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CALEB STRONG, CHARLES PINCKNEY, AND LUTHER MARTIN AND THE
CONSTITUTIONAL CRISES OF THE EARLY REPUBLIC

A Thesis Submitted to the Graduate School in Partial Fulfillment of the Requirements for
the Degree of Master of Arts

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May, 2018

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CONSTITUTIONAL CRISES OF THE EARLY REPUBLIC

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ACKNOWLEDGMENTS

This day would not have come without the constant support of several people:

my mother Julie Yonce, uncle Dr. Eddie Lunsford, and aunt Naomi Lunsford;

Drs. Kris Lawson and James B.M. Schick, professor and professor emeritus Pittsburg State University;

Nikki Thome and the amazing staff at the Naval Medical Center San Diego library;

Yale University Special Collections and the New York City Department of Records;

Dr. David Lightner, professor emeritus University of Alberta;

the Hon. Kenneth Laurence, retired judge of the Massachusetts Court of Appeals whose wonderful email of encouragement pushed me through the final days leading to my defense;

Drs. James McBain and John L.S. Daley who kindly read my thesis and sat on my committee with my advisor;

a very special collection of my high school teachers: Dr. Jeana Conley and Natalie Grant (English), Crystal White (Mathematics), and my American history teacher Cheryl Williams Mason;

my coworkers at Substance Abuse Rehabilitation Program, Point Loma;

my late grandmother, Sue Gibby Yonce, who bought me my first book of Presidents;

and my longsuffering advisor, Dr. Chris Childers.

CALEB STRONG, CHARLES PINCKNEY, AND LUTHER MARTIN AND THE CONSTITUTIONAL CRISES OF THE EARLY REPUBLIC

An Abstract of the Thesis by
Jason W. Yonce

This study determines the place of surviving Framers of the Constitution from the American convention to the constitutional crises of the early republic. Only seventeen of the Framers survived in 1819. In 1820, that number had dwindled to thirteen. Rather than playing background roles while the next generation took the reins of government of the early republic, many of these men were at the forefront of the major turning points of the early republic and their inherent constitutional questions. For Caleb Strong of Massachusetts, the questions concerned the nature of the new union, whether a state could leave the union, and under what circumstances could the federal government conscript state militias during the rise of the Jeffersonian Republicans and the War of 1812. For Charles Pinckney, the questions were of the legality of the three-fifths compromise and the rights of territories to determine the legality of slavery during the Missouri crisis. Luther Martin, as counsel for the State of Maryland in *McCulloch v. Maryland*, denied the existence of implied powers in the Constitution in that seminal case. These events occurred from twenty-seven to thirty-three years after the Constitutional Convention. Rather than being retired sages sought for their wisdom, like Madison and Jefferson, these Framers were still active in government and explicating the document they helped to draft.

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CHAPTER I

INTRODUCTION

This thesis will attempt to show the influence of the Framers of the American Constitution in the constitutional crises of the early republic. The bulk of popular and academic scholarship places the Framers in their better-known context: the drafting and ratification of the United States Constitution. For most of these men, this the 1810s and 1820s were the end of their careers or retirement. For the subjects of this thesis, their lives would extend beyond the eighteenth century and they would become pivotal figures in their states and at the country at large.

Before going further, it is important to establish the meaning of certain terms. The terms Founding Father and Framers have distinct meanings. Who is considered a Founding Father has changed over the course of the term's usage, as it has undergone several academic definitions. It can apply to the signers of the Declaration of Independence, the Articles of Confederation, or the Constitution of 1787.¹ The definition has been extended to major military figures and state-level politicians as well. However, in attempting to shun Great Man history, some historians have extended the term to

¹ It is a trivial matter, but only six men signed both the Declaration and the Constitution: George Clymer, Benjamin Franklin, Robert Morris, George Read, Roger Sherman, and James Wilson. Of those six, only Morris and Sherman signed the Articles of Confederation. Sherman also signed the Continental Association.

include almost anyone in the Revolutionary generation and without regard for race and gender. The growth and rapid popularization of multicultural histories, and British perspectives on the Revolutionary War, shifted the emphasis from the Founding Fathers. Naturally, a reaction also occurred to revive the Founding Fathers and Framers.²

Non-political historians of the early republic avoid this controversy. Their starting points are usually drawn from the realm of social history; the histories, diaries, wills, and other documents showing the accoutrements of the lower classes. The best-known example in recent time has been Laurel Thatcher Ulrich's *A Midwife's Tale* which unpacked the history through the eyes of a woman diarist from 1785 to 1812. These histories can be taken as valuable by themselves or become part of other researched historical patterns. The problem, as Ulrich notes in her introduction is that "taken alone, such stories tell us too much and not enough, teasing us with glimpses of intimate life, repelling us with a reticence we cannot decode. Yet in the broader context, and in relation to large themes in eighteenth-century history, they can be extraordinarily revealing."³

Other books focus on the politics and the emergence of American nationalism as well as identity (David Waldstreicher's *In The Midst of Perpetual Fetes*) and even more conventional histories of the period can focus on the activities of nameless mobs and the political violence and intimidation of the pre-war period (Robert Middlekauff's *The*

² The most popular book of American criticism from this period was Howard Zinn, *A People's History of the United States* (New York: Harper and Row, 1980). British or international perspectives on the Revolution include Stanley Weintraub, *Iron Tears: America's Battle for Freedom, Britain's Quagmire, 1775–1783* (New York: Free Press, 2005) and Thomas Bender, *A Nation Among Nations: America's Place in World History* (New York: Hill and Wang, 2006). An example of Founder revivalism is Joseph Ellis, *Founding Brothers: The Revolutionary Generation* (New York: Alfred A. Knopf, 2001).

³ Laurel Thatcher Ulrich, *A Midwife's Tale: The Life of Martha Ballard, Based on Her Diary, 1785-1812* (New York: Random House, 1990), 25.

Glorious Cause). The books that focus on the common person's experience of the early republic are vital to a holistic picture of history. That is not in dispute. However, there is still a place for the powerful and their influence on the history. Historians have already tilled this ground for many Revolutionary figures. Sans James Madison, many of the surviving Framers in the first quarter of the nineteenth century did not occupy national positions. State-level politics and identity still held primacy as the country endured its growing pains into a single country and would for decades beyond the scope of this thesis. Nevertheless, the actions of these men were significant as expositions of the constitution they helped to draft for an entire country. They are not typically, however, referred to as Founders, they are Framers.

Richard B. Morris, in 1973, confined his "Founders" to seven: Franklin, Washington, Adams, Jefferson, Jay, Hamilton, and Madison. Morris loosely defined his criteria as charismatic leadership, staying power, and constructive statesmanship.⁴ Others, like Patrick Henry or Thomas Paine, made their impacts early in the Revolution and without the footprint of power made by the chosen seven. Morris probed their personal correspondence, to "pierce the veil of privacy." Morris then states, "fortunately, in all seven cases we have enough available documentation to see them on their own ground and judge them on their own terms." The amount of remaining documentation becomes a serious problem even among the elite group of Founders. Figures in national roles – President, Chief Justice, and others – often have their personal correspondence stored in official government archives for posterity. Morris' contention that these men

⁴ Richard B. Morris, *Seven Who Shaped Our Destiny: The Founding Fathers as Revolutionaries* (New York: Harper & Row, 1973): 1-4.

wielded the most influence and had the most charisma is certainly valid. But their placement as the key seven figures also smacks of a choice of convenience because there is no paucity of material written by and about these figures.

David Melinkoff, whose career focused extensively on the removal of archaic language and verbosity in twentieth century legal writing, placed the terms Founding Father and Framers in his 1993 legal dictionary. Melinkoff's definitions lack the stringency necessary for perfect categorization. For Melinkoff, "often the words produce a mood, rather than a meaning, and slip easily into the category of clichés."⁵ Melinkoff differentiated between Founder and Framers. While there is considerable overlap between the two terms, they are different. Where Melinkoff's definition becomes problematic is that it is easy to see which Founders were Framers, certainly names like Madison and Hamilton come to mind. Deciding among the other Framers who can receive the title Founder is far more difficult. But neither Morris's panegyrics nor Melinkoff's *clichés* are satisfactory in this determination. Similarly, when it comes to the major *political* events of the early republic, *political* history must be told by its actors who are, with notable exceptions like Franklin, gleaned from the small world of the powerful, and for this era the powerful are also men. For the purposes of this thesis, the term Founder will remain untouched and Framers will include any of the fifty-five who attended the Constitutional Convention of 1787. To exclude non-signers would be to exclude both Caleb Strong, called away to tend to a sick relative before signing, and Luther Martin who exited in protest with fellow Marylander John Francis Mercer. This same definition satisfied Mel Bradford in 1982 when he biographized the fifty-five delegates. However, Bradford

⁵ David Melinkoff, *Dictionary of American Legal Usage* (Eagan, MN: West Group, 1993), 256.

restricted the length of the biographical entries not solely on available source material but also his perception of each delegate's contribution. While scarce source material can doom many attempts at biography, Bradford used the example of Delaware's Jacob Broom, it is the contention of this text that these three Framers have been underestimated in their contribution not only at the Convention but at explaining the Constitution in the early nineteenth century.⁶

As Antonio Gramsci posited, the history of the ruling class is the history of the country. They unified to form it. The stories of those who existed outside the political society of the early republic are bound to the stories attached to the three Framers at the subject of this text. The histories of those outside the political society are inextricably bound in those of the powerful.⁷ As these groups unite and interact with political society their histories are revealed as well. Any tension between historians of subaltern peoples and of the powerful, like the Founding Fathers, is unnecessary and fallacious. Historians are aware of the effects of the less powerful on government and indeed that history in the broadest strokes cannot always be told from the perspective of political history. Here, however, both are confronted. The three Framers here are the largely forgotten political figures and their relevance is precisely because this is the founding, and development, of a new political structure with only minimal precedent in its own time.⁸

⁶ Mel Bradford, *Founding Fathers* (Lawrence: University Press of Kansas, 1982), xx.

⁷ Antonio Gramsci, *Selections from the Prison Notebooks*, ed. Quintin Hoare and Geoffrey Nowell Smith (New York: International Publishers, 1971), 44-55 and 206-9.

⁹ Maurice Mandelbaum, *The Anatomy of Historical Knowledge* (Baltimore: Johns Hopkins University Press, 1977), 157-60.

The bulk of this thesis will be on the surviving Framers and key constitutional crises from 1803-1821. By 1820, only thirteen of the original Framers plus Adams, Jefferson, Gallatin, Jay, and Monroe remained. However, the scope of this thesis will only focus on the Framers. Harlow Giles Unger wrote an estimable biography of James Monroe titled *The Last Founding Father*. The very young Monroe was an early Virginia delegate to the Confederation Congress but was not a Framer. Monroe's friend, James Madison, survived him by five years. He is, arguably, the last of the Framers and has his later life, and clashes with nullifiers over his legacy, has been examined in detail in Drew McCoy's *The Last of the Fathers: James Madison and The Republican Legacy*. The year 1849 seems to be another terminal year for the founding generation. The last wives of the Framers, Dolly Madison and Anne Gerry, died in that year as did the eighty-eight year old Albert Gallatin.

Not all Framers had much to say about the politics of the 1820s. The period in question here is 1803-1821, from the beginning of the War of 1812 until the close of the Missouri crisis. The youngest Framer, Jonathan Dayton, was twenty-seven at the time and lived until 1824 when he died at the age of sixty-four. This period is the twilight of the founding generation. This text's purpose is to reclaim the work of three lesser known Framers and to show their influence in the politics of the early republic. This is a domain usually occupied by only Adams, Jefferson, and Madison. However, although most of the Framers had already died, a handful of others were left to provide exegesis of the document they had drafted. But just as there are competing and diametrically opposed interpretations of the Constitution in the present, there were similar conflicts among its authors. Some offered nothing at all.

William Few, delegate from Georgia, lived in New York before the War of 1812. Few's surviving records are scant. His autobiography, presumably written sometime in the late 1810s and published in 1881 gives few clues to his opinions.⁹ Few spoke mostly of the corruption of New York politics and banking rather than of the state of national affairs. Though he mentioned the War of 1812 in passing, he did not consider in his old age that readers of his musings would care much of his opinions of the Constitutional Convention. Much of this is the result of his congressional service; he missed much of the proceedings of the convention. Few's obituary mentions him as a member of the convention but grants his war-time activities as a leading officer of the Revolution greater weight than his minimal contributions as a Framers. He was re-interred in 1971 in Augusta, Georgia.¹⁰

Similarly, this thesis will pay little attention to Jonathan Dayton of New Jersey although he survived until 1824. Dayton replaced his father, Elias Dayton, and became the youngest member of the Constitutional Convention at age twenty-seven. Dayton spoke infrequently at the convention and left little insight to his thoughts on government. Mel Bradford's brief biographical sketch hinted at Dayton's "questionable schemes." Indeed, Dayton only narrowly avoided charges of treason colluding with Aaron Burr's military expedition and was a business partner of Thomas Gibbons and political opponent

⁹ Gerald J. Smith, "William Few Jr." *New Georgia Encyclopedia*, last modified June 8, 2017, accessed March 5, 2018, <http://www.georgiaencyclopedia.org/articles/history-archaeology/william-few-jr-1748-1828>.

¹⁰ "Re-burial Asked After 143 Years," *New York Times*, December 5, 1971, accessed February 28, 2018, <http://www.nytimes.com/1971/12/05/archives/reburial-asked-after-143-years-georgia-hopes-to-honor-a-hero-of-the.html>.

of Aaron Ogden of the famous *Gibbons v. Ogden*, adjudicated six months before Dayton's death while hosting the Marquis de Lafayette in 1824.¹¹

Charles Beard took an even less favorable view of Dayton in his seminal work on the economic interests of the Founders. Dayton was a rabid land speculator and spent more of his later life involved in that field than in politics.¹² Dayton was a committed Federalist, although approved he of Jefferson's Louisiana Purchase in 1803. Both Dayton and Pierce Butler of South Carolina offered their defenses of the treaty with France and Spain, although only Dayton's were recorded in the *Annals*. Dayton's initial election to the House of Representatives in 1790 was centered on personalities, not politics, a possibility that many in the convention had feared. Ironically, Dayton was portrayed as an enemy to the constitution he helped to draft. The raucous, sham election elicited comment from James Madison who lamented it was of a "very singular manner."¹³ Dayton served a term as Speaker of the House until his election to the Senate by the New Jersey legislature.

¹¹ Mel Bradford, *Founding Fathers*, 61-3. Christian R. Esh "The Sacred Cause of State Rights: Theories of Union and Sovereignty in the Antebellum North" (Ph.D. Diss., University of Maryland, 2006), 205.

¹² Charles A. Beard, *An Economic Interpretation of the Constitution of the United States* (New York: MacMillan, 1913), 85-6.

¹³ The best expositor of early New Jersey politics, cited by Bradford and numerous others, was the late Richard P. McCormick (1916-2006) of Rutgers University. See Richard P. McCormick, "New Jersey's First Congressional Election, 1789: A Case Study in Political Skulduggery," *William and Mary Quarterly* 6, no. 2 (April 1949), 237-50 and Richard P. McCormick, "Experiment in Independence: New Jersey in the Critical Period, 1781-1790" (Ph.D. Diss., University of Pennsylvania, 1948). The quote is from a letter from Madison to Washington written March 19, 1789. The use of the word "singular" probably means uniqueness since New Jersey law had never stipulated a closing date for the polls. As a result, polling places remained opened for months and corruption between the warring regional factions prevailed. Ultimately, Dayton and the West Jersey Junto were successful. A re-printing of the letter with substantial context can be found "To George Washington from James Madison, 19 March 1789," Founders Online, National Archives, accessed December 21, 2017, <https://founders.archives.gov/documents/Washington/05-01-02-0316>.

By 1802, all of New Jersey's representatives in the House were Democratic-Republicans. Aaron Ogden, who had served alongside Dayton, lost his seat in the Senate and in 1804 Dayton was ousted by blacksmith Aaron Kitchell. Dayton never served in another political post. When the Eighteenth Congress convened in 1824, more fanfare arose from Lafayette's visit than Dayton's death. The *Annals* give way to the much less detailed *Register of Debates* but there is no mention of Dayton's death in December 1824.¹⁴

However, all Framers, without regard to their impact, had an interest in their legacies. The Framers were equally preoccupied with their sectional and personal interests as well as the awareness of their place in this moment of history. A legacy becomes an interesting rhetorical tool here. Take, for instance, the slavery interests of Framers like Hugh Williamson and John Rutledge who, bluntly, held the ratification hostage until assurances that the new document would leave southern slavery undisturbed. Had this resulted in the failure to move past the failings of the Confederation, the men would have the legacy, within their own times, as defenders of southern economic interests and tradition. Compromise, with gritted teeth, ruled the convention and slavery remained for another several decades. However, the other Framers, particularly Rufus King and Charles Pinckney, could turn those same compromises into faults. Instead of a legacy of compromise one has the legacy of holding national unity hostage for sectional, and personal, interests.

¹⁴ The best bibliography of material on Dayton, much of which is referenced here, is collected in the regrettably forgotten *The Speakers of the U.S. House of Representatives*. See Donald R. Kennon, *The Speakers of the U.S. House of Representatives* (Baltimore: Johns Hopkins University Press, 1986), 20-25.

The terms Founding Father or Framers are terms of lionization. In some manner, it is a concern of heritage rather than history. No one wants their heritage to include persons whose actions, in light of present morality, are tainted with oppression and self-interest. However, avoiding the fallacy of presentism, the forefather can be forgiven as a product of his own time and ineligible for judgement based on contemporary standards. Perhaps it is no surprise that historian Richard Morris attempted to restrict the term Founding Father to only seven key figures.

Legacies are an issue of historical interpretation and national memory. Both are subject to popular whims; the former of paradigms and the latter with changing mentalities and morality. As Peter Kosso has noted, historians run the risk of imposing their own ideas and sensibilities on the past.¹⁵ However, it is those of us in the present who determine a prominent figure's, a movement's, or even a country's legacy. Legacies are both value judgements and historical interpretation. Where one begins and the other ends is murky.

