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Constitutional Politics in the Age of Joseph Story

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Abstract: *Supreme Court Justice Joseph Story was a National Republican, and the basic constitutional thesis of national republicanism was that the Constitution establishes a national government with the power to provide the legal, financial, and physical infrastructure for a dynamic and expanding national economy that involves extensive interstate and international commerce (in the sense of buying and selling). Story's doctrine of the Constitution implemented each of those principles. He was a proponent of a strong federal judiciary in the sense of one with broad jurisdiction. In Story's vision of America, good government supported the efforts of the virtuous and industrious to make economic and moral progress. However, Martin Van Buren saw Story's political system as one ruled by self-interested elites who were not faithful agents of the people, and sought to invent a political instrumentality more powerful than Congress, the President, and the federal courts put together: a modern political party.*

In the published version of an Andrew Lang Lecture titled "On Fairy-Stories" that he had delivered in Scotland in 1938, the Rawlinson and Bosworth Professor of Anglo-Saxon at Oxford, J. R. R. Tolkien, said

> To be invited to lecture in St. Andrews is a high compliment for any man; to be allowed to speak about fairy-stories is (for an Englishman in Scotland) a perilous honour. I felt like a conjuror who finds himself, by some mistake, called upon to give a display of magic before the court of an elf-king. After producing his rabbit, such a clumsy

Talking Points

- In his politics Joseph Story was a National Republican, and the basic constitutional thesis of national republicanism was that the Constitution establishes a national government with the power to provide the legal, financial, and physical infrastructure for a dynamic and expanding national economy.
- Story was a proponent of a strong federal judiciary in the sense of one with broad jurisdiction.
- For Story, good government supported the efforts of the virtuous and industrious to make economic and moral progress.
- Martin Van Buren saw Story's political system as one ruled by self-interested elites who were not faithful agents of the people, and sought to invent a political instrumentality more powerful than Congress, the President, and the federal courts put together: a modern political party.
- Constitutional politics refers to the political structures and mechanisms that cause legal rules, especially rules that govern the powers and decision-making processes of the government, to resist change.

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> performer may consider himself lucky, if he is allowed to go home in his proper shape, or indeed to go home at all.[1]

That is how I felt to be introduced by Mr. Meese in a lecture series inaugurated by Judge Bork.

In that Andrew Lang Lecture, Tolkien pointed out the importance of his subject matter, in which the gods themselves regularly appear. "The gods are after all gods, and it is a matter of some moment what stories are told of them."[2] In John Marshall Park, a few blocks from The Heritage Foundation, outside the building where I clerked for Judge Bork, is a statue of Joseph Story's great friend and colleague, the Chief Justice, by William Wetmore Story. There is also a famous statue of Story himself, again by William Wetmore, in a building in Cambridge, Massachusetts, named after the author of a contracts casebook.[3]

Thus presented in bronze and marble, Story and Marshall are gods, and one must be very careful what stories one tells of them. So that I may speak freely, instead of talking about the marble figure at Langdell Hall, I will talk, not about the god, but about an important but more life-size subject: the author of *DeLovio* v. *Boit,*[4] which will figure in this story.

In his politics Joseph Story was a National Republican, and the basic constitutional thesis of national republicanism was that the Constitution establishes a national government with the power to provide the legal, financial, and physical infrastructure for a dynamic and expanding national economy that involves extensive interstate and international commerce (in the sense of buying and selling).[5]

Story's doctrine of the Constitution implemented each of those principles. As he was a judge especially concerned with the role of the courts, I will start with the legal infrastructure, which he sought to provide both structurally and substantively.

Structurally, or wholesale as it may be put, Story was a proponent of a strong federal judiciary in the sense of one with broad jurisdiction. I mentioned *DeLovio* v. *Boit*, a case the importance of which in its day surpasses its notoriety in the 21st century, except among specialists. *DeLovio* held that contracts for marine insurance, a very important component of maritime commerce then as now, were within the federal admiralty jurisdiction. That may seem obvious today, but it was not obvious then, for reasons that appear once you think about it. Marine insurance contracts are made and executed on land, although they are about transactions at sea. They do not involve one of the standard justifications for admiralty jurisdiction: that events in one port might give rise to lawsuits in another. Rather, the shipowners and insurers were routinely all in the same city (so that there wouldn't be diversity jurisdiction).

But Story believed that commercial men needed expert and unbiased tribunals, unbiased here meaning without local bias, and so maybe just a little bit biased in favor of nationwide or international business. The federal courts could be counted on to be like that, especially when he was sitting, state courts not necessarily. So he wanted an admiralty jurisdiction as extensive as it reasonably could be.[6] Not just the admiralty jurisdiction. Story maintained that

1. J.R.R. TOLKIEN, *On Fairy-Stories*, *in* ESSAYS PRESENTED TO CHARLES WILLIAMS 38 (C. S. Lewis, ed., 1947, pap. ed. 1966).
2. *Id*. at 56.
3. My account of Story's thought draws heavily on the definitive work on his life and thought, R. KENT NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC (1985). A picture of the statue at Harvard appears at 236.
4. 7 F. Cas. 418 (C.C. D. Mass. 1815) (No. 3776).
5. As Newmyer puts it, the law as Story saw it "took its character and spirit from the practical needs of real people and more specifically from the needs of the business community and the imperatives of the market as he saw them operate in New England. This was true of Story's constitutional law as well as his private law; indeed, in his American plan there was no disjunction between the two." Newmyer, *supra* note 3, at 116. As Newmyer explains, Story's National Republican view of the appropriate role of a strong federal government was hardly limited to the courts. "Story's plans for national grandeur as expressed to Nathaniel Williams in 1815—which included a standing army, a 'permanent navy,' national military and naval schools and a national bank—depended on executive initiative and congressional power. And such power his opinions sought to supply." *Id*. at 97 (footnote omitted).

Congress was under an obligation to create courts that could exercise the full Article III jurisdiction, which implied that it must create lower federal courts, as some of that jurisdiction is original and may not be exercised by the Supreme Court of the United States.[7]

I call his structural position—extensive federal jurisdiction—a wholesale implementation of his views because he thought that federal courts would, in general, make better decisions than state courts, and for him better decisions would be those that facilitated large-scale commercial transactions. That is the key to understanding the Story case that is much more famous today than *DeLovio*, though famous for having been rejected: *Swift* v. *Tyson*.[8]

Swift was a diversity case involving a bills and notes question. It is best known (though not always well understood) for the general principle that the federal courts, in deciding cases under general commercial law, are not bound by the precedents of the state courts on that subject. That is not surprising if you believe that federal courts are better—technically more expert and less biased—than state courts, and so will find and apply the right law. Of course the unbiased experts should not be bound by the decisions of local hacks.

The actual substance of *Swift*, the retail part, reinforces the point. Story departed from the views of the New York courts on a question of negotiability, and took the view that facilitated negotiability at the expense of cutting off certain rights against subsequent purchasers. A strong holder in due course principle is very useful if strangers are going to engage in commerce in many states and over long distances.[9]

National courts applying pro-business substantive law to economic transactions were one part of the program of supplying legal infrastructure. Another was a substantive doctrinal principle for which Story remains famous today, at least to students of constitutional history. In the late 18th and early 19th centuries, corporate charters were not freely available as they have been for more than a hundred years. Rather, they were provided by specific acts of the legislature. Sometimes, and in their most controversial use, corporate charters would authorize some particular group of individuals to carry on some business in a way that ordinarily was impossible, if only in the corporate form itself .

This was especially common with respect to infrastructure projects like bridges, toll roads, and canals, so perhaps it should go with physical infrastructure, but corporate charters were granted for other functions too, like banks, so I am putting this in the most general of my three headings. The important point for our purposes is that once corporate charters were granted, there were then often controversies over just what had been given, and to what extent the legislature that granted the charter could take steps that reduced its value.

