can only be understood within the broader narrative of American political development.

These developments had important ramifications for the emergence and acceptance of a political opposition because if America was committed to majority rule then an opposition party could gain legitimacy only if it adhered to this commitment. For example, Thomas Jefferson's Democratic-Republican Party has long been considered the first opposition party in American politics. However, Jefferson's, and his party's, ascension to political power could only be complete if it was legitimated by public will. In this way, the Twelfth Amendment was an important political development to ensure the result of the presidential election reflected public sentiment. Likewise, the Electoral College continues to define the relationship between the results of a presidential election and public will. The method of selecting electors and allocating votes essentially

determines the type of majority created in selecting a president and the nature of presidential representation. In other words, a slate of electors selected by a state legislature would produce a president of a different character than if the slate of electors was selected by the public through a general ticket, and it could be argued the latter is more indicative of public will than the former. For an opposition party, then, a legitimate claim to power can only be achieved by a mode of presidential selection that best ensures the Electoral College results reflect and represent popular will. Moreover, the separate states have an important role in fully understanding how popular will is constructed, and, given their plenary power to determine elector selection and Electoral College vote allocation, the states will continue to assume this significant aspect of American politics.

Chapter 6: Conclusion

Instead of abetting the division of his people, [the patriot king] will endeavor to unite them, and to be himself the centre of their union: instead of putting himself at the head of one party in order to govern his people, he will put himself at the head of his people in order to govern, or more properly to subdue, all parties.

Henry Bolingbroke

In every free and deliberating society there must, from the nature of man be opposite parties, and violent dissensions and discords; and one of these, for the most part, must prevail over the other for a longer or shorter time.

Thomas Jefferson (1798)

Men by their constitutions are naturally divided into two parties: 1. Those who fear and distrust the people, and wish to draw all powers from them into the hands of the higher class. 2. Those who identify themselves with the people, have confidence in them, cherish and consider them as the most honest and safe, although not the most wise depository of the public interests. In every country these two parties exist, and in every one where they are free to think, speak, and write, they will declare themselves. Call them, therefore, Liberals and Serviles, Jacobins and Ultras, Whigs and Tories, Republicans and Federalists, Aristocrats and Democrats, or by whatever name you please, they are the same parties still and pursue the same object.

Thomas Jefferson (1824)

Political parties have become entrenched within the constitutional order in the United States. Their status within this order, however, is still unsettled as parties and partisan practices are defensible despite being, ultimately, less than ideal. Put differently, political parties have been lauded for facilitating democratic practices and achieving democratic values; partisanship, however, presents a threat to national unity when the common good is sacrificed for narrow, group interests. Those who defend parties, then, must come to terms with opposition to party practices in politics. Engaging with the promise and peril of party politics enhances our understanding of American

constitutionalism by clarifying the nature and scope of party practices in the American constitutional order.

As long as there have been parties there has been opposition to them. In the United States, criticism of party practices goes back to the framers of the Constitution. And, perhaps the most prominent scholarly account of this early party opposition is Richard Hofstadter's study in which he uses of the framers' anti-party positions to construct an understanding of a constitutional order in which the Constitution was intended to work against parties. Hofstadter's "Constitution-against-Parties" thesis has grounded subsequent studies on American political party development as Hofstadter's work has framed the nature of the questions asked by scholars addressing early party development. Somewhat differently, because of the "Constitution-against-Parties" thesis, scholars have been focused on addressing how and why parties emerged despite such prevalent opposition to them. The standard account of party development concludes by emphasizing the provisional nature of early political parties. As such, the formal adoption of political parties and two-party competition constitutes the abandonment of a prior constitutional order built against parties in favor of one in which parties and party competition would become a central feature. For many scholars, the acceptance of sustained two-party competition represents a constitutional moment in which principles of governance and accepted political practices experience a substantive alteration thereby introducing new ways to structure political participation. And, in general, the acceptance of political parties and two-party competition was a party moment to end all party moments in that, once parties became acceptable, their place in American politics would be reformable but ultimately durable. As a result, many party scholars now focus on the

exact moment of when political opposition and two-party competition became legitimate situating this party moment within a fragmented party history delineated by two constitutional regimes: the regime of a "Constitution-against-Parties" and the constitutional regime defined and structured by party politics.

This study present a new way of thinking about parties by focusing on the development of the early constitutional rules that facilitated the practices of a political opposition and established its role in American politics. Accordingly, party development should not be defined by the division between anti-party and pro-party eras as opposition to parties is not exclusive to the former and support for parties limited to the latter. Moreover, the "party legitimacy moment" approach does not hold when thinking of party acceptance in developmental terms because, as this study has shown, during the era deemed as anti-party, political actors created the very rules that institutionalized party competition and acknowledged the sustainability and desirability of oppositional party politics. In this way, rather than assuming a fragmented history, this study establishes a general continuity to American political party development. In other words, the United States has always had a constitutional order of political opposition with variations coming in how this opposition has manifest through party politics.