Indeed, the balance between what one intended their legacies to be and how the living in the present interpret them is an endless give and take for historians. Legacies are not objective histories. However, the men in question here – Caleb Strong, Charles Pinckney, and Luther Martin – have tenuous legacies as forgotten figures in the present. One should avoid lionizing them simply because they were figures in the founding of the United States but, similarly, a certain objective justice must be done to them as objects of the study of history. As Leopold von Ranke believed, total objectivity is as bad as total

¹⁵ Peter Kosso “The Logical Fallacies of Historians,” in *A Companion to the Philosophy of History and Historiography*, ed. Alviizer Tucker (Wiley-Blackwell: West Sussex, 2011): 262-73.

subjectivity; one must not lose the human connection with our subjects. Similarly, Maurice Mandelbaum stated that objectivity provided no useful test for falsehood and was not necessary although impartiality was.¹⁶

There is an unavoidable subjectivity when discussing the Framers and how their historical legacy should be defined. While most of these competing claims on their legacy can be justified through accepted evidence and research methods, each person will have their own biases. Here, the rare intersection of history and neuroscience appears: one cannot make sense of information without some interpretive scheme through which to interpret it. The absence of a scheme is as risky as a fixed one. This thesis will not attempt to establish a legacy for these men; however, each potential reader can come away with his or her own interpretation. There was no state of ignorance entering into this project. The goal is simply to demonstrate that these elder Framers still held some authority in the exposition of the Constitution they helped to draft in their respective constitutional crises. For Strong, this was the threats of New England secession and the rights a state had over its militia; for Pinckney, the rights of a state to be a slave state and count slaves in its representation in government; and for Martin, it was the basis of implied powers in *McCulloch v. Maryland*. Nothing more in the way of collective legacies of the Founders, or the individual legacies of the three men studied here, have been unpacked for this analysis. Though unintentional, each represents a specific region of the young country and the constitutional questions that those regions faced.

¹⁶ Paul Newall, "Historiographic Objectivity" in *A Companion to the Philosophy of History and Historiography*, ed. Alviizer Tucker (Wiley-Blackwell: West Sussex, 2011): 172-80.

Considering a Founding Father or Framers “forgotten” appears to be a prickly matter for research in the present. The three Framers in question in thesis have gone without serious consideration in the literature for decades or longer. However, the broader topics of this thesis, are not quite as bereft of source material.

The sources for this thesis extend from the broader topics to the narrower, biographical ones. The United States Constitutional Convention has been catalogued in various compendia, although Max Farrand’s four-volume *The Records of the Federal Convention* remains the most frequently cited source. Farrand drew from all the note takers at the convention as well as saving much of the correspondence during the summer of 1787. James Madison’s notes provide the bulk of what is known from the convention. The most serious textual analysis of Madison’s notes has been Mary Sarah Bilder’s 2015 book *Madison’s Hand: Revising the Constitutional Convention*. Bilder’s analysis of Madison’s notes, omissions, and later changes are worth examining in light of Farrand’s work. For state-level conventions, Jonathan Elliott’s equally exhaustive five-volume collection in 1898 collects the notes of ratification debates in a single compendium. Two earlier works on state ratification debates – *Debates Which Arose in the House of Representatives of South Carolina* (1831) and Hugh Blair Grigsby’s *History of the Virginia Federal Convention* (1855) are worth perusing as well.¹⁷

Biographies and essays on the early republic regularly involve James Madison, Thomas Jefferson, John Jay, John Adams, and other towering figures of the

¹⁷ Elliott’s debates have limitations. In the preface of *Debates Which Arose in the House of Representatives of South Carolina*, this is mentioned. The text is meant to add what Elliott omitted. Similarly, Elliott’s treatment of New Hampshire’s ratification is lacking. John P Kaminski’s multivolume *The Documentary History of the Ratification of the Constitution* is a more thorough, contemporary source with an entire volume (no. 28) dedicated to New Hampshire.

Revolutionary generation. Madison, in particular, has received plenty of well-deserved attention for his conflicts with John C. Calhoun in the waning days of his second administration and their later battles over nullification and the legacy of the Virginia and Kentucky Resolutions of 1798. Madison and Jefferson's protests of the Alien and Sedition Acts have influenced interpretations of their actions ranging from controversial, but innocuous to radical and subversive.

Where do the lesser known figures of the convention fit into the early republic? Where is the room in this narrative for the Pinckneys, John Lansing, Caleb Strong, and Luther Martin? This is a matter of narrative framing. Most histories do not neglect to mention these men in some manner or another. One cannot recount the history of *McCulloch v. Maryland* without Luther Martin. Rufus King's name appears anecdotally in pivotal moments such as the Missouri Compromise and the contentious 1824 election.

However, these histories relegate lesser-known Framers to the background while the newer generation of politicians occupy the foreground. Perhaps this is necessary since none of these men, save perhaps Madison and Monroe, occupied prominent positions nationally. However, it is lost on the casual reader that these random names are of figures present at the Constitutional Convention. Histories of the early republic's constitutional crises only offer passing mention of them. This omission robs these figures of their due weight in history.

The due weight of these figures is based on their place in the arc of historical events which blended state-level conflicts into a broader, national conflict. Their importance has been undercut because treatments of Framers as a group centers only on the Constitutional Convention. The failure to mention them as Framers in later contexts

like the War of 1812 or the Missouri crisis robs them of the weight of their words in matters of constitutional interpretation. The younger generation of the early republic and their contemporaries knew that these men were members of the convention. Their later biographical sketches attest to their work at the convention as some of their most important.

Strong's state and regional issues wove neatly into Pinckney's similar battles over the same issue during the Missouri crisis. Indeed, even Strong's actions toward Maine exacerbated that same crisis. In Luther Martin's case, the very notion of enumerated and implied constitutional powers came into question. There were two questions at stake. The first, on the constitutionality of the bank, would grow into prominence in the coming decade during the ascendance of Andrew Jackson. The second question, whether or not implied powers could be derived from the young constitution, set the stage for decades of constitutional interpretation. Martin and John Marshall acted as one another's foils.

Yet these lesser-known Framers should not necessarily be niche figures in the realm of regional, state, or constitutional histories. Granted, with enough patience, one can trace many degrees of connection between any single individual in the early republic to broader historical patterns. However, as stated, these men were known in their time. Governors, legislators, and attorneys general are not small actors even in the present. What has arguably occurred is that time and prioritization of major national figures has simply reduced attention to these figures. Present mentalities, rather than real historical experiences, have dictated the attention shown to these men.

Defining this generational break is not simple and even tracing biennial medians of the birth years of each member of the House and Senate from 1790 to 1824 would be

unlikely to yield a single point of demarcation in which a generational torch was passed. In 1790, the median birth year of a U.S. Senator was 1745. In 1824, this median year shifted to 1776. That a later Congress would be populated with men of later birth years is stating the obvious, but it is critical to understand the differences between these two groups. The men of the Early Republic, the generation born in 1776 came of age in a far different milieu than their fathers. Many of them grew into adulthood during the Virginia and Kentucky Resolutions. A different war with Britain than that of their fathers shaped their mindsets. The whole geography of the United States and its international relationships had changed. France had undergone its Revolution and Napoleon's rise. The disparate Dutch Low Countries discarded their confederation and unified into the Kingdom of the Netherlands in 1815. Spain's relationship Bourbon France had fractured as well. Europe's North and South American colonies had begun revolting.

By 1820, the thirteen survivors of the Constitutional Convention had the privileged position of seeing these shifts from the perspective of the eighteenth and early nineteenth centuries. Luther Martin, a veteran attorney general of Maryland and celebrity lawyer, was a member of this dwindling club, although his involvement in the Constitutional Convention was often on the receiving end of scorn and even mockery from his peers. Any new treatment of Luther Martin requires an overlook of the scholarship and material available. This is regrettably limited and in need of greater work. Most bibliographies of works on Martin have remained uniform since 1970. Much of this work has been on Martin's career as an attorney, his work as counsel during the trials of Samuel Chase and Aaron Burr, his defiance at the convention, and his

reputation for public intoxication. *McCulloch* and Martin's influence on later prominent figures is an afterthought if mentioned at all.

Primary source material on Martin is regrettably limited. Unlike many of his convention peers, Martin did not appear to leave behind an archive of papers and letters.¹⁸ There are a few possibilities here. Perhaps Martin never thought to do so or kept his thoughts bound up in his encyclopedic mind. Martin had no immediate heirs at the time of his death with the exception of a possible grandson. The four to five years between Martin's stroke and his death at Aaron Burr's New York home is a long period during which any papers could have been lost or destroyed. Martin worked as Burr's counsel. Assuming in good faith the valiant efforts of past writers on Martin, few as they have been, it seems likely that these papers, if extant, would have surfaced by the present day.

Luther Martin did leave a handful of published writings. His 1802 autobiography, *Modern Gratitude*, is the only source of information on his early life.¹⁹ His combined writings addressed to the Constitutional Convention and the Maryland House of Delegates' ratification debates were published as *The Genuine Information*. Record of Martin's words exists in Madison's notes on the convention and has been passed down through the estimable scholarship of Max Farrand and others. However, much of Martin's initial speechmaking was unrecorded by Madison. This is perhaps one of the biggest losses on any major figure of the convention. Martin was certainly verbose, but

¹⁸ Interestingly, even Martin's contemporaries including his co-counsel in *McCulloch*, Francis Hopkinson, did not mention Martin in their surviving correspondence or even *McCulloch* in the Historical Society of Pennsylvania's archives of Hopkinson's letters and papers.

¹⁹ Clarkson and Jett used *Modern Gratitude* as the basis for their chapters on Martin's early life filling in descriptive detail with contemporaneous sources on colonial and post-Revolutionary New Jersey. See Paul S. Clarkson and N. Samuel Jett, *Luther Martin of Maryland* (Baltimore: Johns Hopkins Press, 1970), 325.

he did not monopolize the convention any worse than Gouverneur Morris or other statesmen present.

Some of Martin's letters have survived. Most involve matters of legal minutiae and property transfers. Others were to a potential suitor after being widowed in 1796. One series of exchanges that have drawn the interest of biographers were his scathing remarks, some of which were published, toward Thomas Jefferson for slandering Martin's father-in-law, Joseph Cresap.²⁰ Jefferson seemed more bewildered by the matter than anything although Martin took this as a matter of family honor.²¹

The most interesting source appearing in most bibliographies on Martin is a brief biographical treatment from the Maryland Historical Society in 1887, *Luther Martin: The Federal Bull-Dog* written by a well-known journalist for his time, Henry Goddard.²² Goddard was a Civil War veteran and moderate Republican. Goddard claimed that his information was drawn from the famous Supreme Court and southern jurist, John Archibald Campbell. Campbell drew his knowledge of Martin from Roger Taney.²³ Campbell knew Taney well and Taney was a protégé and successor of Martin's in Maryland. Campbell also claimed John Quincy Adams as a source, which is slightly more problematic. However, there is no indication in the text which piece of information

²⁰ Thomas Jefferson, "Notes on the State of Virginia," in *Thomas Jefferson: Writings*, ed. Merrill D. Peterson (New York: Penguin, 1984), 188.

²¹ Thomas Jefferson to Peregrine Fitzhugh, June 4, 1797, in Founders Online, accessed February 24, 2018, <https://founders.archives.gov/documents/Jefferson/01-29-02-0328>. Thomas Jefferson to Mann Page, January 2, 1798, in the Thomas Jefferson Papers, Library of Congress, accessed February 24, 2018, <https://www.loc.gov/item/mtjbib008931/>. Luther Martin to Thomas Jefferson, June 24, 1797, in Founders Online, accessed February 24, 2018, <https://founders.archives.gov/documents/Jefferson/01-29-02-0356>.

²² Carol Bundy, "Memoirs of a Reasonable Union Man," H-Civil War, accessed September 24, 2017, <http://www.h-net.org/reviews/showrev.php?id=32766>.

²³ Taney's own autobiography is a source of information on Martin. See Samuel Tyler, *Memoir of Roger Brooke Taney* (Baltimore: John Murphy & Co., 1872) and William L. Reynolds II, "Luther Martin, Maryland and the Constitution," *Maryland Law Review* 47, no. 1 (1987), 292.

came from which source and Campbell's recollection was so far removed from the people and events in question that it might have been impossible to know the original source.

Federal Bull-Dog repeats a problematic story about Luther Martin that William Giles supposedly received from John Quincy Adams. The story, often repeated, was about Martin's behavior during initial arguments during *Fletcher v. Peck* during which the attorney was so intoxicated that deliberations were canceled until he sobered. Legal scholar William Reynolds offered a historiographical approach to the story in his 1987 essay on Martin in which he concurred with Clarkson and Jett that there were no contemporary sources for the story.²⁴ John Quincy Adams was in Russia at the time of *Fletcher*. Martin's heavy drinking began after his wife and daughters' premature deaths. William Branch Giles was a Jefferson supporter and had supported Samuel Chase's impeachment from the Supreme Court. Chase's friend, and lawyer in the case, was Luther Martin.

Because so much material from later articles and books was derived from *Federal Bull-dog*, these seemingly anecdotal asides are important. This was an interview relating second hand accounts of a popular Marylander. It was not sound textual analysis. As will be seen later, surviving letters do not point to a man sickly and penniless no more than *Bull-dog* could, or should have, lead readers into an accurate portrayal of a loutish legal genius.

Aside from the aforementioned Reynolds, other essays covering Luther Martin include Everett Obrecht's 1932 essay "The Influence of Luther Martin in the Making of

²⁴William P Reynolds II, "Luther Martin, Maryland and the Constitution," *Maryland Law Review* 47, no.1 (1987), 316-7. Clarkson and Jett, *Luther Martin of Maryland*, 284.

the Constitution of the United States.” Obrecht cited Goddard’s essay as well as Ashley Gould’s entry on Martin in *Great American Lawyers* in 1907.²⁵ Other information is built around stock biographical information Martin using primary and secondary source material from and about John Marshall, Aaron Burr, Roger Taney, and the work of Farrand and Charles Warren on Constitutional History.

Philip Crowl continued, somewhat in the Beardian tradition in his work on Maryland Anti-Federalists. His work remains standard material in studies on Maryland and on the few ever done on Martin.²⁶ Crowl is most frequently cited in Forrest McDonald’s seminal reconsideration of Beard’s thesis in *We the People*. Beard, Crowl, and McDonald did not necessarily reach differing conclusions on Martin and his Anti-Federalist contemporaries in Maryland although, naturally, McDonald differed from Beard on who the economic beneficiaries of Maryland’s ratification would be.²⁷

The first serious biography of Luther Martin was R. Samuel Jett and Paul Clarkson’s *Luther Martin of Maryland*. Clarkson and Jett were legal scholars like Reynolds. Indeed, much of the work on Martin has been the product of non-historians. The biography relies on the same source material that has been uniform throughout much scholarship on Martin. Similar to Obrecht, Clarkson and Jett build their history of Martin using contemporaneous sources and other scholarship that would give some the reader some notion of Martin’s living conditions and social milieu at different points in his life.

²⁵ Ashley M. Gould, “Luther Martin,” in *Great American Lawyers*, ed. William D. Lewis (Philadelphia: John C. Winston Co, 1907), 5.

²⁶ Philip A. Crowl, “Anti-Federalism in Maryland, 1787-1788,” *William and Mary Quarterly* 4, no. 4 (October 1947), 446-69.

²⁷ Forrest McDonald, *We The People: the Economic Origins of the Constitution* (Chicago: University of Chicago Press, 1958), 148-63. From McDonald’s perspective, Martin and other opponents to ratification stood more to gain financially from the failure to ratify than the Constitution’s supporters did from ratification. Also see Forrest McDonald, *Novo Ordo Seclorum: The Intellectual Origins of the Constitution* (Lawrence: University Press of Kansas, 1985), 43-4 on Martin’s financial speculation.

The book devotes a large portion to Martin at the convention and his famous trials with the exception of *McCulloch*, which gets very little exposition at all. The best scholarship on *McCulloch* has been the life work of Mark Killenbeck.²⁸ Even in Killenbeck's work, Luther Martin is a present but not well-developed. This has been a longstanding problem with Martin's presence in historical settings including trials in which he was an essential figure. He is too frequently a supporting character in narrative treatments when he should be a primary one.

In the last forty-five years treatment of Martin has been sporadic. Gore Vidal's 1973 novel *Burr*, the first novel in the *Narrative of Empire* series, reproduces Luther Martin using a fictional memoir of Aaron Burr.²⁹ Martin received small revivals in the 1980s and 1990s. He was held in high esteem by conservative scholars. Mel Bradford gave Martin seven pages and an accessible bibliography in his 1981 *Founding Fathers*.³⁰ Martin had a small mention in judiciary testimony during Justice William Rehnquist's 1986 confirmation hearings as Chief Justice and in Rehnquist's own 1999 history of the Chase impeachment, *Grand Inquests*.³¹

Lastly, a second biography of Martin, *Forgotten Founder, Drunken Prophet* was published in 2008 by conservative writer and novelist, Bill Kauffman. This is not a work of professional history but a political biography written by a neo-Agrarian and

²⁸ Mark R. Killenbeck, *M'ulloch v. Maryland: Securing a Nation* (Lawrence: University of Kansas Press, 2006).

²⁹ Gore Vidal, *Burr: A Novel* (New York: Random House, 1973).

³⁰ Mel Bradford, *Founding Fathers*, 110-7.