The case of this nature we most associate with Story is of course *Charles River Bridge*,[10] which involved a much earlier grant of a charter to build a bridge across the Charles River. The question in that case was whether the legislature had implicitly promised not to authorize another bridge. The majority said no and Story, seemingly quite angry, dissented.[11] Of course, he had been a strong supporter to the decision that was the premise for this case, *Trustees of Dartmouth College* v. *Woodward*,[12] which had held that corporate charters were contracts between the state and the people being incorporated, and hence were subject to the Contracts Clause, which forbids states from impairing the obligation of contracts.

6. Newmyer, *supra* note 3, at 123–125.
7. Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816). Newmyer, *supra* note 3, at 106–111; DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789–1888 93–95 (1985).
8. 41 U.S. (16 Pet.) 1 (1842).
9. Newmyer, *supra* note 3, at 332–343.
10. Charles River Bridge Co. v. Warren Bridge Co., 36 U.S. (11 Pet.) 420 (1837).
11. Currie gives a characteristically insightful account of the case. Currie, *supra* note 7, at 209–210.
12. 17 U.S. (4 Wheat.) 518 (1819).

As I indicated, the question in *Charles River Bridge* was about the interpretation of the charter—not whether it was a contract. Story's position, there and elsewhere, was to adopt interpretive principles that favored the holders of the charter and, he thought, in the long run favored economic development. No one would have undertaken to construct that bridge, he reasoned, without an implicit promise of a monopoly, and so that promise was needed to induce the investment that facilitated growth.

It is tempting to say that Story was a strong defender of private rights, but this was the 19th century and everyone was a strong defender of private rights. Certainly Chief Justice Taney, who wrote for the majority, was. Story was a defender of a particular kind of private right that was highly controversial: special grants by the government, like the bridge charter, ostensibly made in the public interest.

There is another principle concerning the way in which the legal system governs economic activity that Story believed in but that the Court did not really implement in his day. That is the idea, familiar now under the name of the dormant commerce clause, that to some substantial extent the federal commerce power is exclusive, so that the states may not regulate interstate or foreign (or Indian) commerce. In *Gibbons* v. *Ogden*,[13] John Marshall flirted with that idea but did not endorse it.[14]

Perhaps Story, who sat on the Court that decided *Gibbons*, was uncharacteristically inattentive to the actual holding of that case, because he said in his *Commentaries* that it had been "settled upon the most solemn deliberation" that the federal power over commerce was exclusive.[15] Of course, a National Republican would think that. If the states can regulate interstate commerce, they can bar imports from other states, for example, and so completely disrupt the national economy.

If the federal commerce power is exclusive, one may wonder, will there not be a legal vacuum unless and until Congress acts? In some ways perhaps, and save that thought. But in many ways no, there will be no vacuum, because economic activities will be governed by the general commercial law, largely adumbrated by the federal courts. They will make sure that the rules governing commerce will favor commerce.

That system of legal rules I have characterized as legal infrastructure. I also mentioned financial infrastructure, and here the most important case is one Story strongly supported but did not write, because he was not the Chief Justice. I mean of course *M'Culloch* v. *Maryland,*[16] endorsing the constitutionality of the Bank of the United States.

For the National Republicans, having a bank that could operate in every state—that was a lot harder, legally speaking, than it sounds—and that was not subject to the control of state politicians—remember, banks were specifically chartered and so subject to much political influence—was key to economic development and the integrated national economy. The problem, of course, was that the Constitution did not obviously authorize Congress to create such an organization. And in the First Congress, James Madison himself had said that no such authority existed.[17]

13. 22 U.S. (9 Wheat.) 1 (1824).
14. Discussing the contention that the federal commerce power necessarily excludes any state power over commerce, Chief Justice Marshall said that the position has "great force," and the Court was "not satisfied that it has been refuted." *Id*. at 209. Justice Johnson, in a concurring opinion, based his decision to join in the Court's judgment explicitly on the premise that the federal power over interstate commerce "must be exclusive." *Id*. at 227.
15. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 366 (abridged edition, 1833, reprinted 1987). David Currie noted that Story was playing fast and loose with his Court's precedents: "Story disingenuously professed that *Gibbons* had settled the question." Currie, *supra* note 7, at 172 n. 99 (citations omitted).
16. 17 U.S. (4 Wheat.) 316 (1819).
17. XIV DIGIACOMANTONIO, BOWLING, BICKFORD, AND VEIT, EDS., DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789–1791: DEBATES IN THE HOUSE OF REPRESENTATIVES 367–381 (1995) (press accounts of Madison's speech against the first Bank).

President Madison thought differently, and signed the charter of the Second Bank of the United States, which was the one upheld in *M'Culloch*. In the absence of any federal power directly on point, Chief Justice Marshall took the line that seems obvious today but that was bitterly controversial back then: he said that Congress could create the bank because that would facilitate the exercise of its other powers. The national government had to engage in all sorts of financial transactions—borrowing money and moving it around—and a nationwide bank with a large capitalization was just the thing for all those purposes. Yes, there were other ways to accomplish that goal, but Congress had much discretion as long as the end was legitimate.

The Bank of the United States was what might be called the affirmative part of providing a sound financial infrastructure for the country. There was also the negative part: what about schemes put together by state governments to produce easy credit and inflate the money supply? That is the opposite of a sound currency, and there are now-neglected clauses of the Constitution that limit it. States are forbidden to emit bills of credit. That imposes some limitation on their ability to supply a currency. Should it be interpreted so as to impose strong limits, or so as to be less restrictive? As one would expect, Story's view was more restrictive.[18]

Having put *Charles River Bridge* in with legal infrastructure, I will assign another borderline principle, quite an important one, to the sound currency category. That is the interpretation of the Contracts Clause in its primary application: limitations on the ability of states to relieve debtors, for example by extending their time for repayment when there was a crash and money was scarce.

A dynamic national economy is going to involve lots of lending from urban financial centers, sometimes in other states, to farmers and entrepreneurs. Sometimes things will go bad, and the state legislature may be strongly tempted to let the out-of-state creditors end up holding the bag. But the possibility that such a thing will happen can, as John Marshall said, "destroy all confidence between man and man."[19] Hence the federal courts had to be vigilant to enforce the Contracts Clause.[20] I do not want to overstate the breadth of disagreement here. Again, this was the 19th century and vested rights were sacred.[21] But there were important differences of degree as to how much help a legislature could give debtors, and on that question Story was consistently on the side of the creditors.

Then there is physical infrastructure, which was very important politically but which was unlikely to come into court very often. Standard National Republican doctrine maintained that Congress had broad power to spend money for the common defense and general welfare, and that included large national infrastructure projects like roads and canals.[22]

18. While Marshall was Chief Justice, Story joined in Craig v. Missouri, 29 U.S. (4 Pet.) 410 (1830), which held that Missouri had violated the Constitution's prohibition on the emission by states of bills of credit when it issued notes that could function as a circulating medium. Seven years later, after the appointment of several new Justices, including a new Chief, Story was the lone dissenter in Briscoe v. Bank of Kentucky, 36 U.S. (11 Pet.) 257 (1837), which upheld the issuance of negotiable notes by a corporation owned and controlled by the Commonwealth of Kentucky.
19. Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 270 (1827) (Marshall, C.J., dissenting). *Ogden* v. *Saunders* is the only constitutional case in Chief Justice Marshall's career in which he registered a dissent; that is how strongly he felt about the matter.
20. "Contract law was the permeating theme of [Story's] great commentaries on commercial law. Through the Contract Clause and the judicial decisions thereon, it became during the antebellum period one of the basic doctrines of American constitutional law." Newmyer, *supra* note 2, pp. 232–233.
21. For example, Story joined Chief Justice Taney in the majority in Bronson v. Kinzie, 42 U.S. (1 How.) 311 (1843), which held invalid under the Contracts Clause an Illinois statute limiting foreclosures and giving mortgagors expanded redemption rights.
22. "And when it came to promoting the development of transportation—'internal improvements,' —in the language of the day—Republican nationalists went beyond anything Hamilton had envisaged. Where his outlook had been Atlanticist, theirs was continentalist." DANIEL WALKER HOWE, WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815–1848 84 (2007).