Political Parties and Political Opposition in American Political Development

In American political development, the efforts of a political opposition have largely been channeled through political parties. For example, in Stephen Skowronek's work on presidential leadership and politics, all presidents of "reconstruction"—or those who have a "great opportunity for presidential action" to create a new political order—

came to office through oppositional party politics.[394] Or, as Skowronek described it: these presidents of reconstruction "were all great party leaders, but, more importantly, each stood apart from the previously established parties and appealed to the interests of a rather inchoate *opposition* movement to forge an entirely new one."[395] While oppositional efforts and leadership have been channeled through party politics, these party and opposition forces manifest in two substantively distinct ways: what I am calling (1) "emergent structures" of party organization and (2) "reoccurring patterns" of political opposition

This study, then, presents a new way to approaching party politics in American political development by emphasizing the interaction between these emergent structures and reoccurring patterns. As previously discussed, party scholars have rightly recognized variations in party practices (and parties themselves) and divided the history of political parties into party eras. These party eras, then, define the nature of political

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[394] Steven Skowronek, *The Politics Presidents Make: Leadership from John Adams to Bill Clinton* (Cambridge, MA: Belknap Press of Harvard University Press, 1997), pp. 37. In general, see his entire discussion of different types of presidential leadership based on the president's relationship to the existing political order in chapter 3.

[395] Stephen Skowronek, *The Politics Presidents Make*, pp.38, my emphasis added. Subsequently, Skowronek's work is not subject to the construction of political eras based on opposition legitimacy and the "Constitution-against-Party" thesis. In other words, as a president of reconstruction, Thomas Jefferson's reconstruction politics were not any different from those of Franklin D. Roosevelt on account of Jefferson being president during the perceived anti-party/opposition era.

parties—both the party-in-government and the opposition party—and the political resources available to them. These variations across party eras are the emergent structures as each party era has a distinct set of ideological and institutional commitments that ultimately define the way in which parties can be organized and participate in politics. So, for example, the patrician politics of the first party era ultimately created and organized different types of parties from the progressive politics of the fourth party era. This study has shown how constitutional developments during the first party era established a commitment to majoritarian politics thereby structuring the way in which an opposition would be able to legitimately participate in politics. In this way, Thomas Jefferson's and the Democratic-Republicans' ascension to the political power by way of oppositional politics can be understood through the patrician politics dedicated to majoritarianism of the time.

A political opposition, then, can only gain political legitimacy by adapting to the emergent structures that define the power and authority available to them at the time. In this way, an opposition's adaption to the politics of the time creates a more dynamic process of gaining legitimacy. Put differently, previous accounts of oppositional legitimacy focused on the moment in which an oppositional politics became legitimate and assumed legitimacy from that moment on. This study, however, focuses on the ways in which legitimacy waxes and wanes with substantive developments in American politics. By framing the concept of opposition in terms of resposnibleness and effectiveness, this study develops a typology of four distinct forms of political opposition, or reoccurring patterns, that become manifest as opposition parties struggle to be responsible and effective amid the political changes within and throughout party eras. In

this way, the Democratic-Republicans' legitimacy was achieved by ultimately becoming a responsible and effective (or legitimate) opposition while the Federalists' inability to achieve effectiveness and their eventual loss of responsibleness ultimately made them illegitimate and increased the probability of their elimination from the political environment.

This study, however, only addressed the first party era, and further research can be done to extend the use of emergent structures of party organization and reoccurring foundations of political opposition to other party eras. Each party era presents a new set of ideological attachments and institutional rules that change the way in which an opposition party can gain legitimacy. Hence, the application of this study provides a new way to interpret the entire history of political parties in American politics.

The Supreme Court and Political Parties

The Supreme Court has recently become an important institution in defining the emergent structures of party organization, and the Court maintains a prominent role in determining the constitutionality of party practices. Furthermore, depending on how cases are adjudicated, the Court has the potential to either strengthen or weaken political parties and the two-party system. Since the 1960s the Court has dealt with cases involving political parties in relation to key features of electoral politics such as campaign finance, ballot access, party organization, and party primaries. Determining the extent to which the Constitution protects parties, then, has ramifications beyond the judicial realm as decisions directly impact electoral politics and the efforts to strengthen the party system and build stronger parties. In this way, scholars and political actors

looking to strengthen (or weaken) political parties and the two-party system should not overlook the Supreme Court's role in settling legal questions that directly impact the nature of party practices in American politics.

These cases involving political parties elicit fundamental questions that directly influence the role parties, the two-party system, and a political opposition assume in American politics. Specifically, if justices choose to protect and promote the two-party system, on what constitutional grounds can they convincingly do so? In deciding cases involving parties, justices are left to their own judicial interpretation in determining the legal status and political desirability of the party system because there are no clear constitutional provisions dictating the nature of the political autonomy granted to political parties. In this way, party jurisprudence is fundamentally based on the justices' interpretation of the Constitution and their understanding of what makes democracy tenable in American constitutionalism. As discussed in the opening chapter, Justice John Paul Stevens and Justice Clarence Thomas disagreed regarding the place of political parties in American constitutionalism. Justice Stevens and Justice Thomas both fundamentally based their legal understanding of parties on the founders' conception of political parties. Somewhat differently, Justice Stevens' critique and Justice Thomas' support of parties are both built on an interpretation of the constitutional order created by the founders, and for their legal interpretation to be convincing they will have had to correctly interpret the place of parties in the founders' constitutional order. Solving the disagreement between Justice Stevens and Justice Thomas will help clarify the larger question of the nature and scope of political parties in American constitutionalism.