³¹ *Consideration of William Rehnquist to be Chief Justice of the United States*, 99th Cong., 2d sess., September 1986. See also: William Rehnquist, *Grand Inquests: The Historic Impeachments of Justice Samuel Chase and President Andrew Johnson* (New York: Harper Perennial, 1999).

correspondent of Gore Vidal. Nevertheless, Kauffman is no blind partisan and his work cites almost every title in Martin's uniform bibliography.³²

Two centuries following Caleb Strong's death a substantive biography has never been written. Two sources serve as the best recounting of Strong's early life: Henry Cabot Lodge's *A Memoir of Caleb Strong* published in 1879 and Alden Bradford's *Biography of Caleb Strong* published the year after Strong's death in 1820. Lodge leans toward a more hagiographic account of Strong's Puritan ancestry but shows some signs of rigorous research in attempting to reconstruct Strong's early legal career. Strong is, according to Lodge, remarkably absent from lists and joint letters with his peers on the Massachusetts Bar, including letters expressing revolutionary sentiments.³³

Bradford begins his *Biography* with a much more sensitive and historiographical treatment of the Revolutionary generation. Bradford is given to much more staid and calmer eulogizing. Bradford, anticipating two centuries worth of future research problems, laments the break between the fighting men of the Revolution and the patriots who occupied governmental and administrative positions during the war. Bradford might well have been attempting to rescue Strong's reputation following his actions (and inactions) in the War of 1812 by reconnecting Strong to his role in the Revolutionary War and the Constitutional Convention.³⁴

³² Bill Kauffman, *Forgotten Founder, Drunken Prophet: The Life of Luther Martin* (Wilmington, DE: ISI Books, November 2008).

³³ Henry Cabot Lodge, *A Memoir of Caleb Strong, United States Senator and Governor of Massachusetts, 1745-1818* (Cambridge: John Wilson and Son, 1879), 6-7.

³⁴ Alden Bradford, *A Biography of Caleb Strong Several Years Governor of the State of Massachusetts* (Boston: West, Richardson, and Lord, 1820), 3-6. Retired Massachusetts Court of Appeals Justice Kenneth Laurence wrote his undergraduate thesis at Harvard on Caleb Strong. Harvard has the only copies and logistical difficulties prevented its review for this thesis. See Kenneth Laurence, "The Political Career of Caleb Strong, 1745-1819" (A.B. thesis, Harvard University, 1958).

Massachusetts politics in the late eighteenth century was dominated by a group of northern Massachusetts politicians known as the Essex Junto. These men stood in opposition to the dominant Adams political family and had a tenuous relationship with Caleb Strong. The best-known research done on Massachusetts' Essex Junto was Charles Raymond Brown's 1913 dissertation "The Northern Confederacy According to the Plans of the "Essex Junto" 1796-1814." The writing style is very dated by contemporary standards and places Caleb Strong in the Junto, which is questionable. Brown cites contemporaneous literature on the Junto that derided the entire notion of its existence as a popular political myth. Equally scarce is research into the proposed northern confederacy. Some Abbeville Institute commentators in the present decry this as a near-deliberate omission on the part of historians; however, the failure for the confederacy to materialize, and the lack of broad support do not really make the matter especially interesting in relation to bigger contemporaneous topics like the Louisiana Purchase. Nevertheless, the northern confederacy is worth consideration and was best formed in Kevin Gannon's "Escaping "Mr. Jefferson's Plan of Destruction": New England Federalists and the Idea of a Northern Confederacy, 1803-1804." Gannon is a specialist in states' rights and secession.

The 1803-4 secession attempt has received less attention than the Hartford Convention. Theodore Lyman published some sparse notes from the convention shortly afterward, the *Short Account of the Hartford Convention*. James M. Banner published the best-known book about Hartford *To the Hartford Convention: The Federalists and the Origins of Party Politics in Massachusetts, 1789-1815* in 1970. Banner's treatment is

thorough, but it is clear in the introduction that he only viewed these incidents as the growing pains of a new republic.

Charles Pinckney has suffered from similar neglect in the present although this was not always the case. The exception has been Marty Matthews short biography *Forgotten Founder: The Life and Times of Charles Pinckney* in 2004. Interest in Pinckney's draft of the Constitution occasionally arose. The best source, Charles Nott's 1908 *Mystery of the Pinckney Draught*, makes this case. Max Farrand collected some of Pinckney's speeches although the South Carolina ratification convention notes were published separately in 1833. Pinckney's cousin, Charles Cotesworth Pinckney, also had an impressive career including a run at the Vice Presidency with John Adams in 1800. The University of South Carolina and the University of Virginia contain the biggest repositories of Pinckney's writing and correspondence.

Pinckney's fondness in his 1820 House speech for Swiss lawyer and political theorist Emer de Vattel is also worth noting. Vattel's influence on the Framers has not been as well explored as English philosophers. Vattel barely received three brief mentions in Alison LaCroix's *Ideological Origins of American Federalism*, but fared much better in Forrest McDonald's *Novus Ordo Seclorum* in 1985. The occasional mention of Swiss federalism as an example of a possible form of government is owed largely to Vattel's influence.³⁵ Vattel's 1758 *The Law of Nations* is a neglected classic. Pinckney cited Vattel twice during his 1820 speech. Pinckney's knowledge of Vattel, his eloquence, and audacity at the Convention and in 1820 speak to his seriousness as a

³⁵ See James H. Hutson, *The Sister Republics: Switzerland and the United States from 1776 to the Present* (Washington: Library of Congress, 1991), 27. Luther Martin was also an admirer of the Swiss model.

Framer even if his nomination to the Convention was primarily a consequence of his class and lineage.

Broader histories of places and events have tended to feature these Framers although it is worth considering them individually and their roles inside these events. They were informed actors directly involved in the formation of the United States' legal foundation and in the positions to apply them and interpret them for a newer generation of politicians. They cannot, by virtue of their membership at the Constitutional Convention, be secondary actors. Particularly in the cases of Luther Martin and Caleb Strong, their intellects and abilities made them consistently re-elected figures in their home states. In Martin's case, even when out of office, he was an eagerly sought lawyer in private practice and mentor. Lack of regard for these men in the present does not equate with a lack of regard in their own time.

A similar treatment of historical figures occurs with even those still alive. Barry Goldwater's dubious achievement in most history textbooks is his loss in the 1964 presidential election against Lyndon Johnson. It disregards his later career in the Senate, his clashes with 1980s Republican Party ideology, his television interviews in his retirement where his opinions were sought on weighty social issues of the early 1990s. Other figures from the last half century as far flung as Birch Bayh, Jimmy Carter, Henry Kissinger, and Billy Graham are sought for their input and expertise on present issues even though public knowledge of their past significance is limited to a handful of key events. Public knowledge of Caleb Strong, Charles Pinckney, and Luther Martin has waned despite attempts by Mel Bradford and many others to treat the Framers and Founders collectively. They are now the titular "forgotten" Founders.

Accepting this progression as a reality of historical knowledge, one can attempt to conserve information and form references for future research and reading. Similarly, articles and books of interest to this subject merit the same conservation to avoid making celebrities out of particular researchers. The loss of information and public knowledge has too frequently been a test of one's relevance in their fields just as it has been a test of a Founding Father's relevance to the Constitutional Convention and the politics of the early republic. This error should have the weight of a fallacy, but it is sidestepped as a foregone conclusion. On that premise, this thesis will attempt to restore three of the forgotten.

CHAPTER II

CALEB STRONG AND THE STRENGTH OF UNION

The name Caleb Strong has a literary sense to it. If one was writing a protagonist who was a scrupulous, eighteenth century Congregationalist stalwart you could not have chosen a better name. “Strong” has its more obvious connotations and Caleb, derived from Hebrew means “dog” or, to appropriate a more endearing canine trait, “faithful.” For Massachusetts Federalists – leaders in their national political organization – Caleb Strong represented an uncontroversial, old-fashioned traditionalist. Strong was of rural Massachusetts rather than the highly commercialized coastal areas of Boston. He was an easy figure around which a largely fractured state party could rally during elections because of his gift for reconciliation with political opponents and for being seemingly above the fray of Federalist factionalism.¹ When one considers that early Massachusetts elections were held annually, a tradition that was descended from the earliest days of the colony, Bay Staters’ fondness for Strong becomes all the more striking.

The Strong family had been a fixture in Massachusetts since the early days of the colony. Strong’s ancestors ultimately settled in Northampton in western Massachusetts. Strong would demonstrate an acute awareness of the political divide between coastal and

¹ One story in Alden Bradford’s biography has Strong stopping a post-election victory parade to break formation at Samuel Adams’ house to shake his hand as a gesture of goodwill.

western Bay Staters during his long tenure in state politics in the nineteenth century. This colonial milieu placed Strong and his ancestors not only in the world of Puritanism but in the First Great Awakening sharing Northampton with another famous resident, Jonathan Edwards.²

Strong grew up as the only son in a rigidly religious family in Northampton. He studied law at Harvard in the 1740s. A disease in his young adulthood affected his eyesight. This is not recorded in other accounts but is in both Bradford and Lodge's biographies. Lodge attributed this to smallpox. The number of smallpox outbreaks in Massachusetts in the seventeenth and eighteenth make it difficult to pinpoint any specific outbreak in which Strong would have lost his eyesight, although blindness was a common outcome for those who survived.³

Before attending Harvard, Strong attended the Dummer Academy then headed by Reverend Samuel Moody, a man of high status of his time. For readers of Strong's nineteenth century biographies, the name Samuel Moody was unmistakable. For those in the present, differentiating among the members of the Moody family can be complicated, especially their Samuels, and takes a bit of detective work. The school continues today as the Governor's Academy to avoid confusing over Dummer's less flattering homophone Dumber. In Strong's time the school also provided preparatory education for fellow Framers Rufus King and Massachusetts jurist Theophilus Parsons.⁴

² See Jonathan Edwards, *A Faithful Narrative of the Surprising Work of God in the Conversion of Many Hundred Souls in Northampton* (Boston: Kneeland T. Green, 1738), 1-102.

³ Samuel Bayard Woodward M.D., "The Story of Smallpox in Massachusetts" (address to the Massachusetts Medical Society, 1932). R.D. Semba, "The Ocular Complications of Smallpox and Smallpox Immunization," *Archives of Ophthalmology* 121, no. 5 (May 2003), 715-9.

⁴ Charles C.P. Moody, *Biographical Sketches of the Moody Family* (Boston: Samuel G. Drake, 1847): 118-29.

Strong served in municipal and state legislative posts representing Northampton. Over the Revolutionary period he served on Massachusetts' Committee of Correspondence and its own state constitutional convention. He was not part of the 1786 Annapolis Convention but was chosen, along with Elbridge Gerry, Rufus King, and Nathaniel Gorham to represent Massachusetts at the Constitutional Convention in 1788.⁵ Francis Dana had also been selected but did not attend. Dana's involvement in the politics of Strong's era did not end here, although shortly after he fought for ratification at the state level.

The five delegates appeared on the commission signed by Governor James Bowdoin in 1787, although only three were required to represent the state. Unlike the commissions of other states, Massachusetts' wording left an opening for more drastic revisions of the Articles of Confederation. Massachusetts' commission included the phrase "render the federal Constitution adequate to the exigencies of government and the preservation of the Union." This stands in contrast to neighboring Connecticut who wrote "for the sole and express purpose of revising the Articles of Confederation." The semantics of conventions and commissions will be of greater importance when discussing Luther Martin.⁶

Strong's peers held him in some regard as an attorney of a man of sturdy moral fiber. Part of his enduring appeal was that he was not the memorable character of his peers. The traits that would make him a useful figure for Massachusetts Federalists in the

⁵ Bradford, *Founding Fathers*, 11-4.

⁶ Max Farrand ed., *The Records of the Federal Convention* (New Haven: Yale University Press, 1911): 504-5. Credentials of Convention members and Commissions from the various states. All Farrand citations will refer to this work. Farrand's corpus of other amazing works of history are worth perusing but are not cited here. Further citations of Farrand will be formatted as Farrand, volume number, page number.

early nineteenth century were known in 1787. He lacked Gorham's prestige as a merchant and as President of the Confederation Congress. He lacked Gerry's charisma and King's eloquence. The growing theme of Strong as a stalwart and reliable figure was established in the minds of his convention peers.⁷

Two points about the convention are important to consider here. One point is Caleb Strong's involvement at the convention. The other is the topic of disunion. These are not easily gleaned from the convention records. Given neither to verbosity nor self-aggrandizement, he spoke infrequently at the convention. Similarly, dissolution and the permanence of the new Union were never consistent ideas at the convention or among the Framers in general. The inconsistency in views, and the vagueness and silence of these views, is best attributed to the idea that the two generations of the early republic still regarded the new nation as an experiment. Whether one believed in permanence or not was neither a guarantee that it would do so nor a doctrine that it should be so.

Kenneth Stampp, among others, has documented the views of various Framers with regard to the permanence of the new country or the right to withdraw from it.⁸ It is unnecessary to reiterate those accounts and arguments in detail here. Suffice it to say that there was no shortage of Framers on both sides of the argument and, too often, those arguments occasionally arose as conviction and, at other times, when they were politically expedient polemic. The constitutionality of disunion is still hotly debated in some circles. The question of whether northern secessionists believed in the

⁷ Drawn from the notes of Georgia's delegate, William Leigh Pierce in Farrand, III, 88.

⁸ Kenneth M. Stampp, "The Concept of a Perpetual Union," *Journal of American History* 65 (June 1978), 5-33. Stampp drew heavily from Thomas Nagel, *One Nation Indivisible: The Union in American Thought 1776-1861* (New York: Oxford University Press, 1964), 13-32.

constitutionality of their actions is moot barring detailed analysis of their correspondence. The greater point for this essay is that, in the absence of guidance from either the Constitution or a preponderance of the Framers, the notion of disunion briefly became a constitutional question. However, the event did not escalate to the point of a constitutional crisis, although Caleb Strong, governor of the men, had to answer the question to avoid the inevitable liability that would be imputed to all New England Federalists if he did not. This crisis arguably did not resolve until Appomattox although the focus here will be from 1803-1815.

Caleb Strong came to the convention and stayed, along with Hamilton and several others, at the Indian Queen Lodge in Philadelphia. He participated in the dining and discourse at the lodge into the wee hours with the other delegates. Elbridge Gerry had his own private residence not far from the lodge. Not too many blocks away Philadelphia's own son, Benjamin Franklin, took many of them as guests.⁹ At the convention, Strong put forth few opinions. He brought from him Massachusetts' willingness to endure annual elections for both the legislature and the executive; an opinion shared by few others as strongly except for maybe Connecticut's Oliver Ellsworth.¹⁰

Aside from Pierce's observations on all of the delegates, Madison's notes are the best source of information on Strong's limited engagement at the convention. This could have been either his quieter nature or that Madison simply never recorded Strong's input. The convention's, and the First Congress's, reliance on Strong in committee belies the

⁹ Farrand, III, 58.

¹⁰ Farrand, I, 360. Also noted in Bradford, *Founding Fathers*, 11.

notion that he was bereft of opinion. It may also indicate that he was a neutral arbiter. Madison and Strong differed on the matter of proportional and equal representation in the legislature. Strong, perhaps presciently, believed the Union, weak as it was, would dissolve over this very matter. He found the idea of a seven-year term for the executive as objectionable as the Electoral College that he believed made an already complex government far too complex for its own good.¹¹ Strong seemed convinced, cited in multiple accounts, that the convention was nearly going to rupture on the matter of equal representation. He credited his ideological foe and future gubernatorial opponent, Elbridge Gerry, for helping to create the final compromise.¹²

Strong rose to defend the new document at Massachusetts' ratification debates. Unsurprisingly, he first had to defend the final compromise on biennial elections. The following day he defended the Constitution's language as precise and explicit. Whether this was sincere or intended as a sales pitch to persuade unwavering Anti-Federalists is uncertain. Ultimately, with the help of elder Anti-Federalists John Hancock and Samuel Adams, Massachusetts fell in line and ratified 187 to 168 February 6, 1788. Ratification came with the recommendation for a Bill of Rights.

Strong's fears of disunion seemed genuine and perhaps his belief in the goodness of compromise to prevent that were well-founded. He was soon to be part of the new country's formation in the new nation's first congresses. Three more states were required to establish a new union. Both Luther Martin's Maryland and Charles Pinckney's South Carolina were critical although neither ratification vote was particularly close. The ninth,

¹¹ Farrand, II, 100. Also mentioned in Danny Adkinson and Christopher Elliott, "The Electoral College: A Misunderstood Institution." *PS: Political Science and Politics* 30, no. 1 (March 1997), 77.

¹² Farrand, III, 261-3.

New Hampshire, came within ten votes as did Virginia four days later. New York ratified with a majority of three. Strong was now to be the most understated and staid figure of the zenith of Massachusetts' power.

The Congressional Annals offer those in the present an insight into its formation.¹³ The Constitution had laid the groundwork, but the first years of the House and Senate were filled with questions of execution and interpretation. Tristram Dalton joined Caleb Strong in the First Congress but was replaced by George Cabot by the second. This was a matter of luck in the First Congress. The Senate's biennial rotation was chosen by lot in the First Congress. Strong received the longer term, leaving Dalton at the mercy of the Massachusetts' legislature in the following election, which he lost.

This was an early peak for Massachusetts' power. In the fifteen-year period before Jefferson's election, Caleb Strong took part in Massachusetts' most powerful period. Bay Staters held the Vice Presidency, and later Presidency, in John Adams. Theodore Sedgwick served as Speaker of the House. To understand what occurs after 1803, and the emergence of the constitutional crises in which Strong found himself, it is necessary to understand the exuberance of Bay State Federalist politics.

The years 1791 and 1792 helped establish the foundations of the American military of the period. President George Washington wrote frequent messages to the Congress on defense matters, which are recorded in the Annals, and the Congress seemed more than willing to grant Washington's wishes. Washington's primary military concern during this period were the Indians. The 1791 budget included a military and defense

¹³ The Second Founding frequently refers to Reconstruction. This period is not a second founding but the becoming of the first.

budget as the first session closed. Resuming business in March, the Senate approved the first line of succession in the President's death or incapacitation in office, the appointment of military officers, and the formation of the War Department. Henry Knox had already been serving in that role without official office and sanction for almost three years by the time the motion passed the Senate.¹⁴

The military acts that came in 1792 were later identified as the Militia Acts. Strong is an intriguing case of a Federalist whose sympathies on military issues aligned more with Elbridge Gerry or Luther Martin although, perhaps, for very different reasons. There were several key provisions in military lawmaking at this time. Though Senate debate is not well documented, final votes are, including Caleb Strong's. He opposed employment of Indians in the American military. Despite his misgivings about the moral propriety of offensive warfare, he did support the existence of a military and defense infrastructure in the early 1790s. Strong attempted to create a middle course of a reduced force and reduced conscription period for state militias.