One of the great things about being a law professor is that you are not bound by the case or controversy requirement or other doctrines that keep issues out of court. You can speak your mind. And that is what Professor Story did on this topic in his *Commentaries*. He explicitly endorsed the Hamiltonian principle that Congress may appropriate funds for the common defense and general welfare. There is, that is to say, an independent federal power to spend the money raised through Congress's broad taxing powers.[23]

What I have just described is a large chunk of Story's constitutional, and other legal, doctrine. There are other aspects, of course. I will not say much about *Prigg* v. *Pennsylvania*,[24] despite its importance and its connection to Story's nationalism, because the controversy about exactly why Story did what he did remains. I will also pass over Story's ardent judicial supremacism.[25] What I have described is a substantial part, and it does follow the theme of the National Republican idea of a national government for a national market.

Having described constitutional doctrine, I want to say something about constitutional theory, in two respects. First, what is the substantive idea of the Constitution's underlying principles on which all this rests? That idea is easy to see. It is well understood, and was well understood at the time, that three particular weaknesses of the national government in the 1780s led to the Federal Convention and the Constitution: First, the national government had no independent revenue, and so couldn't do anything at all, even pay its debts. Second, in part for the first reason but not only for that reason, the national government was not strong internationally, and was ill equipped to deal with other sovereigns either in military conflict or hard diplomatic bargaining. Finally, political developments in that decade had been bad for business, especially business in more than one state.[26]

On the third question, it is again clear that the Constitution took substantial steps to create and protect a national market. Many of the specific powers of Congress are about that, not only the commerce power itself but also the bankruptcy power, the intellectual property powers (as we call them), and the weights and measures power. Not only are they about economic activity, they are about inadequacies of state-level decision making on economic matters: Must one state respect the disposition of a bankrupt estate adjudicated in another? How will all the states agree on what the units of measure, key to commerce, are?

Moreover, the affirmative limitations on the states are mainly concerned either with national security or with business. States may not impair the obligation of contracts, emit bills of credit, or make anything but gold or silver legal tender.[27]

23. Story, *supra* note 15 at 346–350. Indeed, on this point Story quoted Hamilton in his 1791 *Report on Manufactures*. *Id*. at 348-349. In explicitly endorsing Hamilton's view, Story was twisting the knife on the person who appointed him to the Supreme Court. The classic exposition of the opposite position—that there is no independent spending power, only a power to spend tax money pursuant to the other powers—was of course due to James Madison. Story's court eventually would endorse Hamilton's position in this long-running debate. United States v. Butler, 297 U.S. 1 (1936) (describing Hamiltonian and Madisonian positions and endorsing the former).

24. 41 U.S. (16 Pet.) 539 (1842).

25. Story maintained that in justiciable cases and controversies involving the constitutionality of an act of Congress, "there is a final and common arbiter provided by the constitution itself, to whose decisions all others are subordinate; and that arbiter is the supreme judicial authority of the courts of the Union." Story, *supra* note 15, at 125. In 1986 then-Attorney General Meese, after defining constitutional law as "that body of law that has resulted from the Supreme Court's adjudications involving disputes over constitutional provisions or doctrines," said that "we must understand that the Constitution is and must be understood to be superior to ordinary constitutional law." Edwin Meese, III, *The Law of the Constitution*, *in* THE FEDERALIST SOCIETY, WHO SPEAKS FOR THE CONSTITUTION: THE DEBATE OVER INTERPRETIVE AUTHORITY 3, 9 (1992) (reprinting speech delivered at Tulane University, Oct. 21, 1986).

26. A leading account of the difficulties that led to the Federal Convention appears in JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 24–34 (1997).

27. U.S. CONST. Art. I, § 10.

It is not hard to see the big picture: National power needed to expand, and state power be limited, for America to prosper. And that is exactly how Joseph Story saw the Constitution.

Reading the particular provisions of the Constitution in light of its overall purpose is hardly unusual, but it does create some room for the interpreter's own normative vision to enter into the process

The foregoing is constitutional law and maybe constitutional theory. But it is not constitutional politics, which is my subject here. By constitutional politics I mean the political structures and mechanisms that cause legal rules, especially rules that govern the powers and decision-making processes of the government, to resist change. Resisting change means not just enduring, but enduring when there are demands for change so strong that their failure calls for some kind of explanation. Many basic rules are uncontroversial, or of so little controversy that their persistence hardly calls for much of an explanation; it is not really worth anyone's trouble to change them. Yes, there are those who believe that the term of the House or Representatives should be four years, but very few, if any, people care very much about that, so the fact that the term remains at two years does not call for much explanation.

Rather, the legal rules that can meaningfully be said to be entrenched, to be sticky even when there is powerful call to change them, are those that are the subjects of constitutional politics. To engage in constitutional as opposed to ordinary politics is to deal with the structures and mechanisms of entrenchment, of resistance to powerful calls for change.

It may be natural to think that a constitution can itself deal with this issue. Is not Article V the ultimate piece of constitutional politics, requiring special and demanding processes for change and thereby entrenching the whole thing? But Article V is just words on paper, a legal rule only if the actions and expectations of people make it a legal rule. What holds it up? That is the subject of constitutional politics.

Of course, Story believed that his strong national government with strong national courts and strong protection for private property was in the country's best interests. But the people—or the mob, as he sometimes saw things—might mistake their own interests, or want to engage in unjust depredations against the virtuous and industrious.[28] How could the system be set up to resist those unfortunate tendencies? In particular, how could a country without a monarch or a real hereditary aristocracy (and without an established national church) resist those unfortunate tendencies?

To begin to see the answer, think about Hamilton and his fiscal program. Hamilton understood his fiscal system, not only in terms of economics, but of political economy: he thought that it would have effects on interests and incentives that in turn would have effects on politics. He was thoroughly familiar with American politics in the 1780s, and in particular with the interaction between financial interests and politics. He was also familiar with British politics. Both, he thought, pointed in this direction (which is indicated by common sense too): The creditors of a government will want that government to be strong enough to collect the revenue to pay its debts.

Hamilton thus thought that an important bulwark of the new federal edifice would be people who held its debt. They would want to make sure that it did not default. As for the bank, if the bank depended on the extent of national power, and lots of people throughout the country found the bank highly convenient, they too would have an interest in supporting national power as both practical and legal phenomena.[29]

Would those public creditors be able to outweigh the interests of taxpayers who didn't like having to contribute to pay the interest on the debt? Possibly, for two reasons in particular. First, the creditors would have more at stake, proportionally speaking, than the taxpayers. Second, the standard 18th and 19th century systems of taxation could be set up to be relatively opaque, because they depended heavi-

28. For example, Newmyer reports that Story was strongly opposed to Dorr's Rebellion in Rhode Island, regarding Thomas Dorr, in his struggle against the highly restrictive suffrage under that state's old colonial charter that continued as its constitution, as just another demagogue, and his supporters are just another mob. Newmyer, *supra* note 3, at 360.

ly on indirect taxes, particularly on imports. People might have a general feeling that the prices they paid for imported goods were higher than they had to be, but that did not mean they would know exactly what the bill was.

The difference between concentrated and diffuse interests and the importance of information are familiar tools of analysis today.[30] They were not secrets at the time of the framing, though we do profit from much more thought, and many more examples, than were available in the late 18th century.