The way in which early parties became incorporated in American constitutionalism reveals a constitutional commitment to majoritarian politics, even if the majority emerges from a political opposition. And, this constitutional commitment provides legitimacy to a political opposition as well as a constitutional framework by which to discuss political parties. The constitutional constructions and creations that grounded party practices were all made with the intent of ensuring majoritarian results during the electoral process. The early interpretation of the First Amendment established the press as a central tool of political parties in creating a majority by disseminating information and printing party based ballots. The creation of the Twelfth Amendment ensured the result of the presidential election reflected majority will and the executive office would be unified around a single political party. And, the construction of Article II Section I of the Constitution clarified the nature and purpose of the Electoral College and how best to construct majorities that reflected the populations of the separate states. These constructions and creations, then, provide a way to discuss political parties outside of the terms currently employed by the Supreme Court.

In general, the Supreme Court frames cases involving political parties using either the First Amendment or the Fourteenth Amendment as the justices consider the burdens placed on the rights derived from these amendments. Decisions, then, range between affirming state interest in maintaining political stability and protecting major parties from overbearing regulations[396] and providing equal opportunity and protection to third parties or candidates struggling to gain political access against the two-party duopoly.[397] Justice

[396] See, for example, *Storer v. Brown*, 415 U.S. 724 (1974).

[397] See, for example, *Williams v. Rhodes*, 393 U.S. 23 (1968).

Stevens went so far as to admit that the Court's party jurisprudence was incoherent because the justices lacked a "litmus paper test for separating those restrictions that are valid from those that are invidious."[398] And, again, thus far the Court has only utilized the First and Fourteenth Amendments to answer legal questions involving political parties. This study, however, introduces new constitutional avenues for understanding political parties and can help provide some coherence to the Supreme Court's party jurisprudence. Given the early constitutional commitment to majoritarian politics, questions involving party politics could be addressed by assessing the impact legal rules and policy (such as campaign finance, ballot access, and redistricting) will have on how majorities are constructed at various institutional levels and if these constructed majorities are truly representative.

The Court's struggle over laws regulating primary elections is an example of how this alternative way of thinking about political parties can be applied. For example, in *California Democratic Party v Jones*, the Court addressed issues involving partisan primary elections and the relationship between voters and political parties. Voters in California passed a proposition that would change California's closed primary elections—elections in which only registered party members could participate—to a blanket primary that placed all candidates regardless of party affiliation on the ballot. In other words, voters would essentially be voting for individual candidates rather than for parties. At stake in this case was the political parties First Amendment freedom of association and the state of California's desire for more competitive elections that better represented the voting population. The Supreme Court sided with the political parties

[398] *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997).

and reaffirmed their associational rights to determine not only membership but having those members chose who will represent them in elections.[399] Put differently, the state of California's desire for what they considered to be more competitive elections placed too much of a burden on parties' associational rights. Rather than thinking about this case in terms of First Amendment associational rights, the state of California's position could be addressed in terms of creating elections that best reflected the majorities in the state. A question similar to that asked during the 1826 debates over amending the Electoral College could then be posed: which system of primary election produces electoral outcomes that best represent the majorities within the state of California? And, this question extends beyond California and issues involving primary elections as the same type of question can be asked at both the state and federal level on a wide range of issues involving elections and political parties.

Overall, political parties have assumed a central role in democratic practices in the United States. For many, political parties are what make democracy tenable. This study aimed to address one of the major puzzles in American party development as political parties emerged despite ardent opposition to them. As such, American political parties have thus been constructed on questionable foundations as the founders' critique

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[399] In the majority opinion, Justice Antonin Scalia reasoned, "Proposition 198 forces political parties to associate with—to have their nominees, and hence their positions, determined by—those who, at best, have refused to affiliate with the party, and, at worst, have expressly affiliated with a rival." And, "A single election in which the party nominee is selected by nonparty members could be enough to destroy the party." See *California Democratic Party v. Jones*, 530 U.S. 567, (2000).

of party politics loomed behind any praise of parties. This study challenges the conception of a constitutional order meant to reduce (if not completely eliminate) the role of parties in politics. Challenging the anti-party constitutional order conception, then, places political parties on a more stable foundation, and the oppositional politics channeled through constitutional majoritarianism broadens our understanding of the nature and scope of political parties in American constitutionalism. In general, this study enhances our understanding of the place of political opposition in American political development and the role parties have in, as Justice Thomas stated, "preserving liberty while ensuring good government."[400]

[400] See Justice Thomas's dissent in *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 424 (2000).