The militia question caused considerable debate during and after the Constitutional Convention. The ability to summon state militias was close enough to a standing army to warrant concern among Republicans but it was at least no standing army. Standing armies and navies, and their naval infantry (marine) detachments were an anathema to Anti-Federalists, although in 1792 there was no longer a continental navy.¹⁵

The question Strong would face twenty years later would be over whether a state could

¹⁴ *Annals of Congress*, 1st Congress, 2nd sess., 1790.

¹⁵ The intermediary period between the collapse of the Continental Navy, the Constitutional Convention, and the creation of the new United States Navy is overdue a consolidated historical narrative. The best single work on this period was Marshall Smelser, *The Congress Founds the Navy: 1787-1787* (Notre Dame: University of Notre Dame Press, 1959).

refuse the call for militia forces; a question even more relevant since Massachusetts had the most formidable militia in the country. The consolation was that militia forces were at least comprised of citizens rather than a professional soldiery and officer corps.¹⁶

Strong ultimately voted against the final version of the militia acts that mandated nationwide conscription of state militias in national conflicts. It was as close to a standing army Washington could hope to achieve given the varying states of readiness in state militias. Massachusetts' militia was the best organized and oldest in the new republic. The militia was a Federalist bedrock critical, they believed, to a well-ordered society. Rigid rank structures also helped reinforce the ideal stratification Federalists valued. The New England militia's reputation had been well-earned during the Revolutionary War. Strong and others' reluctance might have been ideological, but there was a general distrust of placing such an estimable organization under federal control, especially after 1803.¹⁷

Strong sought retirement after his term in the Senate but became the Governor of Massachusetts, and her militia, four years after the conclusion of his Senate term. The political factionalism so apparent in the final ratification twelve years earlier had grown increasingly toxic although not necessarily corrupt, especially compared to neighboring New Jersey whose politics in the preceding decade were far from the republican ideals espoused at the convention. Throughout the Revolutionary years, politicians from northern Essex County had thrown a wrench in state politics, and later in the Federalist

¹⁶ Joshua M. Smith, "The Yankee Soldier's Might: The District of Maine and the Reputation of the Massachusetts Militia, 1800—1812," *The New England Quarterly* 84, no. 2 (2011), 237.

¹⁷ Donald R. Hickey, "New England's Defense Problem and the Genesis of the Hartford Convention," *The New England Quarterly* 50, no. 4 (December 1977): 587-604.

Party. Charles Raymond Brown attributes the moniker “Essex Junto” to John Hancock. The Junto formed an anti-Adams coalition in the Federalist Party and exerted enough influence to be known to politicians outside of Massachusetts.¹⁸

Whether these regional politicians were as organized as Hancock and others would later contest has occasionally been a point of scholarly contention. One point that unified the disparate members of the supposed Junto was their opposition to John Adams. The more vocal members of Essex could barely hide their contempt.¹⁹ However, the main feature of the Junto for this investigation were their failed efforts at fomenting secession from the new republic. Brown places Strong in the Junto although he gets the details of Strong’s birthplace and association with northern Massachusetts entirely incorrect.²⁰

An example of sparring between Essex and Adams Federalists occurred during Adams’ own administration during this height of Federalist power. The latter half of Adams’ administration had been blessed with Federalist majorities in both houses of Congress. These majorities permitted easy passage of the Alien and Sedition Acts which seemed to its critics to illegalize dissent. This began the destruction of the Federalist stronghold in politics, a zenith it would never regain at a national level. James Madison and Thomas Jefferson anonymously authored the Virginia and Kentucky Resolutions and held to the interposition doctrine even if Jefferson wanted to take more radical steps

¹⁸ Brown, “Essex Junto,” 8-10.

¹⁹ “Letter from Timothy Pickering to Charles Cotesworth Pinckney” in *Documents Relating to New-England Federalism, 1800-1815*, Henry Adams, ed. (Boston: Little, Brown, and Company, 1905), 331.

²⁰ Brown, “Essex Junto,” 10.

toward a doctrine of nullification.²¹ The Essex Junto suddenly had the upper hand and endorsed Aaron Burr for the presidency in 1800 against the rising Jefferson. Alexander Hamilton, a useful ally to the Junto, broke from their ranks to thwart the equally distasteful election of Burr. The Democratic Republicans prevailed and, on the thirty-sixth ballot in the House of Representatives, Jefferson became the third president.²²

Meanwhile in Massachusetts, Strong's re-election as governor was met with general approval. His inaugural address was spent expounding the highest ideals of Northern Federalism – a mixture of public religiosity and paternalism. He praised the Massachusetts militia and lent his quiet approval to the Alien and Sedition Acts. Strong's speaking was frequently given to allusion rather than directness.²³ It was also an unavoidable act of public mourning to eulogize the late George Washington. No one, including Pickering, could avoid Washington's cult of celebrity in public mourning or even private correspondence.

Jefferson was preoccupied with France's acquisition of most of the new continent from Spain. The geopolitical concerns, for Jefferson, outweighed the constitutional necessities of treaty-making and, in 1803, he secured the purchase of over 800,000 square miles of North American territory in the Louisiana Purchase. Federalist outrage swelled over the constitutionality of the purchase although, lingering the background, was a much larger issue of congressional apportionment. The Federalists knew in the state of politics in 1803-4 that allowing slavery in the new territory would bolster southern power and

²¹ Adrienne Koch and Harry Ammon, "The Virginia and Kentucky Resolutions: An Episode in Jefferson's and Madison's Defense of Civil Liberties," *William and Mary Quarterly* 5 (April 1948), 145-176.

²² Brown, "Essex Junto," 25-30.

²³ Caleb Strong, *National Intelligencer and Washington Advertiser*, November 24, 1800.

representation through the three-fifths compromise. These fears would prove overblown in the short term although they would be realized fifteen years later during the Missouri crisis.

What ensued was more the folly of a handful of Essex-aligned Federalists than a mass movement. The drive for northern secession was the brainchild of Federalist radical Timothy Pickering. Strong's place in this narrative is problematic. Even though he would presumably have been a governor within this new proposed nation, there is little indication that anything that occurred in 1803-4 reached his attention although for Aaron Burr it became a national scandal. Pickering's plan was grandiose for its time: secure Federalist majorities in New England states, orchestrate Aaron Burr's election as governor of New York, then secede.²⁴

Before dismissing Pickering's fragile concept of union as impracticable, it is important to note that Pickering was not alone in his conception of the new country as an experiment in 1803. Even among Framers states' rights thought held some primacy. Madison and Jefferson first articulated this in their anonymous Virginia and Kentucky Resolutions. As Kevin Gannon has noted, threats of disunion from northerners were also frequent. Around the same time Henry Cabot Lodge wrote his biography of Caleb Strong he also wrote of his great-grandfather George Cabot and accurately stated that "the hard, matter-of-fact way, in which men seventy-five years ago argued about the advantages and

²⁴ Kevin Gannon, "Escaping 'Mr. Jefferson's Plan of Destruction': New England Federalists and the Idea of a Northern Confederacy, 1803," *Journal of the Early Republic* 21 (2001), 314.

disadvantages of a dissolution of the Union, was as natural and proper as it is for us to consider that question no longer an open one.”²⁵

Timothy Pickering takes the spotlight in 1803 while Strong recedes into the background. Pickering and Samuel Adams were not sent to the Convention. John Adams was in London at the time. Massachusetts had, likely for the better of the Convention, sent its least doctrinaire figures as delegates, Strong among them. It is unnecessary to recapitulate the diplomatic melee in 1798 between France, then governed by the hawkish Directory government, and the United States. What is important to note is that the events drove Pickering, then Secretary of State in the Adams administration, into a state of near-paranoia that led to his dismissal from his cabinet post. Pickering and Adams had also been at odds over the expansion of the military. The military grew, re-establishing the Navy and Marine Corps, and adding the progenitor of the Public Health Service. Pickering favored an even larger force, especially an Army, to counteract what he perceived to be the growing threat of French and Spanish involvement on the continent.²⁶

Elbridge Gerry led the diplomatic negotiations with the French.²⁷ Pickering hoped for Gerry’s failure and a full-scale war. However, in a period of otherwise strong party unity among Federalists, Pickering was unable to maintain party discipline or a sense of compromise. Pickering led a small cabal of radical Federalists at the Coyle

²⁵ Gannon, “Northern Confederacy,” 416. Henry Cabot Lodge, *Life and Letters of George Cabot* (Boston: Little, Brown, and Company, 1878), 440-41.

²⁶ Gerard Clarfield, *Timothy Pickering and the American Republic* (Pittsburgh: University of Pittsburgh Press, 1980), 197.

²⁷ Clarfield, *Timothy Pickering*, 200.

Boarding House in Washington D.C. which catered primarily to Federalists. In this impenetrable bubble, Pickering pushed his plan for secession.²⁸

Hamilton, who was killed by the secessionists' hopeful President, Aaron Burr, was aware of the plan as was Rufus King. Neither provided their assent to the idea of secession. No leading Federalist did so. As stated, it seems unlikely Strong was aware of the goings-on at Coyle that year. It was clear by his January 1805 address to the Massachusetts legislature, however, that he was finally informed of what happened. It was one of Strong's longest addresses although, typical of his rhetoric, he avoids discussing the issue directly preferring a warning against factions in the presence of enemies. Typical of a Founder, he invoked ancient governments and their collapse. The House's response lacked Strong's compunctions and addressed the secessionists directly.

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Pickering was spared enough humiliation to serve as both a Senator and member of the House for Massachusetts until the disastrous fallout of the Hartford Convention which forced his retirement from public service completely. He died in 1829. Strong and Pickering would spar more directly in 1814 over Massachusetts' involvement in the War of 1812.

Strong had two periods of retirement from public life. His Senate term ended in 1796 and former Speaker of the House Theodore Sedgwick took his seat for the next term. Fellow Framers Jonathan Dayton from New Jersey took the Speakership. Strong

²⁸ Clarfield, *Timothy Pickering*, 220-7

²⁹ Caleb Strong, *Patriotism and Piety: The Speeches of Caleb Strong, Esq.* (Newburyport: Edward M. Blunt, 1808), 111-121.

disappears largely from public view until his gubernatorial election in 1800. Following the hotly contested election in 1807, he bowed out of public view yet again. His tenure was remarkably stable. The party majorities in the Massachusetts legislature would become more fluid.

Strong ran against Elbridge Gerry in 1812. Gerry's tenure in office was amiable enough with Federalist majorities, but when the pendulum swung in favor of Republicans once again, Gerry abandoned any pretense of bipartisanship. Gerry made waves with his re-districting plan to sustain permanent Republican majorities: the eponymous *gerrymandering*. Embroiled in scandal, the Federalists brought Strong out of retirement once again. The nation had gone to war against Great Britain and Strong was now a wartime governor in a conflict that could very well bring the frontline to his own shores and would. Pickering's own vision was reified except the enemy was not France. Gerry died two years later while serving as James Madison's Vice-President.³⁰

The thought of a wartime governor carries little weight in the present day that has been absent coordinated attacks on the mainland from enemy nations. The demarcation between state militias and regular forces gave governors great responsibility in the event of a mainland invasion on their soil. It is no coincidence that Strong spent many of his annual addresses in his first seven year stretch as governor to discuss militia readiness.

Of equal importance in the militia was the question of leadership and the summoning of forces. It was a foregone conclusion that in most circumstances that a son of the state would command its militia rather than a federal outsider. The significance

³⁰ A side note: James Madison originally reached out to fellow Framer, New Hampshire's John Langdon. Langdon served as New Hampshire's governor during Strong's administration.

afforded to the militia's place in a well-ordered society has been discussed. In one sense these two implicit rules are related, the gravity and importance of the militia to a society was tied to the best members of that society commanding it.³¹

That is not to say, however, that offensive warfare was an acceptable role for the militia. Many New England clergy had Federalist leanings. Piety and politics were intertwined when it came to the matter of war. Offensive war was a divine punishment and a call for reconciliation and penance. Some ministers added qualifiers that a war could be necessary and just as long as it was defensive in nature. Others struck a more pacifistic tone. It is important to give public religion in New England its weight in shaping political opinion in the early nineteenth century. There was immense disapproval of the War of 1812; the congressional vote itself one of the closest votes on a declaration of war or authorization of force until 1991.³²

Understanding Hartford requires starting in the present and working backward before dealing with the events of 1814 by themselves. Hartford is traditionally understood as a secessionist movement and it bore that stigma even its own time. The opponents of the convention and Essex Federalists (i.e. the Adamses) created this persistent fiction. There was no shortage of radical opinions in scattered editorials during the lead up to Hartford, but the Convention itself had nothing to do with secession or even nullification. Part of the problem for Hartford's legacy also lay with the timing. The

³¹ Hickey, "Genesis of the Hartford Convention," 235-41.

³² Lawrence Delbert Cress, "Cool and Serious Reflection: Federalist Attitudes Toward War in 1812," *Journal of the Early Republic* 7, no. 2 (Summer 1987), 123-45. "Congress Authorizes Gulf War: Historic act: The vote in both houses, supporting Bush and freeing troops to attack Iraq, is decisive and bipartisan. It is the strongest move since Tonkin Gulf," *Los Angeles Times*, January 13, 1991. A good primary source exposing a more pacifistic view see *Letters Addressed to Caleb Strong* (Philadelphia: J. Bakestraw, Printer: 1817).

surge of patriotism following the Battle of New Orleans, and the ascendance of Andrew Jackson, made any movement like Hartford, especially with rumors of secession, all the more suspicious.³³

Pickering's ill-fated secession attempt probably had much to do with this taint and Pickering was no less doctrinaire in 1814. Writing to Strong that same year, Pickering excoriated the war and his closing comments and claimed that the Republicans had brought the country to the "brink of ruin." His language was strong but careful not to make any recommendations. Strong's reply was amiable but ignored Pickering's criticisms of the opposite party.³⁴ Pickering's exchanges with Gouverneur Morris made his last comments to Strong look moderated in comparison. For Strong and Morris, the current situation amounted to a tyranny that had to be stopped.³⁵ This is not to say that some radicals were not calling for secession before Hartford. However, nothing was achieved.³⁶

Luckily, considering the damage impressions alone caused the Hartford cause, moderate voices prevailed during the convention itself. It was not the only convention of the period, though it was the largest. It was also not without precedent. Far from a secession or nullification call, Hartford fit squarely in the controversial, yet incredibly vague, realm of interposition just like the Virginia and Kentucky Resolutions sixteen years before. The two parties' reversal of roles in sixteen years was glaringly apparent.

³³ Hickey, "Genesis of the Hartford Convention," 587. Forrest McDonald, *States' Rights and the Union: Imperium in Imperio* (Lawrence: University Press of Kansas, 2000), 69-70.

³⁴ Adams, *Documents Relating to New England Federalism*, 394-400.

³⁵ Adams, *Documents Relating to New England Federalism*, 400-404.

³⁶ Banner, *To The Hartford Convention*, 310-3.

Fourteen years after the Convention, the surviving Federalists and John Quincy Adams began a series of tense exchanges about the legacy of the Massachusetts Federalist Party. Adams accused the Federalists of having an eye to the dissolution not only during Pickering's attempt in 1803-4 but during the bitter intervening period during Jefferson's embargo. Adams spared no words or feelings in haranguing Harrison Gray Otis, John Lowell, Henry Cabot, and other leaders. Adams published these charges as a sitting President in 1828. The retorts continued through the remainder of the decade with no resolution.

At its core, the Hartford Convention was an interposition to address issues that had arisen during the preceding two years during the War of 1812. Theodore Dwight's lengthy history of the convention, written in 1833, began the history much earlier. Two thirds of the three hundred page history are devoted to events occurring before the War of 1812. The Dwight family had long been a Federalist fixture of both Northampton and Hartford. However, in all histories, the events of 1813 and 1814 leading up to Hartford were simple.³⁷ In 1813, to offset the movement of troops to the Canadian frontier to fight the British offensively, James Madison called on the militias to fill the defensive gaps in their respective states.³⁸

Strong was part of a triad of governors including Roger Griswold of Connecticut and William Jones of Rhode Island who took a suspicious view of this request in 1813. Strong, with the assent of the Massachusetts Supreme Court, refused to comply. Griswold and Jones also refused with each having the support of his state legislature.

³⁷ Theodore Dwight, *History of the Hartford Convention With a Review of the Policy of the United States Government Which Led to the War of 1812* (New York: N. and J. White, 1833).

³⁸ Hickey, *Genesis of the Hartford Convention*, 587.

This was hardly surprising. Militiamen from Pennsylvania and neighboring states had been conscripted in the Canadian campaign and were not defending their states. Strong and his peers in New England did not believe the Canadian operation was a just part of the war. There was also, at least in 1813, no imminent threat of invasion that would demand state militia involvement.³⁹

The religious opposition to the war has been noted earlier, but there were also practical concerns apart from divine punishment for the Madison presidency. Summoning the militia would disrupt an already volatile economy by taking away producers and farmers away from their trades. Overall, the readiness and capability of the New England militias were still enviable. The regular Army, and the Navy, were operationally ineffective although tactically fierce. Naturally, this dovetailed into another reason for opposing the war: the nation was simply unprepared for it.⁴⁰ Opposition or not, Federalists were still Federalists. Calamity and factionalism were very un-Federalist tendencies. Strong and other Federalist leaders urged calm despite the more strident opinions in papers and from the tempestuous Pickering. A New Jersey convention also called for using legal means to resist.⁴¹ Paying one's taxes was fine; enlisting was another matter.

However, in 1814, invasion was no longer mere threat. The British began invasions and bombardments of the New England coast. Left largely undefended by the regular forces and navy, New England was on the hook not only for its own defense but for paying its monetary costs as well. Sympathies for New England after its refusal to

³⁹ Hickey, *Genesis of the Hartford Convention*, 589-91.

⁴⁰ Cress, "Cool and Serious Reflection," 125-32.