With Hamilton's idea in mind, we can think again about the political supports for Story's constitution. Story had good reason to believe that the people who would be brought to power in a national government such as he believed in would have strong *personal* motives to support it. By personal motives, I mean, reasons in addition to, and possibly in opposition to, the interests of their constituents, who might be quite distant from them.

It is important to see that this is not just the claim that the powerful are powerful and will be in favor of what makes them powerful. Rather, there is feedback: a system makes a particular type of person powerful, and people like that—those who are empowered by the system—then have a personal interest in maintaining it so that they, and not someone else, continue to be powerful.

For Story, good government supported the efforts of the virtuous and industrious to make economic and moral progress. The virtuous and industrious were well educated individuals (ideally Harvard graduates) with close ties to commerce and industry. A substantial number of them were lawyers.[31]

If there is some good reason for such people to be political leaders and otherwise important in decision-making processes, then in any system that has some agency slippage between the principals—the people—and the agents, the interests of those people will be influential, sometimes influential in a way contrary to the interests (at least for the time being) of their nominal agents.

To be sure, in a system with substantial political liberty the people, if they are sufficiently dissatisfied with the way the government is operating, can if necessary get a new set of leaders. But that may be very costly, and in particular may require the

29. "One of the things Hamilton wanted to effect with assumption [of the states' war debts] was to unite into one group all the creditors of both the national and state governments. He wanted them all dependent on, and giving their support to, the federal government, and he was very anxious that they not constitute the divisive influence upon public finance that would be created by two opposing classes of financial interest." STANLEY ELKINS AND ERIC MCKITRICK, THE AGE OF FEDERALISM 118 (1993). Forrest McDonald, an admirer of Hamilton, has an understanding of Hamilton's purpose quite different from that of his Jeffersonian opponents:

> His financial program was designed to overcome these "deficiencies" in the Constitution. The absence of a permanent system of status in America would be compensated for by the continuation of landed aristocracies and the creation of a financial aristocracy. The quasi-feudal power of the states would be reduced by making them virtual economic dependencies of the national government. Every important economic interest group in the nation would stand to profit from his system, but every one would be required to bear a part of the burden as well. Most importantly, every person and every group in the highly pluralistic American society would have to deal directly or indirectly with the national government in order to conduct even the most ordinary of business transactions, for the money supply itself would be the creation of government. Of such stuff, Hamilton believed, a nation could be forged—one that would be prosperous and, despite itself, free.

FORREST MCDONALD, THE PRESIDENCY OF GEORGE WASHINGTON 64 (1974).

30. A standard contemporary account of this set of problems is MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1971).

31. Newmyer describes how Story's vision of the role of lawyers in commercial America, especially lawyers educated at Harvard, as at once dynamic and conservative. They would foster economic progress while maintaining moral stability in the face of constant change. "What he wanted was to teach scientific law and to make American law scientific, to reform the legal profession and through law and lawyers save the republic from political parties, professional politicians, and demagogues. The American people might yet be saved from their backsliding ways; conservative wisdom might contain democratic excess; and Story might live 'to posterity,' as he put it." Newmyer, *supra* note 3, at 239 (footnote omitted).

construction of new political mechanisms for identifying leaders—think of the Committees of Correspondence during the Revolution.

What features of a governmental system might bring to power the sort of people Story thought should have power? One important such feature, thoroughly familiar to Americans and to Justice Story, is pure scale: the United States is larger than any state. Members of Congress are elected from large districts, and Senators are elected (indirectly in those days) from whole states. In order to be elected from a large (relatively speaking) district, or to be elected indirectly in a whole state, it helps to have a certain amount of income and a high enough level of education to do more than just talk to your neighbors about how bad the government is.

And if you hope to be President of the United States, you need to be a "continental character," or at least it helps to have a nationwide or region-wide following. People who spend all their time scratching a living from the soil are not likely to show up on that list. People who are wealthy and well educated, who have been to college with other prominent figures, who travel and correspond extensively and have a life-long interest in public affairs, are more likely to be on the list.

This is of course *Federalist 10* and the mechanism of filtration: The government of a larger country will have certain tendencies concerning the sort of person who will be in the government.[32] Madison maintained that filtration would produce people of better character, and Story probably believed that too. My point is that it would produce people who met another criterion that Story had, or that he may have thought was connected to virtue and character: well-educated and economically "progressive" people.

That is one basic feature of the system that will tend to favor a certain type of person. Another is the existence in the national government of technocratic institutions, governmental bodies that require actual expertise. For Story, of course, the leading example was the federal courts, which could apply to all aspects of life the science of the law.

A working technocratic institution needs expertise, and it also often helps if it has substantial insulation from politics. That is certainly true of the courts. Although not everyone supported life tenure for judges throughout Story's career, there was widespread support for independent courts, in the sense of independent of any politician. People did not want their lives, liberty, and property to be determined by decisions of someone's crony. They wanted impartial and expert application of the standing law.

Technocratic institutions are staffed by technocrats. Think of the current Chairman of the Federal Reserve Board of Governors. Chairman, formerly Professor, Bernanke is the kind of person Joseph Story or John Quincy Adams would have thought should be doing the people's business (putting aside the Princeton thing). Expert arms of the government, especially the courts, will naturally be operated by the reasonably prosperous and well educated.

Now think about this from the standpoint of the people. There are good reasons to have a national government and good reasons to have expert and impartial courts. A national government and expert and impartial courts, however, are likely to be staffed by people with interests that are not always in line with those of the people, and whose incentives to put their own interests aside are incomplete. The people might not like that, but they might put up with it, and not change it, if it were too costly to do anything else.

One might say, then, that the well educated can to some extent get disproportionate benefits from the system, because in effect they have a monopoly on what the people need—the ability to operate a national government with some expert institutions.

Indeed, maybe the Constitution itself is like that. The Federal Convention, although it had no formal power, had an enormous political asset: agenda control. It had the people's attention, and was in a position to put to the nation a unified plan on a take it or leave it basis. Although some people in the ratifying conventions tried to press for a second constitutional convention, a great many partic-

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Vanipants in the ratification process who were not enamored of the proposal from Philadelphia thought that it was this one or nothing, and nothing was an unacceptable answer. So they supported the whole bundle, even though it had parts they may not have liked. In particular, it is quite possible that some of the pro-creditor features of the Constitution, like the ban on bills of credit and the diversity jurisdiction of the federal courts, would not have been ratified had they been voted on separately. But they were part of the package the Federal Convention put together.

So if the people at large wanted this kind of government, they might just have to live with some agency slippage in the direction of the interests of the people running the government—people like Story and those he wanted to empower. People who would create national banks and build canals and roads and have creditor-friendly courts creating a uniform commercial law that was pro-business.

For Story and people like him, this was exactly what the national government was supposed to do: It was supposed to bring to power, and keep in power, the intelligent and industrious. From time to time they would check the vices and errors of the people, but that would be all right, either because vice and error should be checked or because vice and error are not really in the people's long-run interests. Either way, it is the dream of the Federalists: Instead of localist demagogues, the nation will be steered by enlightened statesmen.

At least, that is one way to look at it. Another way to look at it is that this is just a power-grab by a bunch of blood-sucking monopolists and speculators and their lawyer tools at the expense of the people. It will produce, not government in the interests of the country, but government in the interests of a narrow, rather snotty elite, who will exploit the people with tolls and taxes and extortionate interest rates, not to mention protective tariffs.

More than one person thought that in the 1820s, but one person did something about it. He set out to destroy the system that Justice Story loved so much, and to sow salt where it had been. He believed that the commercial elites and their lawyers were the natural and permanent enemies of the common man, and that structures had to be put into place to keep them from exercising their evil arts. He was especially outraged by the election of John Quincy Adams in 1824, when the candidate who had the people's suffrage was rejected by the House of Representatives in a corrupt, insider deal.