⁴¹ Cress, "Cool and Serious Reflection," 136-8.

send troops was mixed. On the one hand the Canadian invasion cost the mainland its regular army for defense. However, New England still paid its taxes to the war and was now left in a poor defensive posture. The federal and constitutional boundaries between state militias and the regular military and problems with defense were the impetuses for the Hartford Convention despite whatever other radical elements had in mind.⁴²

The Massachusetts legislature provided the convention delegates with its commission. The states were to assume their own defense and to be taxed appropriately. The original commission called for amending the United States Constitution to this effect. Remove the three-fifths clause, require a congressional supermajority for war declarations, and enforce a one-term limit for each President with the proviso that succeeding presidents must be from a different state than his predecessor. The language was transparently political. This was a maneuver to strip power away from Virginia and other southern states. Strong was not a sitting delegate although he provided his assent by opening its deliberations with prayer.⁴³ Nathan Dane, an elder Essex statesman and member of the Junto, chaired the more important committees which finalized the dicta of the Convention. Dane served as a voice of moderation as well.⁴⁴

⁴² James M. Banner, *To the Hartford Convention: The Federalists and the Origins of Party Politics in Massachusetts, 1789-1815* (New York: Alfred A. Knopf, 1980).

⁴³ Letters from Christopher Gore to Caleb Strong would indicate that Strong was ignorant of the daily proceedings of the convention. Strong was probably not taking totally a hands-off approach but probably had some faith in Nathan Dane while keeping tabs via Gore. See Adams, *Documents Relating to New England Federalism*, 422-3. Gore, like the convention's chairman, George Cabot, had their own misgivings with the Republicans during the Embargo Acts of 1807 during Strong's temporary retirement. Gore's influence in Massachusetts politics during Strong's second retirement is far greater than can recounted here.

⁴⁴ Dane is a regrettably forgotten figure as well. It was his resolution in the Confederation Congress to have the Philadelphia convention in 1787. A digestible biographical sketch is available. See Dean W. Eastman, "Nathan Dane" in *The Yale Biographical Dictionary of American Law*, ed. Roger K. Newman (New Haven: Yale University Press, 2009), 147-8. Dane and Strong had concurrent legal and political careers in Massachusetts. Despite Dane's proposal in 1787, he wrote Caleb Strong October 10, 1787 with his reservations. See *The Documentary History of the Ratification of the Constitution*, ed. John P.

On the war front, Strong's militia left Maine in a precarious position in 1814. The year prior, the refusal to fund federal military operations left the regular army's frontier campaigns, largely in Maine's territory, without needful assistance against the British. Maine, already long politically distant from the rest of Strong's Federalist Massachusetts, used the Federalists' wartime politicking for a call to independent statehood. The debacle of Maine's statehood will be covered in another chapter. Strong's influence over events at Hartford helped to maintain a more moderated position away from the likes of Pickering and Josiah Quincy, but the cost of his interposition was the disaffection of Maine and the waning of Federalist power.⁴⁵

Unfortunately for the Hartford delegates, Andrew Jackson's victory in New Orleans changed the negotiations at Ghent. Three delegates were en route to Washington when the Treaty of Ghent was signed. Their hope to embarrass the Republican administration instead brought heaps of scorn on them. One very irreverent cartoon featured the three delegates sailing in a chamber pot christened "The Hartford." The ship had sprung a leak and was doomed to sink presumably from the delegates' own excrement. The speech balloons were drawn with swirling words seeming to imply the men were talking in circles or that their words sprung from the feculent odor.⁴⁶ Despite the published exchanges between John Quincy Adams and the surviving Federalists, the Federalist period was over. 1824 would usher in an entirely new party system entirely

Kaminski, Gaspare J. Saladino, Richard Leffler, Charles H. Schoenleber and Margaret A. Hogan. (Charlottesville: University of Virginia Press, 2009).

⁴⁵ Matthew Mason, "The Maine and Missouri Crisis: Competing Priorities and Northern Slavery Politics in the Early Republic," *Journal of the Early Republic* 33, no. 4 (2013): 675-700.

⁴⁶ Harlow Scheidly, "Sectional nationalism: The culture and politics of the Massachusetts conservative elite, 1815-1836" (Ph.D. Diss., University of Connecticut, 1990), 4-5. For an image of the cartoon and its accompanying ballad see "Three Wise Men of Gotham Went to Sea in a Bowl," Massachusetts Historical Society, <http://www.masshist.org%2Fdatabase%2F2303>.

bereft of the Federalist Party. It is likely that Theodore Dwight's massive history of Hartford was a response to this criticism and defense of the Federalist Party.⁴⁷

Caleb Strong died in 1819, three years after leaving office. His final speech before his ultimate retirement was conciliatory despite everything that had occurred. He did not live to see the finality of the Maine separation or its difficult context during the Missouri crisis. His successor, John Brooks, was one of the last Federalists elected. Strong's consistency on the indissolubility of the union kept Massachusetts politics and the Hartford Convention free of the radicalism that had long infected Pickering, Quincy, and other men. However, Strong's refusal to contribute the state militia was more problematic. Not initially predisposed to turning against the federal government, Strong's position put the state in a precarious financial position and left his frontier unprotected from the British. The lawfulness, or constitutionality, of his position was likely solid although it was folly to assume that New England would remain free from invasion for long. The decisions were grounded in his moderation and convictions but were mistakes borne of political, rather than defensive, calculation. Unfortunately, Strong and others had little narrative control over Hartford leaving its supporters publicly clamoring over the convention's legacy a generation later. Strong had navigated two constitutional crises: federal control of the militia and the right of secession though later histories, including much of the later calumny about Hartford, made little mention of him

⁴⁷ Journalist John Robertson Dunlap mentioned Dwight's history as well as documenting reactions to the convention including one from Robert Y. Hayne. The work is deliberately partisan and the Kentucky-born Dunlap contended Hartford was most certainly an attempt at secession. See John Robertson Dunlap, *Jeffersonian Democracy* (New York: The Jeffersonian Society, 1903), 230.

despite his presence. Though far from being background noise, Strong was a stabilizing presence in a party tearing itself apart.

CHAPTER III

CHARLES PINCKNEY, SLAVERY, APPORTIONMENT, AND TERRITORIES

This chapter will focus on Charles Pinckney and the Missouri Compromise. At the end of his political career, Pinckney lent his authority as a Framers to the debate over Missouri's application for statehood. He drew on longstanding questions of constitutional interpretation on various clauses and sections: Congress' authority to regulate slavery in territories, the historical basis of the three-fifths compromise, and the meaning of the migration and importation clause.

Charles Pinckney was born into one of South Carolina's most prominent political and agricultural families. His cousin, Charles Cotesworth Pinckney, was also a delegate to the Constitutional Convention and his brother, Thomas Pinckney, was an early governor of South Carolina following the Revolutionary War. Pinckney was also tied to other prominent South Carolina families – Rutledges, Laurenses, and Ramsays – through marriage. His later break with the Federalists was also a break with a longstanding family lineage of Federalists.¹ The Pinckneys had endured South Carolina's unforgiving summer weather, and its tendency toward tropical disease, and remained long enough to

¹ Marty D. Matthews, *Forgotten Founder: The Life and Times of Charles Pinckney* (Charleston: University of South Carolina Press, 2004): 1-24. This is the only recent and scholarly biography of Charles Pinckney to date.

be part of its growth and vitality that made it so important in the eighteenth and nineteenth centuries.

Charles Pinckney was not the youngest delegate at the Convention; that title went to Jonathan Dayton of New Jersey. He had still not reached his thirties when he was chosen to go to Philadelphia with four other South Carolina delegates in 1787.

Pinckney's fearlessness and vanity placed him at the forefront of numerous debates at the convention over suffrage, state sovereignty, and the powers of the executive branch. Despite his later leanings toward greater states' rights, Pinckney was not an initial champion of Anti-Federalist ideas. The one issue, perhaps the biggest issue, which led him toward states' rights was the issue of slavery.²

Pinckney naturally brought with him a desire to protect southern interests. His position on critical constitutional issues indicated a belief that even an energetic federal government it should never intervene on the slavery issue. He once endorsed a congressional veto of state laws, legislative election of the executive, and a shared fear of too much democracy with other Federalists. The legislature would be best suited to know what type of executive would best carry out its laws. He shared with North Carolina's Hugh Williamson a proportional representation scheme, perhaps believing that apportionment including its slaves would give South Carolina parity with larger states.³

There have been a few debates over the years about the extent of Pinckney's contribution to the final draft of the Constitution. As noted in the introduction, textual

² Indexed entries on slavery in Farrand are too numerous to recount here. Bradford, *Founding Fathers*, 201-4. James Madison also penned a defense of the three-fifths compromise in *The Federalist* 54.

³ Ralph Ketcham, *The Anti-Federalist Papers and the Constitutional Convention Debates* (New York: Signet, 1986), 100.

evidence supports the notion that Pinckney might have authored entire drafts of the Constitution. Madison's notes are silent about the draft. Pinckney's youth and bravado might not have endeared him to some of the convention members, but his vigorous support of the Constitution probably helped push South Carolina toward ratification.

Pinckney would likely have enjoyed the plaudits that would have been afforded the primary author of the Constitution. Framers and Founders were typically held in high regard. In the thirty-three years that separated the convention and the debates over Missouri's statehood, the Marshall Court had inherited the duty of Constitutional interpretation including its power of judicial review. This did not endear Marshall, or the Constitution, to South Carolina. Pinckney's 1820 exegesis of the Constitution did not offer any clues to the extent of his authorship. His peer, John Rutledge, had chaired the committee that produced the original draft.⁴ However, Pinckney avoided the question of authorship, if he ever was an author of much of the document, but became its southern expositor in the Sixteenth Congress. While much of Pinckney's analysis was accurate, it was an analysis suited to the political climate of 1820s South Carolina and indeed to any politician or political faction interested in keeping Congress away from the question of slavery in Missouri.

Thirty-two years earlier, at the South Carolina ratification convention in May 1788, Pinckney had also made opening remarks. Pinckney began what may likely be the germinal qualities of an American exceptionalism – America had inspired other European revolutions. He spoke of a mutual interdependence among all classes, of planters,

⁴ Charles C. Nott, *The Mystery of the Pinckney Draught* (New York: The Century Company, 1908): 3-16.

manufacturers, and merchants. Pinckney had an extensive knowledge of state governments and of the differences politically, and in public manners, of men across the new nation. Pinckney concluded with a call for unity and harmony. Though neglected and buried in state level archives, the speech is a powerful piece of rhetoric.⁵ Pinckney's speech is thick with irony as his biographer Marty Matthew notes. Pinckney excoriated European governments, the peerage, aristocracy, religious persecution, and laws of primogeniture. His rhetoric is incredibly democratic and egalitarian even as he held a suspicion of democracy and jealously guarded suffrage for only the elite. Pinckney's conception of American life and commerce was one of interdependence between classes of wealth and classes of occupation.

Pinckney made a sweeping history of the colonies and concluded with a brief pro-and-con of various forms of government: monarchy, aristocracy, republics, and mixed systems. The discussion of these forms of government and of foreign governments has some degree of exaggeration but it still shows incredible knowledge that, outside of Hugh Williamson, is not often accorded to southern Framers outside of Virginia. Pinckney closed his speech floridly tethering the United States to the future of all mankind. He referred to the men of the North as brethren and called for national unity, which naturally entailed ratification of the new constitution.⁶

South Carolina's own sectional splits were apparent in the two major votes of the ratification process: the vote for convention and the final vote on ratification. With only

⁵ *Debates which Arose in the House of Representatives of South Carolina, on the Constitution of the United States, by a Convention of Delegates Assembled at Philadelphia together with such notices of the Convention as Could be Procured* (Charleston: A.E. Miller, 1831) 1-56.

⁶ *Debates which Arose in the House of Representatives of South Carolina*, 74-9.

a handful of exceptions in Prince Frederick and St. Bartholomew parishes, opposition to both votes was firmly entrenched in the Piedmont and Upcountry toward the Appalachians. Pinckney and the colonial Tidewater prevailed despite a geographic and spatial (but not representational) majority throughout the remainder of the state.

The elder Pinckney was sixty-three when elected to the House of Representatives in 1818. Pinckney, like Rufus King in the Senate, was the lone surviving Framers in the House. Pinckney was aware of this status although, for much of the lengthy debates over Missouri statehood, Pinckney remained silent on the floor allowing Henry Clay and John Taylor to dominate much of the discussion that had, by February 1820, lasted for nearly two years.⁷ The debate sporadically arose among other key issues of the day, namely Revolutionary War pensions that neatly mark the generational leap from 1787 to 1820.⁸

Debate on Missouri arose but was quickly swept aside. Both Rawlins Lowndes of South Carolina and Missouri's at-large delate in the House, John Scott, pushed for action.⁹ A debate that seems petty to contemporary ears ensued about the history of the admission of states. Clay recoiled at connecting Maine and Missouri statehood questions because of his own state, Kentucky's, own early statehood mini-crisis with Vermont, a non-slave state, from 1791-2. Other representatives chimed in mentioning Alabama's admission the year before. What of the many stipulations placed on Louisiana's admission? Clay's attempt to couple Missouri and Maine, and his memory of Vermont and Kentucky, was called out as an instance of hypocrisy. Opponents asked Clay if it was wrong to do it in 1791 why is it *right* to do so now? Clay, usually an aggressive

⁷ *Annals of Congress*, 16th Congress, 1st sess., 1820.

⁸ Pinckney was unusually silent on this issue as well.

⁹ *Annals of Congress*, 16th Congress, 1st sess., 1820.

presence in the House, backed down. Connecticut's Samuel Foot, no small figure in the Missouri crisis, intervened at this juncture to focus on Maine's representation in the House as it separated from Massachusetts – an important issue in its own right.¹⁰

Congress reconvened after a very brief recess in January 1820. New York's William Storrs attempted to resume the Missouri debate, although his attempt would, too, be ill-fated. Storrs attempted to attach his name to an early compromise very similar to the eventual Missouri Compromise the following year: slavery would be banned north of a certain latitude and fugitive slaves could be reclaimed. Here Storrs began an interesting conversation on the Constitution: despite the migration or importation clause in the Constitution, Congress still had broad power to regulate slavery via the commerce clause.

This prefaces Pinckney's February 1820 speech before the House. Even considering Pinckney's convention speeches, and his speeches during South Carolina's ratification of the Constitution, his speech on the Missouri crisis is his legacy speech. Aware of his place as the House's sole Framers, he arose and spoke. Pinckney's speech was more than a routine floor speech. This perhaps owes to age as well as his own eloquence, which had been on display for decades, and his interest in securing a legacy. This was Pinckney's exegesis of the Constitution and of American history to that point. He derided the confederated government as a "miserable, feeble mockery of government" and spoke to its near dissolution by 1785 as several states to pay into its treasury.

Pinckney began not with an opinion but a discussion of his silence on the matter. Surviving Founders, usually Madison and Jefferson, could be notoriously reluctant to

¹⁰ *Annals of Congress*, 16th Congress, 1st sess., 1820.

speak on early republic politics.¹¹ Nine months following the speech, Jefferson wrote approvingly to Pinckney and excoriated northern banking interests. Jefferson's health was on the decline and he had not seen Pinckney in almost two decades at the time. Jefferson wrote to Albert Gallatin in December 1820 with a slightly more pessimistic tone linking the sectional misfortunes in the United States to the turmoil in Germany and England.¹²

Pinckney's silence in the House on the matter up until this point might have been a tactical matter. When he did speak it would carry the weight of a Framer who wanted to allow the newer generation to manage its own affairs as his retired contemporaries had. This assumption seems bolstered by Pinckney's insistence as a moderate voice with the authority as the sole Framer in the House. His primary concern was of the issue of slavery in Missouri although he could not broach that topic without first making his way through others. Though it is not explicit in the speech, another generational break between the Framers and Early Republic Congressmen is evident here. Pinckney saw slavery as quite necessary, but far from an evil.

Thirty-three years earlier at the convention, Pinckney had rejected any hope of South Carolina's ratification without protection of slavery although he implied to his fellow Framers that South Carolina could eventually retire slave importation just as Virginia and Maryland had.¹³ Jefferson's letter spoke to Pinckney as someone who

¹¹ Drew McCoy, *The Last of the Fathers: James Madison and the Republican Legacy* (New York: Cambridge University Press, 1989), 9-39.

¹² Thomas Jefferson, *Letter from Thomas Jefferson to Charles Pinckney* (September 20, 1820), Founders Online, accessed March 5, 2018, <https://founders.archives.gov/documents/Jefferson/98-01-02-1544>. Letter from Thomas Jefferson to Albert Gallatin December 20, 1820 in *Thomas Jefferson: Writings*, ed. Merrill D. Peterson (New York: Penguin, 1984), 1447-51.

¹³ Ketcham, *Anti-Federalist Papers*, 153.

equally detested the “peculiar institution” but acknowledged its present necessity economically.¹⁴

Rhetoric on this topic had changed dramatically since the Framers were in their prime. Representatives like William Smith and William Barnwell Rhett had moved the dialogue to conclude that slavery was a positive good for society rather than a necessary evil.¹⁵ In the numerous early debates over the Tallmadge Amendment and the Missouri Compromise, anti-slavery forces reached beyond the Constitution’s language and appealed to the Declaration of Independence’s language of equality. The often legalistic arguments of southern representatives did not leave much conciliatory room for the emotional appeals to the Declaration of Independence. Nathaniel Macon rejected any legal interpretation of the Declaration of Independence outright.

Pinckney continued his speech but lapsed from moderate language into a screed on the three-fifths compromise laden with sarcasm. Had northern states in 1787 accepted the three-fifths compromise on the notion that it would likely be of little consequence later on? Had the compromise been wrung from northern men to create a new Union? Pinckney saw these assertions as deliberate errors. It is unclear whether Pinckney was stating that the compromise was uncontroversial in its own time. That assertion would have been as deliberate an error as any. Pinckney abandoned the question if this was the case.

¹⁴ See also *Notes on Virginia*. This simplifies and glosses over a contentious historiographical debate involving antebellum thought and its usual divisions into pre-post Jeffersonian periods. Despite Jefferson’s claims to the contrary, slavery interests flourished under his leadership and that of his intellectual heirs. Some historians have discarded the pre/post periodization entirely while others defend it or at least are not willing to discard it entirely.

¹⁵ Philip F. Detweiler, “Congressional Debate on Slavery and the Declaration of Independence, 1819-1821,” *American Historical Review* 63, no. 3 (April 1958), 605.

Indeed, the three-fifths representation rule had grown into a rhetorical tool among antislavery forces although 1819-20 were not the first years that complaints about the representation had occurred. Hugh Williamson, who had only recently died in 1819, proposed the idea first although it was rejected until made again by his North Carolina peer, William Davie. As seen in the previous chapter, Davie had been equally engaged with the politics of the early republic although it is difficult to discern from his few surviving letters what he thought in the waning months of his life in 1820 about Missouri.¹⁶ Disdain for the three-fifths rule had arisen several times since the early nineteenth century, particularly during the Louisiana Purchase as several politicians, presciently it turned out, wondered about the future of politics and slavery in new territories.¹⁷

Pinckney left this as the final mention of the three-fifths rule in his speech. This might also have been a tactical move as many of the rule's critics were accurate in their discussion of how it bolstered southern influence in government, particularly that of slaveholders. Indeed, by 1860, although the overall slaveholding population of the United States had dwindled to barely four percent, slaveholders maintained power far beyond their numbers in matters like the Missouri crisis.¹⁸ Pinckney instead focused on the economic vitality of South Carolina where he was on much firmer ground.

¹⁶ William Richardson Davie: *A Memoir, With His Letters and Notes*, ed. Kemp P. Battle and Joseph Gregoire de Roulhac (Chapel Hill: University of North Carolina Press, 1907).

¹⁷ Albert Simpson, "The Political Significance of Slave Representation," *Journal of Southern History* 7 no. 3 (August 1941), 323-4.

¹⁸ Andrew M. Schocket, "Thinking About Elites in the Early Republic," *Journal of the Early Republic* 25, no. 4 (Winter 2005), 547-55.

For Pinckney in 1820, the issue was not northern and antislavery complaints per se, but their very right to make such complaints. The attacks on slave representation and the right to slavery in southern and western states were to the point that fostered international enmity. He referenced Britain's attacks on the colonial economy and, perhaps hyperbolically, decried the attempts at controlling slavery in Missouri as worse than that offense. At one point, Pinckney refers to slaves as property, a point that in his prime at the convention would have stirred northern opposition to the three-fifths rule as asinine since no other property in the Union would have been factored into apportionment. Pinckney spoke approvingly of southern blacks, their service in the past wars, and the common blood shed between white and black men alike.

Pinckney compared the exports of the Northeast, including Maine, and those of the slaveholding states. He cited a document from the treasury, although it is unclear which one it was, only that it had been released "a few weeks ago." The Annual Report of the Finances does not divide imports and exports along sectional lines the way that Pinckney described them.¹⁹ Pinckney spoke of the national financial troubles that had arisen in the wake of the Panic of 1819. He largely glossed over much of the detail necessary to understand the issues at hand. In the aftermath of the War of 1812, as peacetime markets readjusted in Europe, the United States was flooded with cheaper European goods that adversely affected the northern manufacturing sector while southern agricultural exports were on the rise. Import duties on the whole had been on the decline after the War of 1812. Whether Pinckney's omission was deliberate or borne of

¹⁹ *Annual Report of the Secretary of the Treasury on the State of the Finances*, by William Crawford, December 1819.

ignorance is uncertain. The rhetorical goal was to defend southern slavery and, consequently, to attack northern complaints about the three-fifths representation.

Although by 1820 exports were on the decline as Europe recovered, agricultural interests in the South weathered the panic better than others. Also of note: the final debt of the Louisiana Purchase was due, in specie, by 1819.

It is difficult in the present to understand the apparent hypocrisy of Pinckney's clamor for treatment of slaves as members of the population. The arguments for this had begun at the convention mostly along, though not entirely along, sectional lines. There was little impetus from northern Framers to offer equal representation to slaves because it would assume equality among white citizens and black slaves.²⁰ Indeed, it is difficult to accept that southern politicians would call for equality in representation for men and women denied any stake in the destiny and day-to-day decision-making in the southern states. Could this have been a common problem among black and white in South Carolina in 1820? South Carolina residents were "represented" but were denied suffrage and many of the privileges of the planter class. White men in possession of fifty acres for a minimum of six months or taxpayers of three shillings sterling who had lived in their district for six months could vote.²¹ This is unlikely. The previous requirements for suffrage in South Carolina required a greater freehold of land, but this was fairly easy to obtain: over eighty percent of adult white males in South Carolina owned sufficient land for suffrage as early as the 1780s.²² In fact, South Carolina, Georgia, and Virginia were the only three of the original thirteen states that continued to ban black voters in the

²⁰ Simpson, "The Political Significance of Slave Representation," 330.

²¹ South Carolina Constitution, 1790, art. 1, sec. 2.

²² Donald J. Ratcliffe, *The One Party Presidential Contest: Adams, Jackson, and the 1824 Five-Horse Race* (Lawrence: University Press of Kansas, 2015), 10.

1780s. Pinckney seemed satisfied that nearly forty years after the Revolution, it was wholly unjust to not count men and women entirely bereft of rights of suffrage (among others) as citizens because of their contributions to the economy for which they benefitted little.²³

Pinckney's constitutional exegesis in his speech on the House floor continued. Here he commented on the migration or importation clause. He derided his colleagues for what he considered a deliberate misrepresentation of its intent. The argument might have been moot considering the nebulous clause could have easily been superseded by the broad latitude of the commerce clause. Pinckney acceded to the notion that had it not been for the 1808 clause that the commerce clause could have granted Congress the power to restrict slavery much sooner. However, the South's agreement to stop importation was "a solemnly understood compact, that, on the southern states consenting to shut their ports against the importation of Africans, no power was to be delegated to Congress, nor were they every authorized to touch the question of slavery. . ." While this statement was contentious enough, Pinckney's explanation of *migration* was of far greater interest. Importation referred to African slaves; migration to free whites.²⁴

On the surface, Pinckney's claim seemed like an obfuscation, but it had merit. Luther Martin and other Northerners were willing to trade liberality on the issue of slavery for liberality on navigation and trade.²⁵ Charles Cotesworth Pinckney, Charles Pinckney's cousin and fellow delegate to the convention (and also alive into the 1820s

²³ Murray N. Rothbard, *The Panic of 1819: Reactions and Policies* (New York: Columbia University Press: 1962), 1-37.

²⁴ The best account of the 1808 clause to which this section owes a great debt is David Lightner, "The Founders and the Interstate Slave Trade," *Journal of the Early Republic* 22, no. 1 (Spring 2002): 25-51.

²⁵ Luther Martin, "Genuine Information VII," *Maryland Gazette* (Baltimore), January 18, 1788.

like his cousin) approved of such a deal.²⁶ If *migration* also applied to slaves it would imply that Congress had power to regulate both foreign and interstate slave trafficking after 1808.

Pinckney closed his speech with two points. The first lauded southern slavery as not only the positive force for the American economy but also the best for the slaves themselves. He began much of the early lauding of southern slavery's paternalistic qualities; confusing, as many in the present, paternalism for altruism. Pinckney's assessment of free blacks, as well as Louisiana's slaves, were grounded in caricatures that would take hold for nearly two centuries.²⁷ He further contrasted the state of English beggars with southern slaves. He also echoed northern abolitionist sentiments that had an air of racism to them as "educated" free blacks were the only ones who could rise above vagrancy and indolence. This was a common sentiment among well-meaning abolitionists attempting to *civilize* blacks rather than commingle as equals.²⁸

The second point in closing was on matters of fairness between the states.

Pinckney was still very much a unionist and, perhaps accurately, holding to the notion

²⁶ Lightner, "The Founders and the Interstate Slave Trade," 28.

²⁷ In some manner, Pinckney's assessment of free blacks in the North was not too off the mark. It is an enduring paradox that calls for abolition arose alongside proto-Jim Crow discriminatory laws throughout the North. DeToqueville made a similar observation about states that had abolished slavery versus the South years later. See Joshua M. Zeitz, "The Missouri Compromise Reconsidered: Antislavery Rhetoric and the Emergence of Free Labor Synthesis," *Journal of the Early Republic* 20, no. 3 (Autumn 2000), 470.

²⁸ Zeitz, "The Missouri Compromise Reconsidered," 453. More thorough treatments of proslavery thought can be found in Lacy Ford, "Reconfiguring the Old South: 'Solving' the Problem of Slavery, 1787-1838," *Journal of American History* 95, no. 1 (2008): 95-122 and in "Introduction: The Proslavery Argument in History," in *The Ideology of Slavery: Proslavery Thought in the Antebellum South, 1830-1860*, ed. Drew Gilpin Faust (Baton Rouge, 1981), 1-20. Lacy states that slavery-as-positive-good arguments came after the Missouri Crisis. This is mostly true but in the case of Pinckney's speech it need not be stated so explicitly in order to make the "positive good" argument. "Most slaves are happier in their present situation than they could be in any other, and anyone who would try to give them freedom would be their greatest enemy." Pinckney made this case before Calhoun, Macon, or others who made similar arguments the following decade.

that the expanse of American territory required a more decentralized governmental structure. Here, the man who had thirty-three years before was as close a Hamiltonian figure as one could find among southern Framers, now praised strengthening state governments not only for the practical purposes of governance in a large territory but in order to maintain fairness among the states. And what was good for Louisiana and Alabama was certainly good enough for Missouri. Pinckney, again accurately, questioned what would become of the slaves and farms already established in the incipient state.

Twice during the speech Pinckney drew on Swiss political scientist Emer de Vattel. Vattel was well known, in French and English translations, among the Constitution's Framers. Both Washington and Franklin were among Vattel's audience. Vattel's magnum opus *The Law of Nations* was one of the Enlightenment's first forays into forming an international law. An over-simplification would be to label this treaty law. The analogy here is striking especially from a devoted unionist like Pinckney. The entire Missouri crisis would disrupt good faith relationships with the federal government akin to a treaty. Madison had cautioned against such a rendering of the United States theory of union because of the nature of treaty law that Pinckney to which Pinckney would have presumably been familiar. Abrogation necessarily entails dissolution of the union as a consequence. The rhetoric here is equally striking. Pinckney laid before the House a vision of the union and the wiles of factionalism and predictions for dissolution. Yet, perhaps without realizing it, he treated the country's unifying principal as no more than a treaty. The analogy is flawed but in territorial matters not entirely imperfect. How

could a state accept statehood on terms different than another? Why should Missouri capitulate on the matter of slavery when Louisiana did not?

Just as other congressmen would invoke Europe during the Missouri crisis, Pinckney believed that Europe was awaiting not only America's dissolution but awaited bad faith negotiating over Missouri as a sign of the United States' own bad faith treaty making internationally. Of equal interest to the question of the nature of the states among themselves was the nature of the country to its territories. If Missouri was not admitted as a state what would its status be? Could it simply break away and form its own independent country? Here, Pinckney was perhaps most prescient. Would the United States then take up arms to secure the statehood on the North's preferred terms and, if it did, would Missourians' fellow countrymen be willing to take up arms against their brothers?

Pinckney's shift in thought presaged the similar change of John C. Calhoun a decade later. Indeed, Pinckney's image of countrymen slaughtering their own was employed by Calhoun during the Nullification crisis questioning the value of a union held together at gunpoint.²⁹ While Madison stayed largely silent on Missouri, Jefferson busily pumped his fears of disunion over Missouri into the minds of those who approached him for comment. The intent of these letters have been interpreted as overwrought but predicting disunion had the benefit of creating the urgency for compromise. The growing disaffection following the War of 1812 in Republican-held Maine allowed for such a

²⁹ William K. Bolt, "Founding Father and Rebellious Son: James Madison, John C. Calhoun, and the Use of Precedents," *American Nineteenth Century History* 5, no. 3 (Fall 2004), 22.

compromise to take place.³⁰ Although, in his correspondence with Pinckney, Jefferson alleged the entire scandal was a Federalist ruse.³¹

Pinckney is an almost too-useful face for this transitional period between before the Jacksonian age. He, like Jefferson, believed in union although both sowed rhetorical seeds that would undermine it in the years to come. Yet, Pinckney's arguments about apportionment, the nature of union, acting in good faith in a federal system, and his exposition of the terms migration and importation were not necessarily false. Pinckney was a vocal and engaged member of the Constitutional Convention along with his cousin Charles Cotesworth Pinckney. Pinckney tried to protect southern interests by tilting toward a more Jeffersonian bent than he had been in 1787 but without entirely abandoning the idea of a harmonious union. The clamor of abolition was not, for Pinckney, a moral crusade although he did chip away at Biblical antislavery arguments in his House speech. The clamor was instead an attempt to undermine southern parity in government. Therefore, it was important to undermine the two strongest arguments Northern congressmen like Talmadge had: the three-fifths representation rule and the constitutional relationship between the federal government and the territories. Who better to argue against this than the lone Framer in the House? It is difficult to accept Pinckney's correctness in the present for what it attempted to defend yet his arguments were quite sound and, frankly, practical in an age before mass communication and rail. Like Strong and Martin, Pinckney was in a unique circumstance to expound upon the Constitution he had helped to draft. The compact world of the Framers was much more

³⁰ Stuart Leibiger, "Thomas Jefferson and the Missouri Crisis: An Alternative Interpretation," *Journal of the Early Republic* 17, no. 1 (Spring 1997), 121-30.

³¹ Joshua M. Zeitz, "The Missouri Compromise Reconsidered," 447-85.

diffuse by 1820. The country in which Caleb Strong was more or less surrounded by no one but Founders and Framers had moved on and, as Pinckney made his speech in 1820, only thirteen of the original Framers remained. Though overshadowed by Madison and Jefferson, Pinckney was the only one present in the House in 1820 to speak on the behalf of the founding document.

CHAPTER IV

LUTHER MARTIN AND IMPLIED POWERS

Luther Martin's contribution to constitutional interpretation in the early republic was on the issue of implied powers. Though a formidable legal mind frequently embroiled in high-profile cases, as well as a lengthy career as Maryland's Attorney General, Martin's greatest explication of implied powers came during the seminal Supreme Court case *McCulloch v. Maryland*. Martin's colorful persona is recorded in numerous sources. Regrettably, perhaps his greatest rhetoric in *McCulloch* is known only through John Marshall's decision which was as far removed from Martin's point of view as any decision could have been.

Martin was born in New Jersey to a poorer family. Through the support his father and older brothers he left as an adult to study at the College of New Jersey. It was there he made the acquaintance of future convention delegate, and ideological foe, Oliver Ellsworth of Connecticut.¹ Later he worked as a schoolteacher and then moved to Williamsburg, Virginia to practice law. Surviving letters indicate that James Madison had at least a passing knowledge of Martin as early as 1772.² George Washington

¹ Clarkson and Jett, *Luther Martin*, 16. Ellsworth and Martin did find some common ground at the Convention on representation for smaller states.

² "To Philip Freneau from James Madison, November 22, 1772," Founders Online, National Archives, accessed October 17, 2017, <https://founders.archives.gov/documents/Madison/01-01-02-0016>.

mentions Martin and his wife in a letter in 1785.³ Martin met his wife, Sarah Cresap, in a story he relates in *Modern Gratitude* during his time in Virginia. When the pair first met, she was still a minor. Martin's devotion to his in-laws would reach a fever pitch toward the end of the century.

Martin had been present in key pre-war meetings in Annapolis and afterward at the Annapolis Convention in 1786. He joined William Paca and Samuel Chase in calling for Maryland's independence. He served as Maryland's Attorney General from 1777 to 1805 and was reappointed in 1818. Martin's credentials notwithstanding, he was not the first pick of Maryland's House of Delegates for the Constitutional Convention. Most of Maryland's leading politicians declined the offer. Two of Maryland's delegates, Daniel of St. Thomas Jenifer and Daniel Carroll were part of Maryland's powerful aristocracy. Luther Martin, despite his position and prestige, and his Anti-Federalist cohort John Francis Mercer, were not part of that stratum.⁴

Martin was a few days late to the convention. He sat waiting for days before speaking. He did not represent his home state's interests particularly well. Martin, among other leading Anti-Federalists, believed that the convention had been called to amend the Articles of Confederation. Discovering that they were called to overhaul the entire American government and draft a new constitution struck them as a monarchical plot.⁵ Martin assailed the convention. He saw himself, as Mel Bradford noted, not as a

³"To George Washington from John Harvie, August 5, 1785," Founders Online, National Archives, accessed October 17, 2017, <https://founders.archives.gov/documents/Washington/04-02-02-0406>.

⁴ Philip A Cowl, "Anti-Federalism in Maryland," *William and Mary Quarterly* 4, no 4 (October 1947): 455. Martin had international renown as well. Farrand relates an anonymous Frenchman's notes on the Convention delegates that described Martin: "Avocat distingué et qui a beaucoup écrit contre les résolutions de la Convention de Philadelphie, don't il été member." "A distinguished lawyer who has written extensively against the resolutions of the Philadelphia Convention, where he was a member." See Farrand, III, 237.

⁵ Cowl, "Anti-Federalism in Maryland," 446.

founder but as a *preserver* of the Articles.⁶ Martin's speeches were described as long-winded although, in sum, he was no more verbose than Gouverneur Morris, perhaps the most frequent speaker at the convention.

Martin and Mercer stood in stark contrast to Jenifer and Carroll. Maryland's government, at least until the end of the century, was one of the most conservative in the Americas. The Senate was rigidly aristocratic. The House was not much better, but what few major proposals percolated from the House were usually thwarted by the Senate. This included paper money bills for which Martin, frequently in debt himself, supported much to the embarrassment of his Federalist colleagues.⁷ Martin's sentiments rested with states righters and the have-nots of society. Maryland land speculators had huge holdings in Appalachia. In addition to the barrier the Articles had been to taxation, and to defense, giving up land rights in the West was hardly tenable to Maryland speculators.⁸

Sensing a doomed battle at the convention, Martin attempted to wrest as many concessions as he could from more nationalistic delegates. At the end, despite his victories in persuasion, Martin clashed with Jenifer with the former stating that he would be hanged before Maryland accepted the nationalistic Constitution. Jenifer sarcastically warned Martin to stay in Philadelphia if that were the case.⁹ Robert Yates and John Lansing of New York left the convention in protest. They, like Martin, stated that they believed their original purpose was to revise the Articles of Confederation.¹⁰ Yates'

⁶ Bradford, *Founding Fathers*, 115.