I am not talking about the political loser in that corrupt deal, Andrew Jackson. Jackson was not exactly a theorist or a political entrepreneur, and this task called for a theorist and a political entrepreneur. I am talking about the person who is the answer to two excellent trivia questions: (1) Who was the first President to be born a citizen of the United States? (2) Who was the first (and I believe still the only) President whose native language was not English?

Yes, that is the Little Magician, the Sly Fox of Kinderhook, Martin Van Buren.[33] Van Buren looked at the system that Story admired so much and saw in it domination of the national government by self-interested elites who were not faithful agents of the people. Those self-interested elites could control Congress, the presidency, and the federal courts. So in order not only to defeat them, but to render them permanently politically powerless, it would be necessary to invent and then build a political instrumentality more powerful than Congress, the President, and the federal courts put together.

It would be necessary to design and construct a modern political party: An extra-constitutional but fully lawful private organization, with its own permanent institutions, through which the people could control the government so that it would not control them. That institution, the political party, would be the true instrument of the people's power. *Demos-kratia*, one might say. It would be the Democratic Party, and would come to be called not just that but also simply, the Democracy.[34]

33. MAJOR L. WILSON, THE PRESIDENCY OF MARTIN VAN BUREN 17 (1984). Wilson suggests that Van Buren was called by those names, and perhaps even more aptly Talleyrand, by those who believed that he was "a professional politician who had no principles." *Id*. My argument is that Van Buren was a professional politician who did have principles, which did not necessarily keep him from being sly or two-faced.

The Democratic Party had substantive principles, or as we would say today, an ideology. At least, it had one with respect to the national government, and as to the national government its principle was Jeffersonian strict construction. The powers of Congress were not to be read broadly, and they were to be exercised only in the common interest of the whole country, not in ways that benefited only one section or interest. The Union had to be strong, but it didn't have to be omnicompetent, and it was not. In particular, it was not supposed to raise large sums of money and use that money on projects that might go to special interests. Concentrated, central power would inevitably be hijacked by the monied elite, at the expense of the people. Therefore such power must not be available.[35]

That was the substance, but of course a main theme of American constitutional thought is that substance and structure go together. As an organization, the Democratic Party had two crucial features. First, and most important, it had to be relentlessly grassroots and local, designed so that the bottom was permanent and the top only temporary.[36] Conventions of the people, more transparent and less manipulable than legislatures, would be its decision-making bodies. Local conventions, the people acting directly, would elect delegates to state conventions, which in turn would elect delegates to national conventions. Although the people involved would be party loyalists, the great bulk of them would not be full-time politicians, and the conventions would control the people in government.

Second, both in the electorate and in the government, it would have party discipline. Once the majority (or often a super-majority, as in nominating presidential candidates) had spoken, the minority would go along. That way, the enemies of the people—or the virtuous and industrious, if you thought like Story—would not be able to divide the people and seize power.[37]

Martin Van Buren is said to have inaugurated the Second Party System, but that is not what he had in mind. Rather, he wanted to create a one-party system, because the people, the majority, were united in an interest.[38] So the system in Van Buren's original design was to our eyes quite Leninist, in that one of its purposes was to exclude from power altogether people like Joseph Story, in effect to disenfranchise them through the discipline of the people's party.

This new institution, although no part of the national government, would control the national government. It would make sure that the people's choice was the electors' choice and that the House had no corrupt bargains to make. The party, and emphatically not the Supreme Court of the United States, would be the keeper of constitutional principle.[39]

It had powerful appeal at the time, and has powerful appeal now. It rested on the idea that the two

34. This account of Van Buren's thought and the political system he designed is based on the work of Professor Gerald Leonard, who has shown just how important and under-appreciated a constitutional politician Van Buren was. Gerald Leonard, *Party As a "Political Safeguard of Federalism": Martin Van Buren and the Constitutional Theory of Party Politics*, 54 RUTGERS L. REV. 221 (2001). As to the identification of the party with democracy itself, Leonard writes: "Far from advocating party organization *within* the democracy, Van Buren sought party organization *of* the democracy." *Id*. at 246.

35. *Id*. at 251–262.

36. In Van Buren's theory, the party of democracy must have the democratic substantive principle of strict construction, and "the internal operations of a democratic party must themselves be democratic—not just because a party espousing democracy should live up to its own principles internally but because the party's job was not simply to *espouse* democracy but to *be* the democracy in action, in governance." *Id*. at 256, Decentralization and the convention system followed from the structural imperative. *Id*.

37. "The convention system could only work, however, as long as a strict ethic of party loyalty was in place." *Id*. at 257 (footnote omitted).

38. *Id*. at 250.

39. *Id*. at 262–268. Having noted Story's firm belief in judicial supremacy in interpretation, I should also stress that Van Buren on this score was in lockstep with Attorney General Meese in rejecting the claim that the Court speaks authoritatively to the other branches of government. *Id*. at 265.

great principles of Liberalism—liberty and equality—are not in conflict, but reinforce one another. For everyone to be free, to have no aristocratic superior, everyone had to be equal. And the way to ensure that was to have a political structure, both constitutional and extra-constitutional, that was relentlessly decentralized and popular.

Liberty! Equality! Democracy! Van Buren!

To put Van Buren's thinking about constitutional politics in more modern terms, one would say that he assumed that the majority of the people were united in important interests, especially when it came to how the national government should behave. You might think, then, that the task would be easy—surely the power of the people will always prevail, and it will not be necessary to have any entrenching mechanisms in place to prevent minority rule.

But no, the institutions of the Constitution are subject to minority subversion. Although they are designed to make popular government work permanently, there are deviationist tendencies. The problem, again as I would describe it, is that the rent-seekers are intrinsically more organized than the people. Missing is some mechanism by which the people as such can reliably bring their power to bear. Some mechanism is needed to facilitate the exchange of political information and in particular to coordinate the people, so that they can avoid being divided by the monied interest. Some mechanism is needed to stabilize the Constitution against the attempts of neo-Hamiltonians to subvert it. The agency problems, Van Buren assumed (although he did not put it this way), are not fully solved by the Constitution's own rules, and so additional rules are necessary.

Once those additional rules are in place, the system should be stable, because the interests of the people are permanent and united, at least at the national level. Well, maybe.

That was the idea, and in the medium term it was very successful. Democrats dominated the presidency and the courts for the next 30 years, and regularly controlled Congress. And on the questions that were of special interest to Justice Story, the Democracy was very successful, so much so that Story spent much of his later life in deep despair about the country. Although the Democrats did not contract the jurisdiction of the federal courts as Story had feared, and as some of them wanted to, they did not expand that jurisdiction as Story had sought. The Taney Court did take one interesting step, extending the admiralty jurisdiction beyond the ebb and flow of the tide, to the inland lakes and rivers of this great continent.[40] Judicial activism? Maybe that, and maybe a way to have some federal authority in an area of federal importance without expanding the commerce power. I suspect the latter.

As to the Contracts Clause, the Democrats believed in vested rights but they also believed in the rights of the common man. So they were more circumspect in interpreting corporate charters and other promises by the government to favor private interests, but hardly brought about a revolution in doctrine.[41] It was on the question of the national fiscal system that the Democrats differed most strongly from the National Republicans and from Justice Story in particular. They believed that *M'Culloch* was wrong and the banks unconstitutional because beyond congressional power. They implemented that constitutional position, as Van Buren wanted them to, in all branches of the national government: Congress, the presidency, and the courts.

It is a familiar story that those Democratic principles prevailed in the elected branches. Congress, with Whig majorities, passed legislation extending the charter of the Second Bank of the United States in 1832, and sent it to President Jackson. The pro-bank legislators thought they had Old Hickory over a barrel. Either he would veto the bill and offend important constituencies that found the bank very useful, or he would sign it and they would get another 20 years of the bank. But of course he vetoed the bill on constitutional grounds, delivering an answer to *M'Culloch* based in part on a draft pre-

40. The Propeller Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443 (1852), *overruling* The Steamboat Thomas Jefferson, 23 U.S. (10 Wheat.) 428 (1825).