⁷ Henry P. Goddard, "Luther Martin: The Federal Bull-Dog," *Fund Publication no. 24* (Baltimore: Maryland Historical Society, 1887), 40.

⁸ Clarkson and Jett, 63.

⁹ Farrand, III, 85.

¹⁰ Herbert J. Storing, ed., *The Complete Anti-Federalist Volume 2: Objections of Non-Signers of the Constitution and Major Series of Essays at the Outset* (Chicago: University of Chicago Press, 1981), 16. Farrand, I, 242.

notes of the convention became much more important later on. Lansing preserved Yates' notes.¹¹

Understanding convention custom is neglected but absolutely essential to understanding the behaviors of some Anti-Federalist delegates in 1787 and in studying other conventions before and after.¹² The Constitutional Convention was one of a long line of conventions that had taken place since the mid-1760s to attempt confederation between the disparate states. Conventions had their own legal jargon and operated within certain guidelines. This format was present in the Annapolis Convention, the convention at Philadelphia, and even the Hartford Convention (the third convention to bear that name) in 1814. Conventions operated on certain protocols and largely off custom. They could be “general” or “partial” in scope or unlimited (plenipotentiary convention). However, the state sending delegates (never *legislators*) could amend the commission as New York had. In this archaic legal custom Martin, Lansing, Mercer, and Yates were correct that their commissions did not allow them to do anything but amend the Articles. For Lansing and Yates the commission was specific; Martin and Mercer bent the language of the Maryland commission to suit their purposes. Similarly, Hamilton was working far outside the scope of the commission he shared with Lansing and Yates.

One of Martin's notable accomplishments was the supremacy clause. This may seem a strange position for an ardent Anti-Federalist devoted to the preservation of state sovereignty but pulling back there is a broader context. Madison, Hamilton, and other

¹¹ Farrand, I, 536.

¹² Robert G. Natelson, “Founding Era Conventions and the Meaning of the Constitution's “Convention for Proposing Amendments,” *Florida Law Review* 65, no. 3 (May 2013): 615-710. State conventions also occurred and Georgia's 1777 constitution required conventions to draft new amendments. Pennsylvania's (1776) and Vermont's (1786) required a “council of censors.” These protocols and customs were essential to understanding the workings of Conventions as well as the nebulous amending conventions in Article V of the Constitution which is the basis of Natelson's incredible article.

delegates had favored broad oversight of state legislature activity at the national level. This would have included a veto over state legislation. Charles Pinckney and James Madison favored the action. Roger Sherman was not opposed as long as there were only certain instances in which the veto could be applied. Pierce Butler, Pinckney's peer from South Carolina, was vehemently opposed along with George Mason and Luther Martin.¹³ Martin, who had also been incensed at the Virginia Plan's subordination of smaller states, was equally galled by the threat of Congressional usurpation of state-level prerogatives.

Charles Pinckney's mysterious draft of the Constitution also had such a veto in place. Martin's fellow Anti-Federalist, Lansing, also demurred. On June 15, William Paterson proposed a version of the supremacy clause.¹⁴ An early draft of the Constitution from the Committee of Style also uses the clause. This seems to have been written close to the final draft approved in September. During Martin and Ellsworth's *Landholder* exchanges early the following year, Ellsworth charged that Martin had originated the supremacy clause. Martin did not deny the charge stating in his March 1788 reply that it was a compromise maneuver to dodge the power of congressional veto that he, Anti-Federalists, and Federalists alike disapproved.¹⁵ Martin would find the clause turned against him thirty-two years later.

One point on which states' rights advocates and Federalists coincided was on the power of the judiciary. After *McCulloch*, charges against the role and activism of the Supreme Court would have seemed foreign to the Framers whom the neo-antifederalists

¹³Ketcham, *The Anti-Federalist Papers*, 34-8. For Martin's disapproval see Farrand, I, 438 in Yates' notes.

¹⁴ Farrand, I, 245. II, 572-80.

¹⁵ Farrand, III, 273-86.

and fire-eaters summoned as authorities on the limited role of government. Framers wavered in their support of the support of the role of a judiciary.

The role of the courts was the subject of vigorous debate following the Revolution.¹⁶ The period from 1788-1803 was critical for the development of American judicial review doctrine. Anti-Federalists, for all their disapproval of consolidation and federal overreach, were overwhelmingly in favor of the Court. Framers as ideologically distinct as Oliver Ellsworth and George Mason approved of the judiciary although their model judiciary was not necessarily a branch of government distinct from the Executive.¹⁷ Elbridge Gerry was the first to demur from an aligned Executive and Judiciary preferring a “guardian of the rights of the people” to rest within the legislative branch. Gerry’s colleague, Caleb Strong, tersely disagreed; making and clarifying law were two separate roles.¹⁸

Luther Martin interjected, arguing that the judiciary should be a separated *third* branch of government with the right to judge the constitutionality of laws as well as the right to nullify them. Now, it was unclear whether Martin intended this adjudication to be for federal laws only or also to the state. George Mason’s reply that judges should be given greater authority to be a negative on *any* improper law implied that Martin was taking a middle course. Anti-Federalists differed on the appointment of these judges, but there seemed to be little disagreement in the role of a federal judiciary only its compartmentalization.¹⁹ Mason’s views were far ahead of their time although he had

¹⁶ The debates extended far back into the realm of British law. See Forrest McDonald, *Novo Ordo Seclorum: The Intellectual Origins of the Constitution* (Lawrence: University Press of Kansas, 1985), 85-7.

¹⁷ Ketcham, *The Anti-Federalist Papers*, 107.

¹⁸ Ketcham, *The Anti-Federalist Papers*, 108.

¹⁹ Ketcham, *The Anti-Federalist Papers*, 109-14.

Federalist peers at the convention who wanted nullification of state laws to reside in the legislative branch. Luther Martin agitated for what became the supremacy clause in a compromise to avoid granting federal supremacy but avoiding giving it broad powers over state lawmaking.²⁰

The diversity of opinions reflected the new country's split sentiments over the role of the judiciary. Judicial review was required in some state constitutions, like Kentucky, but expressly forbidden in others, like Pennsylvania. Ohio impeached two judges in 1807 and 1808 for declaring state legislative acts void. German and Swiss courts, whom Martin and other Anti-Federalists endorsed as models of government, did not necessarily annul cantonal laws but no law could conflict with confederation law. Judicial review evolved in the states and soon enough Pennsylvania had created the reasonable doubt criterion by which a judiciary could nullify a state law.²¹

While *Marbury* is frequently credited with establishing a national precedent of judicial review, it might not have reached the same level of contention as a state level case did Maryland's *Whittington v. Polk*. Maryland, once so rigidly conservative and Federalist was not immune to the Jeffersonian shellacking in 1801. Martin's fellow Marylander and Anti-Federalist, John Francis Mercer, rose as governor and Republicans took both houses of the legislature. In a case very similar to *Marbury*, *Whittington* saw a Federalist judge suing for his old seat in Maryland.²² The new Republican dominated

²⁰ Obrecht, 280.

²¹ James B. Thayer, "The Origin and Scope of the American Doctrine of Constitutional Law," Presentation at the Congress on Jurisprudence and Law Reform, Chicago, IL, August 9, 1893.

²² Jed Handelsman Shugerman, "*Marbury* and Judicial Deference: The Shadow of *Whittington v Polk* and the Maryland Judiciary Battle," *Journal of Constitutional Law* 5, no. 1 (October 2002), 59. Douglas Edlin also argues that judicial review had a lengthy common law basis in colonial governments through post-ratification. One pre-*Marbury* case he cites was *Jones v. The Commonwealth* in Virginia which was decided on constitutional (it was before *Marbury* but after ratification of the Bill of Rights) and common law grounds. See Douglas E. Edlin, "Judicial Review Without a Constitution," *Polity* 38, no. 3 (July 2006),

legislature had stripped the 1796 Maryland judiciary law to create new space for friendlier judicial appointments.

Whittington received more national attention in 1801 than *Marbury* in 1803. *Marbury*, often elevated to a turning point in historical myth-making, did not raise nearly the same ire. Both decisions maintained judicial independence during the Jeffersonian onslaught while simultaneously restraining judicial scope.²³ Even *Marbury*'s aggrieved defendant, James Madison, mentioned it infrequently in contemporaneous writings.²⁴ Maryland electoral politics was a complicated morass in which judges often served as state electors for presidential elections in ways that would alarm contemporary voters. Maryland ousted ideologically disharmonious judges including William Whittington. Whittington's counsel included Robert Goodloe Harper and Jeffersonian foe Luther Martin.²⁵

The case was not decided in Whittington's favor, much to Martin's alarm. The case fell under judicial purview, but the state Supreme Court would not go as far as to declare the acts void. This decision set the stage for what James Bradley Thayer identified in *Origin and Scope* as the foundation of American judicial review. The question at stake must be substantial enough to warrant judicial intervention.²⁶

Implied powers have a complicated path in American constitutional history. The origin of the necessary and proper clause is unclear from the surviving records.

345-68. For an older, exhaustive treatment of pre-*Marbury* instances of judicial review see the two part essay Edward S. Corwin, "The Establishment of Judicial Review," *Michigan Law Review* 9, no. 2 (December 1910), 102-125.

²³ Shugerman, "Marbury and Judicial Deference," 61-2.

²⁴ Jack N. Rakove, "Judicial Power in the Constitutional Theory of James Madison," *William and Mary Law Review* 43, no 4 (2002), 1513-4.

²⁵ Shugerman, "Marbury and Judicial Deference," 73.

²⁶ Thayer, "The Origin and Scope of The American Doctrine of Constitutional Law," 14-5; Shugerman, "Marbury and Judicial Deference," 81.

Randolph rejected the clause. Elbridge Gerry likewise rejected its inclusion stating that it would be the “general power of the legislature to make what laws they please . . .” This sentiment was echoed in Rufus King’s notes on the convention. George Mason likewise thought the clause was a catchall.²⁷ There is an irony here. While Luther Martin would later attempt to argue that the clause’s purpose was limited to only the execution of enumerated powers, it seems clear that many of his Anti-Federalist peers thought otherwise. Martin never mentioned the clause in *General Information* or in other documents.

However, the furor over the clause persisted into the state-level ratification debates. Alexander Hamilton was the first to answer the charges in January 1788’s *Federalist 33*. Hamilton tethered the necessary and proper clause to the supremacy clause. Hamilton did not think the clause was necessary; a sentiment Marshall used verbatim in *McCulloch*. However, where Marshall was more conservative in his defense of the Clause, perhaps deliberately so as will be explained below, Hamilton was more forceful. For Hamilton, the threat of state usurpation of national authority was a greater threat to be thwarted by the two clauses. It was the state’s parsimony over constitutional construction that Hamilton wanted to avoid. Strict Constructionism was a dragon Hamilton intended to slay in its infancy.²⁸

Hamilton’s fears were well founded. Six months later, Hamilton faced Luther’s peers in the New York. Among the most difficult opponents of ratification were John Lansing, who had walked out of the convention, Thomas Tredwell, and Gilbert

²⁷ Farrand, II, 633-40.

²⁸ Alexander Hamilton, *The Federalist Papers: no. 33*,” The Avalon Project, Yale University, accessed January 2, 2018, http://avalon.law.yale.edu/18th_century/fed33.asp.

Livingston. Tredwell's comments occupy a large portion of *Elliot's Debates* notes on New York's ratification. Tredwell attempted to restrict the meaning of the necessary and proper clause to only those powers "expressly given." These were undoubtedly among the notes Luther H brought to his arguments in *McCulloch* along with the Virginia ratification debate from which he quoted the Chief Justice's own limited government sentiments in 1788.²⁹ John Jay joined Hamilton in defense of the new document.

The vote in New York was dangerously close at 30-27. New York was not necessary to meet the nine-state threshold for ratification, but it was an important state. Alexander Hamilton, and the realities of ratification, swayed enough delegates to change their votes. Lansing and Tredwell voted against ratification while another faction of Anti-Federalists, inexplicably, and perhaps fortuitously, abstained.

The situation in Maryland was far different for Luther Martin who, like Lansing, had returned home with John Francis Mercer to defeat ratification. Maryland's ratification vote, Luther's convention bluster notwithstanding, was perhaps more of a given than any other state. Maryland's vote, despite Martin's long-winded rhetoric, voted 67-11 in favor of ratification.

Maryland's vote was critical. Delaware, Pennsylvania, New Jersey, Georgia, Connecticut, and Massachusetts had ratified in two months. South Carolina and Virginia's votes were uncertain. New Hampshire had adjourned without a decision. Rhode Island and North Carolina were determined not to ratify. Indeed, it would be over two years before Rhode Island joined the Union. The strong Anti-Federalist contingents

²⁹ Samuel R. Olken, "Chief Justice John Marshall and the Course of American Constitutional History," *John Marshall Law Review* 33, no. 4 (Summer 2000), 769. Olken also cites Marshall's biography of George Washington in which Marshall summarizes Hamilton's arguments.

in Virginia and New York were seeking a mandate and were close to getting one if Maryland failed to ratify. The situation elicited the concern of Madison, Jefferson, and Washington.³⁰

Federalist sentiment rang strong in Maryland. Newspapers and pamphleteers took to the presses to encourage support for ratification. Martin and other Anti-Federalists hoped for a similar adjournment to New Hampshire's pending a vote in the more politically influential Virginia. He also responded to Maryland Federalists in a series of publications aimed primarily at a working class audience. These did not have the sway he had hoped. Martin and other anonymous Anti-Federalists seemed too alarmist claiming that the Senate would seize power, the government would suspend habeas corpus, and a list of other hypothetical scenarios of nationalist power grabs.³¹

Ultimately, Harford and Baltimore counties elected Anti-Federalist delegates. All other counties were predominantly Federalist. In all, twelve Anti-Federalist delegates attended the ratification convention. As noted, this was insufficient to thwart ratification and Maryland became the seventh state to ratify in what Washington and others hoped would be a domino effect to bring Virginia and New York Anti-Federalists to heel and gain the requisite nine states for final adoption.

Martin's views on the clause were not unlike his Anti-Federalist peers in New York. Marshall summed up Martin's arguments in *McCulloch* as actually restrictive. "In support of this proposition, they have found it necessary to contend that this clause was inserted for the purpose of conferring on Congress the power of making laws."³²

³⁰ Bernard C. Steiner, "Maryland's Adoption of the Federal Constitution," *American Historical Review* 5, no. 1 (October 1899), 22-44.

³¹ Steiner, "Maryland's Adoption of the Federal Constitution," 36-7.

³² *McCulloch v. Maryland*, Wheaton 17 U.S. 412 (1819).

Marshall retorted, “would it have entered into the mind of a single member of the convention than an express power to make laws was necessary to enable the legislature to make them?”³³

Marshall exercised restraint here; more than what was immediately obvious although Marshall did dismiss Luther’s constitutional literalism. Any text in its most rigorous and literal reading would deliver a different meaning than intended. Marshall listed cases where the government had broad powers that were not enumerated in the Constitution specifically. What was proper and what was necessary were distinct questions. In Marshall’s phrasing, “let the end be legitimate.” Necessity was a legislative determination. Propriety belonged more to the judiciary.³⁴

Hamilton and Madison had both grappled with the clause as it related to the First Bank of the United States in 1791. Hamilton wrote to President Washington in his capacity as Secretary of Treasury opposing the counsel of Jefferson, who had replaced John Jay as Secretary of State, and Edmund Randolph as Attorney General. Interestingly, while not an Anti-Federalist, Randolph, like Martin and Lansing, had refused to sign the final Constitution. Madison, having secured ratification in Virginia, was serving in the House of Representatives.

Hamilton, speaking for the Framers, spoke more so for himself. Ultimately, he successfully convinced Washington to sign the banking bill. Hamilton’s lengthy letter made no distinction between implied or enumerated powers. As Hamilton noted early in the letter, the convention’s intent was to grant broad latitude toward the execution of all

³³ *McCulloch v. Maryland*, Wheaton 17 U.S. 413 (1819).

³⁴ Randy E. Barnett, “Necessary and Proper,” *UCLA Law Review* 44 (1997), 772.

powers, enumerated or otherwise. The clause “ought to be constructed liberally in advancement of the public good.”

Hamilton addressed Randolph and Jefferson’s arguments point-by-point although, toward the end, his argument was clearly from utility. Hamilton cited the example of war during which easy money was necessary for victory. Hamilton, like Marshall, was acutely aware of the financial and logistical complications that plagued the Revolution.³⁵

While Hamilton had no compunctions about blurring the line between “necessary” and “expedient,” Madison clearly sought to distinguish the two. Madison was uninterested as a legislator in the political outcomes of these experiments but their constitutionality. Madison did not resort to turning the Constitution into a lengthy legal code (as Marshall warned strict construction and enumerated powers would), but stated that the Constitution’s wording left only strict construction as the proper interpretation. Madison referred to the Bill of Rights, which were making their way through state ratification in early 1791.³⁶ Barnett emphasizes that Madison’s definition of necessary matched Jefferson’s who, in his own address to Washington, stated that the clause only applied to enumerated powers.³⁷

Madison and Hamilton’s differences set the rhetorical stage for *McCulloch*. John Marshall, while keeping the veneer of a detached judiciary ultimately had to wax political, at least in action. Marshall could not adopt the broad latitude of Hamilton nor was he willing to subscribe to the strict construction Luther Martin expounded. By 1819,

³⁵ Alexander Hamilton, “Opinion as to the Constitutionality of the Bank of the United States,” Avalon Project, Yale University, accessed October 4, 2017, http://avalon.law.yale.edu/18th_century/bank-ah.asp.

³⁶ Barnett, “Necessary and Proper,” 753-4.

³⁷ Barnett, “Necessary and Proper,” 755.

even Madison and Jefferson had employed the bank in their presidencies. Martin's arguments seemed hopelessly archaic.