41. Currie, *supra* note 7, at 222.

pared by his Secretary of the Treasury, one Roger B. Taney.[42] That veto message is probably best known today for asserting some independent presidential interpretive authority, but it was also important for its substance on the constitutional question: The Necessary and Proper Clause should be read more narrowly than the Court had read it, and in any event the bank was not necessary and proper under even a broad understanding of that power.[43]

Less well known since, at least until some good recent scholarship, is that Jackson and fate kept the Court from overruling *M'Culloch* itself. Because of Jackson, there was no re-charter in 1832, or while Democrats held the White House. Then Fortune intervened, with a financial crash, and the Whigs took control of Congress and the presidency in 1840, with the election of Old Tippecanoe, William Henry Harrison. With control of the legislative authority, the Whigs were in a position to create a new bank, or an institution much like the old ones. Then Fortune turned the wheel again, Harrison died early in his presidency, and his ticket-balancing Vice President, His Accidency John Tyler, took custody of the presidential veto power.[44] Tyler had long been a critic of the old bank, and after futile attempts to negotiate an acceptable bill with the real Whigs in Congress, he vetoed legislation that would have created a new bank, citing limited congressional power.[45]

That made it unnecessary for the Democratic Court to do what it was very likely prepared to do: hold the bank unconstitutional and overrule *M'Culloch*.[46] In doing so the Court would have been implementing the constitutional theory of the Democratic Party and its principal architect, Martin Van Buren. The Democratic Justices did not have the opportunity to overrule *M'Culloch*, but no one could make them cite it as good authority regarding congressional power, and they refused to do so.[47]

As for Story's goal of a federal government that would create physical infrastructure to promote economic progress, the Van Burenite Democratic Party endorsed the end but not that particular means. The proper means were state governments and the private sector, sometimes in tandem, and the proper model was the Erie Canal, built with no federal assistance.[48]

As the point about federal spending demonstrates, as if Jackson's bank veto were not enough, Democratic constitutional principle and politics were not just about, and indeed really were not

42. A good account of the Bank veto appears in DONALD B. COLE, THE PRESIDENCY OF ANDREW JACKSON 95–105 (1993).

43. Jackson's veto message appears in II JAMES D. RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS, 1789–1897 576–591 (1899).

44. Whether, under Article II of the Constitution, Tyler succeeded to the presidency or remained Vice President while acting as President, is one of the standing conundrums of American constitutional law. *See* NORMA LOIS PETERSON, THE PRESIDENCIES OF WILLIAM HENRY HARRISON & JOHN TYLER 45–50 (1989) (dispute on Harrison's death as to Tyler's precise status). The question was rendered moot by Section 2 of the Twenty-Fifth Amendment, which provides that when the President dies, resigns, or is removed, the Vice President shall become President.

45. V JAMES D. RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS, 1789–1897 63–72 (1899).

46. "In the absence of a national bank whose constitutionality might have been challenged, the Supreme Court after 1832 had no opportunity to reconsider *McCulloch*. Had a Jacksonian tribunal considered the matter, good reason exists for thinking the bank would have been declared unconstitutional." Mark A. Graber, *Antebellum Perspective on Free Speech*, 10 WM. & MARY BILL OF RTS. J. 779, 807–808 (2002) (book review). Professor Graber's discussion of the reasons for his conclusion, *id*. at 808, n. 161, persuades me that the good reason to which he refers is in fact very strong. Professor Gerard Magliocca reaches a similar conclusion on similar grounds: "The paramount doctrinal goal of Jackson's supporters was the reversal of McCulloch in the Supreme Court, and there is considerable evidence that they thought the decision's demise was only a formality." Gerard M. Magliocca, *Veto! The Jacksonian Revolution in Constitutional Law,* 78 NEB. L. REV. 205, 248 (1999).

47. *M'Culloch* "was largely a hollow shell for the next fifty years. In fact, the Court did not cite the decision's discussion of implied power from 1824 until the first Legal Tender Case in 1870. Marshall's reasoning was also ignored by the political branches, as Democratic Presidents routinely vetoed bills as unconstitutional when Congress sought to spend funds for ends that were not enumerated." Gerard N. Magliocca, *A New Approach to Congressional Power: Revisiting the Legal Tender Cases*, 95 GEO. L. J. 119, 130 (2006) (footnotes omitted).

mainly about, changing judicial doctrine. Rather, they were about changing the constitutional principles on which the whole national government operated. So presidential vetoes of recharters and spending plans were just as important as judicial vetoes, perhaps more so. And the most important protection of the plain republicans against the rent-seeking projectors came from Congress's general unwillingness to do much along those lines. The Court was not the centerpiece of this system, but rather back-stopped Democratic constitutional principles in those unusual circumstances when the more basic mechanisms broke down. Thus the Court's likely willingness to overrule *M'Culloch* when the Whigs happened, briefly, to have control of the legislative process is an important example. The courts were available in reserve, but were not the main actors in the constitutional system.

Martin Van Buren had hoped to set up a permanent political structure, but of course Fortune laughs at such attempts. In the 1850s the instrument he designed, the Democratic Party, came under increasing stress. In particular, something happened that he had hoped to prevent through the design of the party's institutions: one particular interest group gained disproportionate power. Southern slave-holders achieved outsized influence, such that the Democratic nominee for President in 1856, James Buchanan, was known as a Northern man with Southern principles.[49] And the faction-within-the-party did something that Van Buren had always despised: it tried to use the Supreme Court to impose its solution to a contested political issue on the country. That was *Dred Scott*,[50] as to which two crucial Jackson lieutenants, Taney and Van Buren, disagreed violently.[51]

Whether *Dred Scott* was symptom or cause, Van Buren's nightmare followed: the Democratic Party came apart. One result was that some Northerners who were generally sound, Van Burenite small government, states-rights Democrats, simply could not stay in the party of the Slave Power. Some of them then joined a new political party, which like all American political parties sought to wear its principles on its jersey. Because the Slave Power threatened to turn America into an aristocracy, and because Democracy was already taken, they called themselves, Republicans.

Not all Northern Democrats left the party, of course, but many of those who stayed became increasingly restive under Southern domination. They went along with the nomination (and election) of a pro-southern Pennsylvanian in 1856, but were not thrilled about doing so again. So in 1860, Martin Van Buren's nightmare became real: the Democratic Party broke into Northern and Southern wings, nominating two different presidential candidates, and a rent-seeking railroad lawyer was elected President.[52]

48. The Democratic position found its classic expression in Jackson's veto, on Van Buren's advice and with his drafting assistance, of a bill to build the Maysville Road through Kentucky as part of a system of highways. "Interestingly, Jackson did not set his face against economic development or the expansion of commerce in general. Far from decrying the effects of the transportation revolution, Jackson fully conceded the popularity and desirability of internal improvements.... But he felt that these projects were better left to private enterprise and the states." Howe, *supra* note 22, at 358. Howe goes on to put the point in terms familiar to us: "The Maysville Veto Message had been crafted to endorse what we would call the transportation revolution while condemning what we would call big government." *Id*. at 359. He also points out that with the Erie Canal already built, New York, home of the Sly Fox, had little to gain from federal support for infrastructure projects. *Id*. at 358. It is always easier to be principled when principle and interest align.
49. "In Van Buren's view, the desperate crisis over slavery in the territories was moving otherwise genuine democrats to fall in with the merely factional movements of the southern-rights Democrats and the free labor Republicans—neither party now resting on the democracy as a whole, but only on the partisans of its substantive policy preferences." Leonard, *supra* note 34, at 278.
50. Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).
51. "For Van Buren, the predictable and damning result of this development was *Dred Scott*.... [The question the Court decided in that case] like all constitutional questions, belonged preeminently in politics where the sovereign majority might most readily dispose of it, and the Court's holding on that question was a usurpation by a merely coordinate institution in the service of the substantive interests of the South." Leonard, *supra* note 34, at 278–279.