Marshall's decision attempted to draw his own interpretation toward the center and cast Martin and the bank's opponents as the radicals. Marshall took a similar tack that was seen in *Whittington*. *Whittington* established the constitutionality of judicial review but limited its scope to cases with extraordinary stakes. *McCulloch* was similar in that it did not assert a Hamiltonian vision of the necessary and proper clause. Marshall's dispassion was well placed. Had this been any other case involving similar elements – rather than a banking case on the coattails of the Panic of 1819 – it might not have elicited the response that it had. Even legally, the case had not been anything new. In *U.S. v. Fisher* in 1805, Marshall had already established the view of the necessary and proper clause that he employed in *McCulloch*, which involved matters of national debt collection.³⁸

McCulloch served as the galvanizing event for neo-antifederalists. Marshall's emotional detachment from the case would not last. Marshall and Virginia jurist, Spencer Roane, engaged in heated debates over *McCulloch* and the right of judicial review in the Virginia *Enquirer*. Marshall had long attempted to distinguish between legal and political concerns – this was much to Luther Martin's delight when Marshall subpoenaed documents from President Jefferson during Aaron Burr's trial.³⁹ Luther Martin seemingly vanished from the scene although both Roane and John Taylor of Caroline would cite Martin as influences later on. Roane attempted to solicit Jefferson

³⁸ *U.S. v. Fisher*, 6 U.S. 2 Cranch 358 (1805).

³⁹ Samuel R. Olken, "Chief Justice John Marshall and the Course of American Constitutional History," *John Marshall Law Review* 33, no 4 (2000), 759.

and Madison's support for the neo-antifederalist cause. Madison disliked the direction and scope of *McCulloch* but was no foe of judicial review, which he made clear to Roane. Madison's judicial review ideology was limited, and originally tethered to the other branches in an advisory role. As noted, Caleb Strong tersely objected to any attempt to make the judiciary a part of the other branches. The attempts to recruit the Founding duo after *McCulloch* and during the Missouri crisis would foreshadow the attempts to do the same during the Nullification crisis a decade later.

As the 1820s faded into the 1830s, James Madison was lone survivor of the convention. John Lansing mysteriously vanished in 1829. William Few died in 1828.⁴⁰ Monroe, Madison's closest friend, died in 1831 mourning that he could not see Madison at least once more. The rise of the Jackson Democrats and southern states' rights ideology sought to place their roots in the convention. The next great constitutional crisis was John C. Calhoun's supposed nullification of the 1828 tariff in South Carolina. This was the same Calhoun who had once formerly supported greater nationalistic policies and had faced disappointment when President Madison refused to sign his Bonus Bill.

South Carolina politics had changed from the days of Pinckneys and Rutledges. A new breed of politician, the fire-eaters, had begun their ascendance. Whether John C. Calhoun's ideological shift arose from political realities in South Carolina or genuine reconsideration of his ideas is a matter of debate. Calhoun had an estimable and capable mind and claimed as progenitors the Framers, especially Jefferson. By 1832, Madison was alone to face down this last constitutional crisis.

⁴⁰ Albert Gallatin is not listed with Framers or Founders although he was only a year younger than Jonathan Dayton, the youngest of the Framers. Gallatin outlived them all dying in 1849 at age 88.

Calhoun cited the Spirit of '98, the Virginia and Kentucky Resolutions, as his historical precedent for nullification. Jefferson died in 1826. Madison stood vehemently against any sort of state veto of national laws. He had, in fact, been an early supporter of the opposite flow of power, which had rankled Luther Martin and led him to triangulate at the convention to pull the germinal supremacy clause from the New Jersey Plan and give it primacy in the final draft of the Constitution. Tragically, Madison found himself on the receiving end of scorn and jokes because of his stance. As the Founding generation was more or less gone, the compunctions about delivering insult to them, even to someone of Madison's stature, were lost.⁴¹

Although Jefferson survived as the iconic Founder for the neo-antifederalists, Luther Martin had also endured in their collective memory. Calhoun's *Exposition* speech referenced Martin's *Genuine Information* and the right of collecting duties on imports. Calhoun would have undoubtedly had access to Yates' notes on the convention, although considered wrong by Madison, which included information on Luther Martin. Luther's radical notions of state sovereignty, as a preserver of the Articles, would have appealed more than James Wilson's divided sovereignty, or especially Hamiltonian notions of federal supremacy.

John Quincy Adams, never ideologically harmonious with Martin, nonetheless admired him. In the closing statements of the *Amistad* case in 1841, Adams referred to Martin as an opponent but "a brilliant luminary, so long the pride of Maryland and the American bar." Adams listed several retired and deceased American lawyers. Adams indicated his own retirement from public life although he lived to 1848.

⁴¹ The single best source of James Madison's later life is Drew R. McCoy, *The Last of the Fathers: James Madison and The Republican Legacy* (Cambridge: Cambridge University Press, 1991).

Both John Archibald Campbell and Samuel Nelson, a John Tyler appointee to the Supreme Court, cited Martin as an authority in *Dred Scot* in 1854. Alexander Stephens A *Constitutional View of the Late War* also cited Stephens at least five times as a Framers more to his ideological liking. Similarly, Jefferson Davis's *The Rise and Fall of the Confederate Government* cited *Secret Proceedings* and Luther Martin. Less than a decade later, Campbell's interview in *Federal Bull-Dog* on Martin appeared as well as Roger Taney's autobiography.

Martin appears in various other documents through the turn of the century. Bernard Steiner's history of Maryland's ratification, cited here, in 1899 resurrected Martin's memory as well. *Confederate Veterans* May 1908 issue also elevated him as a states' rights champion perhaps, in some way, shoehorning Martin into the realm of Lost Cause mythos.

In broader strokes, Martin was as indefatigable and contrarian in 1819 as he had been in 1787. He was, in 1787, a preserver of the Articles adhering to his commission as a convention delegate. In 1819, he was the expositor of a Constitution that still embodied those basic ideas of state sovereignty. He was on less sound textual ground in 1819. Martin advocated not only for state sovereignty that might have been more appropriate in the Articles but also against the use of implied powers whether they were as far-reaching as Hamilton's notions or as limited as Marshall's.

When Charles Pinckney criticized the Missouri Compromise his exposition of the Constitution, on apportionment and slavery, were rooted in intense sectionalism. Pinckney's interpretation of the 1808 clause, as well as slave representation in apportionment, was discussed at length at the convention. Similarly, Martin's ideas

about implied powers and state sovereignty were given their due consideration at the convention. Neither man was necessarily wrong, and both had formidable influence on the final document, although Pinckney fought to ratify against difficult odds as Martin fought against ratification despite an overwhelming majority in favor of the new document.

Granted both were in positions of power in which their constitutional expositions made political sense. Martin represented Maryland and its right to tax as Maryland's attorney general. Pinckney represented South Carolina's slaveholding interests in the House of Representatives. To that end, their ideas about the document they helped to draft were necessary as representatives of their state and its electorate. However, their stances had not changed, or changed very little, since 1787. This indicates a deeper adherence to principle.

Both men saw a threat in the growing national government as many of their peers did in 1787. Charles Pinckney, Luther Martin, and Caleb Strong had lived long enough beyond the convention to see just how far the new government could extend itself into the affairs of individuals and indeed the world. They had seen what their own peers had done in their roles as Presidents of the new country. It was the supplanting of the wills of smaller men and institutions and the supposition of a national will and telos. This was a process that would have incited fear in the Founding generation and did so in its surviving members in the 1820s. Therefore, while there were the elements of sectionalism and state interest in the arguments of Strong, Pinckney, and Martin there was also genuine fear of the direction their experiment had taken. Each had a hand in writing the Constitution but were charged with the leadership and representation of a

particular state (Massachusetts, South Carolina, and Maryland) when the questions of constitutional crises emerged. How Jefferson or Madison would have dealt with the constitutional questions at the national level would invariably be different than how someone operating at the state-level would answer those questions regardless of their involvement in drafting the Constitution. Madison and Jefferson had done no different in 1798.

Luther Martin died July 10, 1826, four days following Thomas Jefferson and James Adams. His letters in 1821 attest that he at least maintained some of his intellectual faculties as late as that year. The Maryland legislature passed a unique bill calling for a portion of each legislator's salary to be given as a makeshift old age pension to Martin. Although Martin's younger brother, Lenox, worked in Baltimore as a lawyer, he was taken in by Aaron Burr in New York.

In his dotage, Martin was known to walk into court in Baltimore and sit before the judge. Judges simply recessed out of respect to the man. In New York, Martin's style of dress was considered an anachronism in the early 1820s as he strolled about seemingly clueless to his surroundings. The Manhattan borough documented his death, interestingly giving an age that hints at an earlier birth than the typically given 1748. His cause of death was rather imprecisely listed as "old age." There is a tiny star next to Martin's name on the deaths register as if to indicate a footnote. In the remarks next to the sexton's name, the administrator said simply "a celebrated lawyer."⁴²

Martin's reputation is often lost in the present although it was never questioned in his own time. He represented the past and its ideas even in his own present. He argued

⁴² Deaths Register, Manhattan Borough, city of New York, 1826.

forcefully, perhaps dogmatically, for a government that his contemporaries saw hopelessly ineffective. Barring the reformation of the Articles, Martin argued for an interpretation of the Constitution that Marshall, and others, saw as a fiction. However, as far as the antebellum South was concerned, Martin was more ahead of his time than behind it. Jefferson might have been the celebrity figurehead among southern states rightists, but their truest ideological forebear was Luther Martin. It is fitting that Martin's role in this school of thought remains so understated. He downplayed his own involvement in the Constitution's formation though perhaps out of his frustration with the document than genuine humility.

Yet the "real" Luther Martin would never neatly fit in the mold of a southern states' rightist either. He deplored slavery, opposed Jeffersonian principles, and discharged what he believed to be his commission from the state of Maryland at the Constitutional Convention. Decades later during *McCulloch*, he restated his own principles to a government more frequently hostile to them. Those friendly to his ideas would not have been as ideologically harmonious with Martin as they might have believed. To see in Martin, or other Anti-Federalists, an "original" intent is simply an instance of confirmation bias and borne of expedience when appealing to national memory in works of persuasion. A more objective treatment of Martin's ideas and character is far more interesting and reveals the mind of the man who was so greatly respected by his peers as far-flung ideologically as John Quincy Adams and Roger Taney.

CHAPTER V

CONCLUSION

Evaluating the actions of these men in the past runs the risk of presentism. Those in the present are fortunate to have information and insight not necessarily available to their forebears. Even more difficult for Caleb Strong, Charles Pinckney, and Luther Martin, and their many peers was the uniqueness of their situation from 1787 to 1821. The word “interpretation” must give way in some circumstances to “invention.” Try as many did to find precedent or parallel for the American situation, it was not always possible to do so.

Federalists tended to look toward England, Luther Martin toward the Swiss Confederation, and others still to the Dutch Low Countries for inspiration.¹ Those who looked toward England had the example of the Acts of Union which established a structure of two parliaments under a single crown for England and Scotland. Alison LaCroix rightfully points out the error in treating the Constitutional Convention as time zero in the story of American federalism. Not only does that history extend before 1787 but across geographic boundaries as well. The question is who understood that point in 1787.²

¹ Hutson, *The Sister Republics*, 27.

² LaCroix, *Origins of American Federalism*, 7.

James Madison best understood the unusual nature of the new republic in 1787. Madison's impressive education at Princeton was steeped in political philosophy. John Adams' Harvard education was geared toward his development as a minister and future political leader. Adams later defended a thesis on government before beginning his career in law. It is no exaggeration that Madison and Adams were perhaps the best read in political science and keen on its application. Caleb Strong was a Cantabrigian like Adams and Luther Martin a Princetonian like Madison, but neither had the same exposure to political theory even if they were, by surviving accounts, very well read in Coke, Littleton, and other famous legal scholars. Here the Constitution may be divided into two categories: a political document and a legal document.

Strong would have recognized the nature of the union as Madison saw it. Had individual legislators ratified the constitution, rather than conventions, the new document would have had the force of a treaty; one that abrogated by any of the parties would have rendered it non-binding on all the others. This also placed the repeal of such an act back in the hands of the legislatures.³ The designs for a northern confederacy were likely concocted without the input of Strong, Rufus King, or other Federalist Framers.⁴ While the idea of disunion was an acceptable one in theory, its application was considered ill-conceived. Strong made clear his disapproval in his 1804 annual address to the Massachusetts legislature.

This disapproval was not necessarily a legal one. A radically state-centered interpretation of the Constitution would have made the action acceptable. Politically,

³ McDonald, *States' Rights*, 21. Letters from Pickering to King make it clear King did not approve.

⁴ McDonald, *States' Rights*, 60-62.

without New York as a ballast, the proposal would have been legally arguable but politically disastrous. Sounder and less doctrinaire minds, like Strong's, prevailed. This was not ground in political theory but was more a pragmatic stance. None of Luther Martin's surviving documents hint at a favorable attitude toward disunion despite his vehement opposition to ratification. However, given his estimable legal mind, Martin could have persuasively argued for it. Martin's legalistic, rather than political, worldview never permitted the legitimacy of the Constitutional Convention or the nine-thirteenths ratification threshold for the Constitution to be binding on all states.

Pinckney is an interesting case since the Pinckney of 1787 and of 1820 would hardly recognize one another's politics. He became the champion of slavery as a positive force at a time when an opinion from a lesser figure other than Framer, might have carried less weight. Three-fifths representation was not good enough for Pinckney yet abhorrent to the Essex Junto seventeen years earlier. Pinckney's states' rights was still a vision of national unity that casts doubt on the idea that he was thinking regionally. He stood on firmer ground than first appeared. Pinckney also carried an understated amount of weight in the final draft of the Constitution and was more in line with Madison than the Anti-Federalists of the period. Pinckney straddles the line between political and legal interpretation, but may be more appropriately in the realm of the political. The moving away from conciliation to fractured regional and political identities led Pinckney to make a stand for the political reality that underlay the formation of the new republic. It was not an answer suitable to his opponents or to those reading in the present. Even if his arguments seem legalistic, federalism was the schema that allowed for coexistence of very different sets of states, histories, identities, and interests.

As stated earlier, the complications of governing in a multi-layered government were new. Although some Framers would try to draw parallels to other countries, including in Great Britain, these were not perfect analogies. How a military would function in this new republic was uncertain and militia traditions were as varied as any other colonial institution. How powers would be parsed in this multi-layered governing structure, and which layer could claim ownership to unspecified powers, were not easily answered. And what would become of less savory institutions like slavery where regional opinions and moralities clashed? The road to American federalism had a lengthy ideological background beginning as far back as Samuel von Pufendorf (LaCroix), Marilius of Padua or the Magna Carta (McDonald) or even over 800 years with the Althingi (Bradford). LaCroix's ideological history points to not only the nearer ideological background of Hobbes, Locke, Pufendorf, and Bodin but the early plans at unionizing, particularly Benjamin Franklin's Albany Plan.⁵

Knowledge of this history and the ideology made better leaders and thinkers of some, like Madison and Adams. However, the institutional and practical work of federalism were better known to Strong, Martin, and Pinckney although all three were steeped in political philosophy as well. For those swayed by states' rights notions, the latter three Framers are far better friends than Madison, Adams, or Hamilton. The electorate was the final arbiter of Strong's ideas; the Federalists waned in power and Hartford became a national punchline. Martin's ire over implied powers was, in his time,

⁵ LaCroix, *Origins of American Federalism*, 25-8.

disassembled by John Marshall, but found currency in the South even if only a few knew Martin by name. Pinckney's question was ultimately settled at Appomattox.

As leaders these men were heavily influenced by what Gordon Wood identified as a gentlemanliness which emphasized public leadership. Many of the Framers and Founders were from humbler origins but sufficiently well-off to send their sons to universities; usually the first people in their families to do so. There they were influenced by the ideals of the Enlightenment and the proper role for a gentleman and aristocratic leader. George Washington, despite his untouchable public celebrity, often felt embarrassment for being unlettered and not fluent in a foreign language as his peers were. In this sense, Caleb Strong was perhaps as much an image of this disinterested gentility as he was of an old-fashioned, Puritanical character. Though perhaps not as lettered as Adams, he was nonetheless as much a product of this generation.⁶ Pinckney and Martin's place in this world is not as certain; Pinckney was southern aristocracy and Martin, although the first one of his New Jersey family to attend university, was hardly gentlemanly in his behavior. Martin stands as an outsider to this world, perhaps a testament to his placement in the middle of the South and North.

Of the three men, Strong perhaps used his membership at the convention the least although it likely contributed to his unrivaled popularity in Massachusetts. The problem with singling out "forgotten" Founders and Framers is that it turns into an opportunity to resurrect figures who lack historical significance merely because of their presence at a major historical event, in this case the Constitutional Convention. That would be

⁶ Gordon Wood, *The Radicalism of the American Revolution* (New York: Vintage, 1993), 197-213.

hagiography. It also tries to treat a group of men collectively who cannot be categorized in any other way except in their joint membership at the convention.

Nevertheless, the textual evidence and participation in key events in the early republic give reason to re-consider these “forgotten” men, and reconsider how their participation at the convention and their understanding of the Constitution helped them to navigate the problems of the early republic. There is no need to shoehorn Strong, Martin, or Pinckney into roles that are written to show more influence on events than they actually had. It is possible to trace their palpable effects on the thinking on constitutional issues without over-exaggeration or attempting to elevate their status to that of Jefferson or Madison. One need not have been a national figure to participate in constitutional crises in a way that warrants attention. Their status as Framers, and their actions during questions involving the document they helped to draft, are important and have implications for history and law, particularly in times where constitutional interpretation could be based on expediency or political demagoguery.

Yet if a subtle affection creeps into writings about these men, it arises organically from the knowledge of what has transpired in constitutional thought since their time. It is not judgement for their blunders or for their opinions that, in the present, seem immoral or dated. It is admiration for the recklessness and hell-bent for leather willingness to assume roles that were incumbent on men of means and learning. Assuming that role as a matter of duty, in spite everything they did know, and did not know, preceded as much from knowing the consequences of failure as they did from conviction. Theirs was an awesome responsibility. The historical record invariably loses information with time. This was an attempt to preserve as much information in the system about men who, like

many others preserved solely as names on a stele or parchment fragment, merited a greater space in our national memory.

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