So the wheel turned, and a new set of constitutional principles made its way into the national government. If only Joseph Story had lived long enough to see it, he would have been pleased.

Although we tend to forget this today, the centerpiece of judicial constitutional doctrine in the Republican Era—from about 1870 to about 1930—was a vigorous dormant commerce clause doctrine, the point of which was to protect the national market from particularistic state regulation. Although the doctrine was constructed to leave substantial room for state autonomy, it was highly protective of interstate business, not only against discrimination but also against even non-discriminatory legislation that had a substantial impact specifically on the interstate aspects of business.[53]

Moreover, that era, and not Justice Story's own, was the heyday of what has come to be called federal common law—the independent interpretation by federal courts of the general principles of law when those principles were chosen by the applicable choice of law rule. Indeed, in a controversial move the Court in that era went beyond the commercial-law origins of the doctrine in *Swift* and applied it to the law of torts.[54] The resulting substantive tort law was thought by many to be unfairly pro-business-defendant.

As for the protection of private rights, it luxuriated. To be sure, the Republicans had a legal implement that Story could only dream of: a due process clause, in the Fourteenth Amendment, that applied to the states and not just the national government. With that in place they could give systematic protection to vested rights of life, liberty, and property, securing them against legislative confiscation and excessive post hoc alteration.[55] That understanding of vested rights had consequences in some ways that are unfamiliar today but that fit into the Republican pattern of protecting a national marketplace against localist, and sometimes just local, regulation. A contract entered into in a state whose law was, shall we say, pro-business could then create vested rights that would have to be respected when the contract was being carried out in another state.[56]

As to financial infrastructure, the Republicans again were a dream come true for a National Republican. Not only did they have national banks, free from state visitation and other regulation, but once the dust had cleared they even had a national currency, with full legal tender effects.[57] And they justified it constitutionally, not with some complex house-that-Jack-built argument under the Necessary and Proper Clause, but on grounds that Justice Story would have approved: federal sovereignty.[58] That conclusion, unthinkable to Jeffersonians, was easy for Justices whose party had fought and won a civil war on the principle of national sovereignty; states' rights yes, state sovereignty no.

52. The classic work on how the American political system, and in particular the Democratic Party, seized up in the decade before the Civil War is MICHAEL F. HOLT, THE POLITICAL CRISIS OF THE 1850S (1978).
53. The system that emerged in the late 19th century, with the dormant commerce power principle at its center, is described in Barry Cushman, *Formalism and Realism In Commerce Clause Jurisprudence*, 67 U. CHI. L. REV. 1089 (2000).
54. Baltimore & Ohio Railroad v. Baugh, 149 U.S. 368 (1893).
55. An important example of the Court's derivation of due process principles that we would call substantive from premises that we (and perhaps they) would call procedural is Chicago, Milwaukee, & St. Paul Ry. v. Minnesota, 134 U.S. 418 (1890), which set the federal courts on the path of reviewing the reasonableness of railroad rate regulation in order to prevent what would amount to confiscation through regulation.
56. Allgeyer v. Louisiana, 165 U.S. 578 (1897).
57. Act of Feb. 25, 1863, ch. 58, 12 Stat. 665.
58. "It appears to us to follow, as a logical and necessary consequence, that Congress has the power to issue the obligations of the United States in such form, and to impress upon them such qualities as currency for the purchase of merchandise and the payment of debts, as accord with the usages of sovereign governments." Juillard v. Greenman, 110 U.S. 421, 447 (1884). One Justice, an old-line Jacksonian with roots in the New York Democracy of Van Buren, although usually a supporter of the protection of property rights and the promotion of the national market, was not on board. "From the judgment of the court in this case, and from all the positions advanced in its support, I dissent." *Id.* at 451 (Field, J., dissenting).

State banks? Congress could and did tax their notes out of existence.[59] The power to tax *is* the power to destroy.[60]

Physical infrastructure? Even during the Civil War, the Republican Congress (the Democrats were meeting in Richmond) found time to adopt the Pacific Railroad Act in 1862. For "postal, military, and other purposes," Congress chartered corporations and gave them land grants of immense value.[61] This will show our national greatness, the Republicans said. Soo-wee pig, the old Jacksonians said. And in enacting the Pacific Railroad Act, Congress, the Supreme Court determined, had given its corporations access to federal court when they were sued.[62] That's how to read a corporate charter!

Was all this the result of clever constitutional politics by the Republicans, of thought-out institution building to create a regime that would withstand a certain amount of stress? I doubt it. The main constitutional entrenchment mechanism the Republicans tried, the 15th Amendment, did not do that well. Although the amendment was not immediately nullified the way some people today think it was, it did not make the post-Reconstruction South politically competitive, let alone Republican.[63]

To some extent Republican dominance of the courts, especially the Supreme Court, was just the result of political success at the presidential level. It is possible, though I have not investigated this, that having Senators from some small and heavily Republican New England States helped with judicial confirmations, as the Senate was often Republican in this period when the House was Democratic. The latter is a result of a feature of the Constitution, but not one the Republicans planned.

Because my larger story is about the work of Fortune, and hence of fortuity, I want to focus one important and highly fortuitous factor in conservative dominance of the courts in the late 19th century, and hence in the creation of the doctrines that would have made Justice Story so happy. That part of the story would have amused Martin Van Buren, but only if he had a strong sense of irony (and I do now know just how strong his sense of irony was). It involved the foundations of all of Van Buren's activities as both statesman and working politician: the politics of New York, especially as it interacted with political parties.

During the later part of the 19th century, New York was the most populous state by far. And it was also very, very politically competitive in presidential elections. Combine that fact with the general ticket for presidential electors and you have a very, very important prize. Indeed, the first President elected without a popular-vote majority in an era when all electors were elected by the people, Benjamin Harrison, achieved that result with a narrow win in New York in 1888.[64]

That was especially striking because Harrison defeated a New Yorker, Grover Cleveland, who returned the favor in 1892. The Democrats thus had a New Yorker at the top of the ticket in three consecutive elections—1884, 1888, and 1892. That was hardly new, as they had nominated former Governors of New York in 1876 and 1868.[65] Indeed, the electoral situation in those days made it virtually impossible for a Democrat to become President without New York.

59. Veazie Bank v. Fenno, 75 U.S. (8 Wall.) 533 (1869).
60. M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 431 (1819).
61. Act of July 1, 1862, ch. cxx, 12 Stat. 489.
62. Pacific Railroad Removal Cases, 115 U.S. 1 (1885).
63. A useful account of the effective elimination of black voting rights in the South, which shows that it did not happen immediately after Reconstruction, appears in ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 105–116 (2000).
64. HOMER E. SOCOLOFOSKY AND ALLAN B. SPETTER, THE PRESIDENCY OF BENJAMIN HARRISON 14–15 (1987). Harrison took New York by 13,002 votes out of 1,315,409 cast.
65. The Republicans often nominated someone from Ohio, another big swing state, like Grant and Hayes and Garfield and McKinley, but they certainly did not neglect New York, nominating New Yorkers for Vice President in 1876, 1880, 1888, and 1900, for example.

With the New York vote crucial to Democratic chances, the New York Democracy had outsized influence, especially with respect to judicial selection. New York was the great industrial, commercial, and financial center of the country, and hence many New Yorkers had a very strong interest in maintaining a national economy with free internal markets and strong protections of private property, especially investment property. It should be no surprise, then, that the New York Democratic Party, the home of the only Democrat to make judicial appointments from 1861 to 1913, was the party of Grover Cleveland. Cleveland did not buy the entire Republican program, in particular all that big government spending the Republicans loved, but he did buy the part about private rights and a hard currency and a national market.[66] So his judicial nominees were some of the strongest protectors of the national economy, despite being loyal Democrats on partisan issues.[67]

The story of Cleveland's nominee for Chief Justice, Melville Fuller, is instructive about Supreme Court politics in those days. Fuller would be the first Democratic Chief Justice since Taney, and Republicans were in control of the Senate, so the nomination was no cakewalk. Indeed, the Republicans, as we would say, "Borked" Fuller, claiming that he was unsound on a litmus test question, the constitutionality of paper money. Fuller believed in the gold standard so strongly it is possible he really disagreed with the *Legal Tender Cases*, but his friends managed to convince relevant Senators (without a hearing) that he was not a threat to that part of the Republican platform.[68] On other parts, he was right down the line.

As a result, the Court remained strongly protective of private rights, so much so that it created an enormous national trauma, and brought about first another round of debate on whether the Constitution really provides for judicial review, and then the Sixteenth Amendment, by holding a recently adopted income tax illegal in 1895.[69] Writing for the majority was Democratic Chief Justice Melville Fuller. And one might well say that the Court was carrying New York's water in that case. It is easy to forget that the income tax was unquestionably constitutional insofar as it applied to wages, salaries, and other income derived from personal services. The constitutional challenge was to the taxation of income from property, including income from securities. The plaintiffs argued, and the majority of the Court agreed, that taxing the income from property was a way of taxing property, and that taxes on property were direct taxes that had to be apportioned among the states so that the per capita burden in each state was the same. The apportionment

66. In general, Cleveland stood for limited federal regulatory power, economy in government, free markets and free trade, and hard money. ROBERT W. WELCH, JR., THE PRESIDENCIES OF GROVER CLEVELAND 10–17 (1988). In all that, he regarded himself as a Jacksonian Democrat of the old school, *id*. at 16, and hence perhaps should have regarded himself as a Van Burenite. On the other hand, a large man whose nicknames included Uncle Jumbo, *id*. at 26, perhaps was not the true heir of the Little Magician.

67. As to Cleveland's generally conservative politics, Abraham recounts a story the theme of which was that Woodrow Wilson, "only half jokingly," regarded himself as "the first President of the Democratic party since 1860," Cleveland having been the only Democrat elected between Buchanan and Wilson. HENRY J. ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS 105 (new rev. ed. 1999). Specifically as to Cleveland's judicial appointments, according to Abraham, "The President's criteria were easy to behold: a Democrat in good standing (no Democrat had been appointed since Stephen J. Field in 1863); an individual known to him personally; an economic-proprietarian of generally conservative bent; and a non-Populist from an appropriate geographic area." *Id*.

68. *See* JAMES W. ELY, JR., THE CHIEF JUSTICESHIP OF MELVILLE W. FULLER, 1888–1910 19-21 (1995). It is noteworthy that on the question of paper money Cleveland and Fuller were more conservative than the Republicans, both supporting the gold standard. *Id*. at 20. In addition to questions concerning Fuller's soundness on legal tender, there were allegations that his positions in the Illinois legislature during the Civil War constituted him a Copperhead. *Id*. In addition to those ideological obstacles, Fuller had to overcome the fact that President Cleveland had passed over the preferred nominee of Senator George F. Edmunds, Chairman of the Judiciary Committee. *Id*. at 17. The politicization of Supreme Court nominations is not a recent phenomenon.

69. Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, *modified on rehearing*, 158 U.S. 601 (1895).

requirement was designed to prevent inter-regional redistribution from states rich in property to those less well supplied with it.[70] Especially rich in property, particularly intangible property, was of course the Empire State.[71]

Party competition, the politics of one particular state, and the details of the system of presidential elections thus had outsized influence on the judicial interpretation of the Constitution at a time when that interpretation had important economic effects. Think about this from the standpoint of Martin Van Buren and it may seem a bit painful. Here are two features of the political system that he knew intimately—presidential elections and New York politics—combining with one he invented—the American political party—to empower the agenda of the other party. Perhaps not exactly what he had in mind. Certainly party competition, let alone in New York itself, was not something he had in mind.

Probably not, but if Van Buren believed he could really influence history over a time period that long, well past his own lifetime, then even he still had not penetrated all the way to the heart of American constitutional theory and politics.

That is because a basic feature of constitutionalism actually favors fortuity, the unexpected and unpredictable.

As I noted earlier, constitutional rules operate as such not only when they endure, but when they resist strong political pressures to change them.[72] Institutional structures, like electoral systems and political parties, can resist change for a number of reasons, one of which is this: It may be difficult to predict exactly what their consequences will be with respect to any particular substantive policy issue. Moreover, any one institutional structure may produce some good results and some bad results as far as different interest groups are concerned, thus reducing demands to change them.

One inference that can be drawn is that the ability of a constitutional rule, especially a structural rule, to resist change will be inversely related to the strength and especially the predictability of its substantive effects, because the more predictable and systematic those effects are, the less likely the rule is to last in the face of strong opposition. And if there is no strong opposition to the rule, then it cannot be said to be really entrenched, because it is not resisting serious calls to change it.

True enough, but now consider another point: Even when a rule *does* have important substantive effects that some powerful people do not like—for example, magnifying the power of some others with adverse interests—it takes time to change it. Changing important and structural rules, like the method of selecting the President and Supreme Court Justices, requires that more and more people be convinced that the structure is bad. Plans for change have to be considered and debated. If necessary, existing political institutions have to be recruited, as the Prohibition movement created its own party and sought to enlist both the main existing parties.[73] All that takes time.

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70. Chief Justice Fuller emphasized this point. In discussing the formation of the Constitution, he noted the differences in wealth among the states that then existed and those that were expected to join the Union later. "So when the wealthier states as between themselves and their less favored associates, and all as between themselves and those who were to come, gave up for the common good the great sources of revenue derived from commerce, they did so in reliance on the protection afforded by restriction on the grant of [federal] power." 157 U.S. at 557. He later put the point more baldly: "Nothing can be clearer than that what the Constitution intended to guard against was the exercise by the general government of the power of directly taxing persons and property within any State through a majority made up from the other States." *Id.* at 582.
71. "Public debate over the income tax bared political, sectional, and class divisions. Republicans in Congress uniformly opposed the income tax. It was calculated that the tax would fall upon a handful of individuals living in the industrial northeastern states and California. Opponents charged that western and southern enthusiasm for the income tax was dictated by the fact that few persons in those regions would have to pay it. They pictured the tax as a spiteful attack on eastern capital and as the opening wedge for socialism." Ely, *supra* note 68, at 118.
72. I am indebted for seeing this point clearly to Professor Daryl Levinson.
73. For a useful discussion of the different political tactics of different parts of the prohibition movement, see RICHARD F. HAMM, SHAPING THE 18TH AMENDMENT: TEMPERANCE REFORM, LEGAL CULTURE, AND THE POLITY, 1890–1920 23–33 (1995).

Sometimes the change will happen. Other times, the movement will be overtaken by events. Especially if the rule at issue is structural, its practical valence may change. Certainly that has happened repeatedly with the most change-resistant structural rule in the Constitution, officially speaking, the equal suffrage of the states in the Senate.

Put those features of the system together and the message is, expect the unexpected. Rules will last because, in the long run, it is hard to predict their consequences. But they really do have consequences; it is just hard to predict them. Often those consequences will appear, matter a lot for a while, then change before major effort is made to change the rule.

Or, to return to one of the themes with which I began, there's a goddess involved here, on whose wheel history revolves and is likely to keep revolving. Fortune will continue to be the empress of the world.

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